



PEMBROKE PLANNING BOARD MINUTES

MONDAY, FEBRUARY 5, 2018

PRESENT: Rebecca Coletta (Board Chairman), Andrew Wandell (Board Vice-Chairman), Thomas Irving (Board Clerk), Paul Whitman (Board Member), Daniel Taylor (Board Member), Matthew Heins (Planning Board Assistant), Peter Palmieri (Merrill Associates), Daniel Smith, Robert Galvin (Attorney), Kevin Grady (Grady Consulting), David Norman, Danielle Markol, Donald Markol, Charles Maccaferri, Jennifer Smith, Jeffrey Perette, Jacqueline Hauser, Frank Soracco, Cheryl Smith, Sean Melanson, Kristin Norman, Maria Karas, Paula DeMelo, Arthur Rubin, Maureen Robinson, Kenneth McCormick (Deputy Fire Chief), Robert Costanza, Ronald Robinson, Scott Glauben (Department of Public Works), Mark Hurley, and others.

Chairman Rebecca Coletta opened the meeting by reading the Chairman's statement.

PUBLIC HEARING FOR PROPOSED SITE PLAN #SP3-17 AT 346 WASHINGTON STREET

Ms. Coletta reopened the public hearing (continued from December 18, 2017, and January 22, 2018) for proposed site plan #SP3-17 at 346 Washington Street, from the application of Smith & Sons, 43 Mattakeesett Street, Pembroke, MA 02359, requesting Site Plan Approval under the Zoning Bylaws of the Town of Pembroke Section V.7. (Site Plan Approval). Smith & Sons proposes to relocate to the property at 346 Washington Street. The company engages in the business of construction excavating, and also of mulch processing and sales. The property would be used for the storage of equipment and trucks, and for other purposes associated with excavating operations, and for the storage and sale of mulch. Two buildings, consisting of a total of 22,800 square feet, and one accessory furnace building would be constructed on the property. The property is located in the Business B zoning district, the Residential-Commercial zoning district, the Residence A zoning district, and the Historic District, at 346 Washington Street, Pembroke, MA 02359, as shown on Assessors' Map E12 Lot 12 and E12 Lot 14. A copy of the application is available in the Office of the Planning Board.

Ms. Coletta noted for the record that since the board's previous meeting, three members of the Planning Board went on a site walk at 346 Washington Street and also at the applicant's mulching location at Copeland Lumber in Marshfield.

Ms. Coletta mentioned that a letter [email] was received from Attorney Matthew Watsky on 2/5/18, and she asked that (with the permission of the board) rather than reading it into the record, it be included in the minutes of the meeting. [See materials appended to minutes.] In the letter Mr. Watsky stated that he would not attend the meeting, and he expressed certain objections to the project relating to noise and odors.

Ms. Coletta mentioned that a letter was received [on 2/5/18], signed by many [12] abutters, expressing concerns about the project as to whether its operations will be injurious, noxious or offensive to the neighborhood, and arguing the proposed use would not be light industry. She suggested that, with the permission of the board, it be included in the minutes of the meeting. [See materials appended to minutes.]

Ms. Coletta mentioned that a letter was received on 2/5/18 from David Norman, an abutter residing at 15 Pleasant Street, with court opinions attached. The letter is concerned with impact standards, wood grinding, the agricultural exemption, notice requirements, a possible common driveway, and other issues. She stated that the letter would be included in the minutes of the meeting. [See materials appended to minutes.]

Ms. Coletta mentioned that a letter was received [on 2/5/18] from Attorney Robert Galvin, which states that the applicant offers a condition restricting use of the mulch grinder in his ongoing operation, but proposes to use the grinder for the cleanup of the site. The letter also explains and describes other issues. Mr. Galvin also submitted a letter, which he received from the Massachusetts Forestry Alliance, regarding the law on lumbering operations as a farming use. Mr. Galvin also submitted a proposed schedule of loam screening. [See materials appended to minutes.]

Based on the materials submitted by Mr. Galvin, Ms. Coletta described the loam screening and its impacts. Ms. Coletta explained that, in addition, the vehicles and equipment would be equipped with Smart White Noise backup alarms, to adjust the backup alarm sound relative to ambient noise. She explained that regular operations would be 6 to 8 Monday to Friday, 7:30 to 4:30 on Saturdays, and pickups and deliveries only on Sundays and holidays.

Ms. Coletta noted that the board had received a new review letter from its peer review engineer, Peter Palmieri, and the board members spent a few minutes reviewing the letter. Ms. Coletta and Mr. Palmieri discussed the need for soil testing, and the waiver requested for curbing.

Ms. Coletta mentioned that the board also received a copy of a letter dated January 24, of a peer review on behalf of the Conservation Commission of the wetlands area.

Ms. Coletta and Mr. Galvin discussed requesting an extension of the time for site plan review.

The board members discussed the site at 346 Washington Street, and Mr. Whitman described how bad the site's current condition is. Ms. Coletta also described the disheveled nature of the site, and emphasized the benefit to the town if it were to be cleared. Mr. Whitman went into more detail about the site's condition, and mentioned that he'd be opposed to grinding on a long-term, permanent basis. Mr. Irving concurred.

The board members, Daniel Smith and Kevin Grady discussed the landscape barriers proposed around the edges of the site, the anticipated process of cleanup, and the challenges of building on the site. Mr. Whitman and Mr. Grady discussed a wet area that Mr. Grady said the Conservation Commission doesn't regard as a wetland.

Mr. Taylor and Mr. Grady talked about the entrance to the site, along Washington Street, and its design.

Mr. Galvin explained that a noise study showed it would be cost-prohibitive to reduce the noise of a grinder sufficiently. He emphasized that a loam screener makes dramatically less noise. He noted

that the Massachusetts Forestry Alliance agrees that Mr. Smith's operation would qualify to be agricultural. He described the Smart White Noise backup alarms. He said the regular operation of the business would be 6 am Monday to Friday [Mr. Galvin did not clarify the ending time], 7:30 am to 4:30 pm on Saturdays, and pickups and deliveries only on Sundays and holidays. Thus a person could, for example, pick up mulch on the weekends. There would be no loam screening on the weekends.

Mr. Galvin explained that he had informed Attorney Matthew Watsky of the applicant's willingness not to do mulch grinding on a permanent basis.

Ms. Coletta opened the meeting to comments from the public.

Maria Karas, a resident at 400 Washington Street, spoke. She expressed concern about the grinding, and Ms. Coletta explained that this would be a condition in the decision. Ms. Karas expressed her worry about the operations in general, traffic and the damage to the road's paving, possible odors, the possibility of small particles and asthma, the lack of a noise study, and the quantity of loam screeners. She stated her concern that the project's specifics keep changing. She said that the property owner should be required to clean up the site.

Ms. Karas complained that the board is favoring the applicant, and Ms. Coletta explained that the board treats both sides equally.

A member of the public (who did not state her name) asked about property taxes, and Ms. Coletta and Mr. Galvin clarified this, especially relating to Chapter 61B (the forestry-agricultural use). Mr. Galvin explained that only a portion of the land would be classified as Chapter 61B. Ms. Coletta explained the rest would be taxed per its commercial use.

Ms. Karas asked about how the trees would be accessed when they are cut, and Mr. Galvin and others explained this. Ms. Karas asked about the 30' rule and frontage. She explained that she would prefer there not be mulch on the property, and there be no additional traffic. She expressed worry that the project keeps changing, and Mr. Grady and Mr. Galvin explained that the plan had not changed in the past two weeks—the only thing that had changed was the withdrawal of the proposed grinding. Ms. Karas stressed that such a use should take place in one of the industrial zones, not in a business zone.

Louis Horvath spoke. He explained that he has been the manager of a business in the center of Pembroke for 15 years, and has seen a Smith Excavating project in his neighborhood. He expressed the opinion that the presence and activities of Smith & Sons have been a benefit to the town, and that the company would probably do a fine job of improving the site.

A member of the public (who did not state her name) said that noise from the site travels to her property easily, and is a disturbance to her. Therefore she is concerned about any sort of use that would create noise. Ms. Coletta explained that anyone who develops the property would have to do a cleanup which would generate noise, and the member of the public stated that her concern is about the long-term use.

Ms. Karas added her additional concerns about the project. Ms. Coletta said that the Planning Board seeks to take into account the abutters' worries, and to avoid unnecessary problems, but also tries to attain the highest and best use of land in town. She noted that the site is mostly zoned for business use. Ms. Karas said that business and residential uses should not be mixed, and that the proposed

use does not qualify as light industrial. A few board members noted that Smith & Sons' current operation is located in a denser part of town with several residences nearby.

Mr. Smith described the loam screener. He mentioned that his business has been operating a screener like this at its current location for several years, and the neighbors haven't been bothered by it. He stated that the site will need an extensive cleanup, which will be a major operation. He talked about the history of his company.

Mr. Galvin mentioned that only a small portion of the property is zoned Residential-Commercial. Referring to a site map, he indicated where the different zones lie on the property. He noted that in the Business B zone, new residences cannot be built. He emphasized that Route 53 (Washington Street) is already a very busy state highway, and the additional traffic caused by Smith & Sons would be minimal relative to the existing traffic.

Jennifer Smith spoke. She explained that she is the wife of Daniel Smith. She emphasized that the site is very large, at 16 acres, and any development would probably generate a great deal of traffic. She said that some other types of development might cause more traffic than Smith & Sons. She stated that the smell of mulch is not objectionable. She emphasized that Smith & Sons cares about the town.

Ms. Karas said that perceptions of what smells are unpleasant are relative. She stated that abutters should be protected from noxious businesses which generate odors or noise, as is provided in the zoning bylaws.

Jacqueline Hauser, a resident at Carriage House Lane who lives nearby, described her concern about the cost of the cleanup. Mr. Whitman explained that the applicant, Smith & Sons, would clean up the property, and that presumably this is why the property owner has chosen to sell the property to Mr. Smith. He discussed the history of the site and the damage done to it by Chip-Tech.

Danielle Markol, a resident at 416 Washington Street, spoke. She stated her opinion that the businesses in the vicinity do not get monitored and policed properly, and thus the businesses tend to do what they want regardless of the effect on the neighbors.

Charles Maccaferri, a real estate broker representing the owner, spoke. He explained that the owner of the property is not Chip-Tech, and that the owner received several offers for the property and chose Mr. Smith's offer as the most suitable. He said that Mr. Smith asked if fill could be stored on the site, and the owner of the property checked with the engineer that the material would only be clean sand, and then agreed.

Paula DeMelo, a resident at 400 Washington Street, spoke. She said that one of the residents on Pleasant Street told her that it took the firefighters three weeks to put out the fire in the mulch piles when Chip-Tech was using the site.

Kenneth McCormick, the Deputy Fire Chief, explained that Chip-Tech did not store and maintain the mulch piles properly, and that the Fire Department now has stricter rules and will enforce them more vigorously. He described some of these rules and guidelines, and emphasized that the Fire Department will monitor the situation.

Mr. Smith explained that the finished product of mulch does not even burn. Ms. Karas said the mulch should be turned regularly. She said that a smoker could accidentally set a mulch pile on fire.

A member of the public (who did not state her name) asked if there will be a fuel tank to pump gas for Smith & Sons' trucks and equipment. Mr. Smith said yes, and Mr. McCormick explained that this is legal provided it meets the applicable codes and rules, and that there are already a few of these in Pembroke, such as at landscaping companies.

David Norman, an abutter who lives nearby, asked the board to impose some time limit for the cleanup of the site. He stated that the agricultural use is questionable, and asked the board to consider this carefully. Ms. Coletta said that, since the proposed grinding has been withdrawn, perhaps the board no longer needs to decide on the agricultural issue. Mr. Whitman noted the applicant plans to grow trees on the site, and so a portion of the site would be agricultural. Mr. Norman stated that the issue is more complex, and a discussion ensued about agricultural use. Mr. Norman noted there would still be a question of incidental agricultural use versus primary agricultural use.

A member of the public (who did not state her name) asked about the noise involved in the harvesting of the trees. Ms. Coletta described the various agricultural, forestry and recreational classifications.

A member of the public (who did not state her name) expressed concern about the noise involved in the harvesting of trees. She said that in the past Chip-Tech did not follow the conditions of the decision, despite her efforts to get them enforced. Ms. Coletta noted that Smith & Sons has not caused any complaints at its current location.

The board and Mr. Heins discussed the schedule of future board meetings, and the need for the applicant to request an extension of the deadline.

Scott Glauben, of the Department of Public Works, spoke. He explained that he runs the cemetery adjacent to Smith & Sons' current property, and the noise of the loam screener has never been an issue, even during internments. He stressed that Mr. Smith uses state-of-the-art equipment, and so the noise is minimal and there are no complaints.

Ms. Karas asked how many loam screeners would operate at the site, and Mr. Smith said it would be one screener and one stacker. He and Mr. Grady said that cutting down the trees would only take a day and a half, after three years of growing.

Ms. Karas complained that there is bias. Ms. Coletta said her impression is that some neighbors don't want any noise at all and would prefer the site become conservation land. Ms. Karas said that she feels the board is biased, and Mr. Wandell and Ms. Coletta expressed disagreement. Ms. Karas expressed her opposition to the project again. Mr. Wandell mentioned that the board has given a lot of time for members of the public to express their views. He and Mr. Taylor explained that the area will always have some noise due to the traffic on Route 53 and the nearby businesses.

Donald Markol, a resident at 416 Washington Street, spoke. He stated that the street is busy, but in the backyard it's fairly quiet and this project would create noise in his backyard too.

A member of the public (who did not state her name) complained about the cleanup. Ms. Coletta explained that another use could be equally loud. The member of the public said that the project design keeps changing, and Ms. Coletta explained that the changes have generally reduced the noise and impact. The member of the public said that she wishes the property would remain undeveloped.

Mr. Grady explained that another proposed use had involved a donut shop, gas station and strip mall.

The board and Mr. Heins discussed the schedule of future board meetings. Mr. Wandell made a motion to continue the public hearing at 7:45 pm on Monday, February 12, 2018, Mr. Whitman seconded the motion, and the board voted unanimously in favor.

Ms. Coletta explained that the public hearing has not been closed but continued. She explained that the next hearing will probably be shorter, and the board might reach a decision and vote on the project at that time.

Mr. Wandell made a motion to adjourn the meeting, Mr. Taylor seconded the motion, and the board voted unanimously in favor.

The next regular meeting of the Planning Board will be on Monday, February 12, 2018, at 7:00 pm.

Respectfully submitted,

Matthew Heins, Planning Board Assistant

APPENDED MATERIAL: LETTER FROM ATTORNEY ROBERT GALVIN RE: SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 1 OF LETTER)

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February 5, 2018

VIA HAND-DELIVERY

Rebecca Coletta, Planning Board Chair
Pembroke Planning Board
100 Center Street
Pembroke, MA 02359

RE: 346 Washington Street, Pembroke, MA

Dear Ms. Coletta and Members of the Planning Board:

As you know, this office represents Dan Smith of Pembroke in connection with his application for site plan approval with the Pembroke Planning Board. This letter is intended to address continuing issues that concern the site plan and the proposed uses of the site.

Firstly, as a concession to the neighborhood, Mr. Smith will agree to a proposed condition that restricts him from using the grinder as a part of his ongoing business that the Board members observed at his location in Marshfield on Plain Street. Mr. Smith will need to be able to use the grinder to clean up the stumps and materials that were left on the site and is willing to agree to restrict that clean up time to weekdays. There will be no new materials brought onto the site for processing although we maintain that the uses are exempt from zoning as a part of a lumbering operation.

Based on a noise study, the sound of the 1050 hp grinder can be sufficiently mitigated by the establishment of sound buffers; however, the cost to mitigate that sound is not cost effective given the price of the property and other financial considerations. As a consequence, last week, I informed Attorney Watsky we would not be proposing those type of continuing activities at the site as a part of our operation.

For the Board's information only, I am attaching a letter that I received today from the MA Forestry Alliance's Executive Director, Nathan L'Etoile, who as a former assistant

**APPENDED MATERIAL: LETTER FROM ATTORNEY ROBERT GALVIN RE: SITE PLAN #SP3-17 AT 346
WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 2 OF LETTER)**

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commissioner of MA Department of Agriculture, expert in such law and a primary author of recent revisions to Mass. Gen. L. c. 128 §1A, opines that the type of lumbering operations proposed by Mr. Smith are considered agricultural activities and are not restricted in terms of their being products of the farm.

The law states as follows:

Section 1A. "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil ... the growing and harvesting of forest products upon forest land, ... and 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, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

Mass. Gen. L. c. 128A §1A.

In Mr. L'Eoitle's opinion, lumbering operations include the act of cutting or preparing for market, any forest products, including sawing of raw wood, chipping of clean wood for use as pulp, energy production, and ground covering, the drying and treatment of wood, debarking of logs, or any other activities that add value to products produced from trees. See Attachment A.

Next, I am attaching a schedule of when Mr. Smith would still propose to screen loam which is an activity that he currently is engaged at his Mattakeesett Street property with immediate residential abutters. The screener utilizes only a 100 hp engine (compared to a 1050 hp engine), does not make the type noise that the grinder makes, and is used to create loam from soil and biodegraded wood. Mr. Smith intends to sell the screened loam as his product and other types of materials that are manufactured elsewhere. The screening activities would be only proposed on Mondays to Fridays 7:30AM to 4:30PM to minimize any early or late afternoon, or weekend impacts, if any. See Attachment B.

As a further gesture to reduce noise impacts, all of the vehicles and equipment will be required to be equipped with "Smart White-Noise Back Up Alarms" which is a proprietary back-up alarm manufactured by Brigade Electronics. These alarms automatically adjust the volume of back up alarms to 5-10 decibels above ambient noise which is the DEP standard for noise pollution. See Attachment C.

In terms of the regular business hours at the property, we are proposing hours of 6:00AM to 8:00PM from Monday to Friday, 7:30AM to 4:30PM on Saturdays, and pick-ups and deliveries only on Sundays and holidays.

**APPENDED MATERIAL: LETTER FROM ATTORNEY ROBERT GALVIN RE: SITE PLAN #SP3-17 AT 346
WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 3 OF LETTER)**

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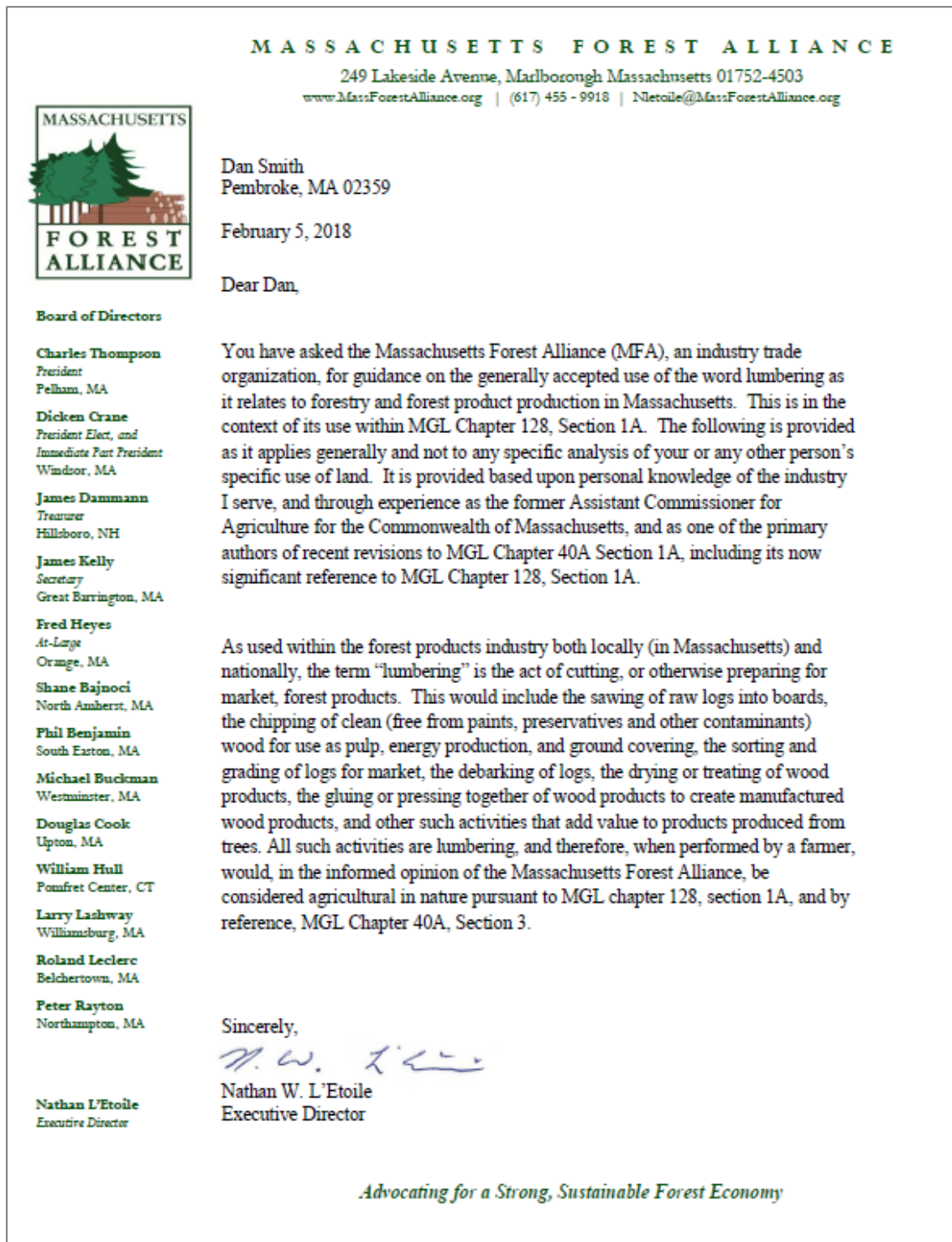
Thank you for your anticipated courtesy and cooperation in this matter.

Very truly yours,

Robert W. Galvin

cc: client

APPENDED MATERIAL: LETTER INCLUDED WITH LETTER FROM ATTORNEY ROBERT GALVIN RE: SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 4 OF LETTER)



**APPENDED MATERIAL: SCHEDULE INCLUDED WITH LETTER FROM ATTORNEY ROBERT GALVIN RE:
SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGES 5-7 OF LETTER)**

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APPENDED MATERIAL: EMAIL FROM ATTORNEY MATTHEW WATSKY RE: SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 1 OF EMAIL)

RE: New peer review engineering report for 346 Washington

From: Matthew Watsky
Sent: Mon 2/5/2018 12:52 PM
To: Matthew Heins; Maria Karas

Mr. Heins:

Thank you for forwarding the peer review comments by Merrill.

The Applicant represented at the informal site meeting that you and I, the engineer from Merrill and three of the Board members attended, that the applicant would engage a noise mitigation expert and submit that expert's recommendation on the site design to properly attenuate the noise from the large scale equipment proposed for use on the site. The applicant has not submitted either a revised site plan to show noise barriers recommended by such an expert, or plan with those revisions. Nor has the applicant responded to demonstrate how the proposed uses, which will require use of large, heavy industrial scale equipment and industrial scale outdoor storage and processing of materials, would comply with the restricted uses contemplated in the Limited Industrial Zone.

I note that the Merrill peer review, though cast as a zoning review letter, is incomplete and does not address the requirements of Zoning bylaw Section V(6) Impact Standards, and Merrill offers the Board no guidance or opinion on whether the proposed use, and the proposed site design, can comply with the Impact Standards of that section, or of the Section 7 requirement for Site Plan Approval to include protection for abutting land owners . . ." If Merrill does not have the expertise in house to perform a noise and odor assessment or to peer review a noise and odor expert's report, I request the Board to engage services of an expert or experts who can do so.

I am assuming that, consistent with its assurances at the Site meeting, the applicant will present the Board with a report and design recommendation from a noise expert to attenuate the noise impacts to neighbors from the proposed use of heavy industry equipment on the site, and actually evaluate the odor impacts of industrial scale mulch accumulation, storage and processing during warm late spring and early summer months, and not just in January when decomposition is likely slower due to the cold and odors likely less than in warmer months.

The Applicant has made review and comment for neighbors and concerned public on this project a moving target. In response to our comments on the original design, the Applicant came to the first Planning Board hearing and presented conceptual designs and presented a plan change to not use the Residentially Zoned land on the site for the heavy equipment, but would use that area only for planting, growing and harvesting of trees. At that same meeting the Applicant's representative asserted that the wood proposed to be grown on that small area of residentially zoned land would supply a substantial percentage of the total wood waste for processing by the heavy equipment – but the Applicant himself contradicted that later in the

APPENDED MATERIAL: EMAIL FROM ATTORNEY MATTHEW WATSKY RE: SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 2 OF EMAIL)

meeting and in the Site meeting, to state that the heavy equipment would be used to process wood waste as it came into the site – bring it in, process it and get it back out again. Even that statement was again contradicted by the Applicant in the site meeting, as he displayed the enormous piles of mulch and piles of stumps, and indicated that the mulch is accumulated all through the Fall and Winter months, and then used intensively after the Spring thaw and then most of the mulch would be shipped off site by the end of July. Also at the site meeting the Applicant assured us that it would engage a noise expert. But we face the next Board meeting without a noise report or a revised design.

Expecting that revised plans and a noise report will be provided eventually, I will not attend this evening, though I anticipate that Ms. Karas and many of the neighbors will be present at the meeting to comment further on this project to express their concerns and opposition to siting a large scale, heavy industrial use in the midst of a residential neighborhood, on land zoned for quiet, odorless, light industrial activities.

I expect that the Board will continue the hearing until such reports are provided, and I will await the Applicant's promised preparation and submittal of a noise report and revised plan for my review, and with that revised plan will consider what further comments to provide to the board.

I request that this email memo be distributed to the Board members and read into the record.

Respectfully,

Matthew Watsky

Matthew Watsky, Esq.
30 Eastbrook Road, Suite 301
Dedham, MA 02026
(781) 329-5009 (O)
(781) 461-9068 (fax)

Statement of Confidentiality

The information contained in this electronic message and any attachments to this message are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, please notify Matthew Watsky, Attorney at Law, at the indicated phone number or e-mail address.

APPENDED MATERIAL: LETTER FROM 12 NEIGHBORS RE: SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 1 OF LETTER)

January 3, 2018

Pembroke Planning Board



Re: 346 Washington Street Permit Application

We are writing to you today to express our concerns about Smith & Sons application for 346 Washington Street. We urge the Planning Board to vote against this petition.

Per Town's Bylaws, were enacted to lessen congestion in the streets, to conserve health, to secure safety from fire, and conserve the value of land and buildings, including the prevention of blight and pollution of the environment, to encourage the most appropriate use of land throughout the town. Pembroke By-laws Section I

Whether farming, storing, processing, cutting or grinding, the type of business proposed by Smith & Sons will be injurious, noxious, offensive to the neighborhood by the emission of odor, dust, smoke, noise and heavy volume of traffic. Page 12 of the Bylaws specifically states that regardless of farming, garden, even a church any type of business shall not be injurious or offensive to the neighborhood, not just abutters.

The proposed use in Commercial/Residential is also not light industry and shall not be approved. Simply put by the Cambridge dictionary, light industry is "industry that makes small things and does NOT need to use large, heavy machinery and Smith & Sons machines are heavy industrial. As many last minute revisions Smith & Sons have performed and continue presenting to the board a day or two before public meeting, the proposed project still represent noise, odor, fire risk, and still offensive to the neighborhood.

Furthermore, permits shall be granted when the applicant establishes that such uses are not noisy, injurious, noxious or offensive to the neighborhood. Our neighborhood has already expressed how this project will be offensive to us and Mr. Smith has not proved yet that it won't be noisy or spread noxious odors, especially during warm weather. We are also not willing to settle for noise versus smell. We want to leave a peaceful life and enjoy our homes with windows open during summer time- without noise from any type of loud equipment or strong smell. We also request that the Planning Board assigns proper independent review of their noise study and traffic studies to make sure it is performed in an unbiased manner.

APPENDED MATERIAL: LETTER FROM 12 NEIGHBORS RE: SITE PLAN #SP3-17 AT 346 WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 2 OF LETTER)

This application will cause detrimental effects to the character of our neighborhood. Also, we request for the Planning Board to required Mr. Smith to be mindful of abutters and other neighbors' time and submit changes to the site plan at least a week in advance of public hearing. Last hearing, revisions and peer reviews were submitted the day of hearing, making impossible for anyone to comment accordingly. And, again, revisions were submitted on Thursday for a Monday meeting.

Sincerely,

Name

Address

<u>Donald & Danielle Mankel</u>	<u>414 Washington Street</u>
<u>James Bridgewater Arthur Rubin</u>	<u>Pleasant St</u>
<u>Arthur J. Rubin</u>	<u>31 Pleasant St.</u>
<u>Maureen Robinson</u>	<u>31 Pleasant St</u>
<u>Ronald Robinson</u>	<u>15 Pleasant St.</u>
<u>Carol M. Mankel</u>	<u>15 Pleasant St.</u>
<u>Khan</u>	<u>400 Washington Street</u>
<u>Paula Demelo</u>	<u>400 Washington Street</u>
<u>Maria Kazas</u>	<u>55 Pleasant St.</u>
<u>John Sepic</u>	<u>61 Pleasant St</u>
<u>Carlos Cruz</u>	<u>21 Pleasant St</u>
<u>Jorge Rey</u>	

CC: Josh Cutler, State Representative; Board of Selectmen; Board of Health

**APPENDED MATERIAL: LETTER FROM DAVID NORMAN RE: SITE PLAN #SP3-17 AT 346
WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 1 OF LETTER)**

February 5, 2018

Via Email: mheins@townofpembroke.com

Ms. Rebecca Coletta
Planning Board Chair
Pembroke Planning Board
100 Center Street
Pembroke, MA 02359

Re: Application for Site Plan Approval- 346 Washington Street

Dear Ms. Coletta and Members of the Planning Board:

Please include this letter (including attachments) in the record of the February 5, 2018 Planning Board Meeting and please consider its contents as you deliberate on this Application for Site Plan Approval ("Application").

My family and I live at 15 Pleasant Street and we are abutters to 346 Washington Street. You may recall that at the January 22, 2018 Zoning Board meeting I was one of many abutters who expressed my strong concern about the noise, odors, potential fire hazard, traffic, and other issues related to the Impact Standards under Pembroke Zoning Bylaws ("PZB") Section V, Paragraph 6 (the "Impact Standards").

I also asked the Board to place more weight on the comments and concerns of the abutters and others who may be directly impacted than on statements by people who live across town from the proposed site and are offering character statements or statements about Smith & Sons' current operation off Mattakeesett Street, which, in all relevant respects, is not comparable to the proposed operation at issue before this Board.

There is already general agreement that Mr. Smith seems to be a nice guy, with a nice family, who, by all accounts, is a responsible and conscientious business owner. My opposition is not personal and not an indictment of how Mr. Smith conducts other businesses elsewhere. I am simply trying to preserve a quiet, clean, and safe lifestyle for my family and to protect our property value, which finds support in the applicable PZB and state law.

Impact Standards

In addition to my prior comments regarding the Impact Standards and concerns voiced by many other abutters and neighbors, please consider the case of Town of Uxbridge v. Stephen M. Griff (attached).¹ Like the application before this board, Griff (the land user) was seeking to operate a business under the protection of being in an industrial district. The land in question was located in an industrial district of Uxbridge. The applicable bylaw permitted: "In ... industrial districts ... other lawful industrial use which is not dangerous by reason of fire, explosion or other hazards, or

¹ *Town of Uxbridge v. Stephen M. Griff*, 68 Mass.App.Ct. 174 (2007).

**APPENDED MATERIAL: LETTER FROM DAVID NORMAN RE: SITE PLAN #SP3-17 AT 346
WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 2 OF LETTER)**

Pembroke Planning Board

injurious, noxious or detrimental to the Town of Uxbridge or its populace by reason of emission of dust, odors, gas, smoke, vibration or some other nuisance...." (my emphasis).

Griff was operating a motocross practice track and training facility, which was causing noise and dust for abutters and even distant neighbors, who testified that "the 'unbearable noise' affected their ability to be outdoors and enjoy their property."²

Griff admitted that the riding was noisy and that there were "sound issues," for which he proposed to install a sound barrier. The town of Uxbridge, claiming that Griff's use was a violation of the town's zoning bylaw, brought a successful enforcement action in Superior Court against Griff and obtained injunctive relief.

In affirming the Superior court decision, the Mass. Court of Appeals stated that "the facts support the ruling of the [Superior] court that the use was not permitted in an industrial zone" . . . and that "The noise alone was noxious, and is a commonly understood justification for regulating the use land to limit this type of nuisance."³ The Court even goes on to add; "nor can these activities be protected as a permitted use in a business district."⁴

The PZB Impact standards should be applied in a similar fashion with regard to the immediate Application. Whether the proposed activity is to be in a Business B, Residential Commercial, or Residence A district, the Town has the authority and duty to protect the community by mandating conformance with the Impact Standards.

Wood grinding and Chipping is industrial and is not allowed as ancillary to the retail sale of mulch

This case involves questions of regulatory taking and negligent misrepresentation by town officials, which are not relevant to the immediate Application. However, the background facts and the underlying zoning questions are similar and relevant; and had to be analyzed in order for the Court of Appeals to reach a decision on the regulatory taking and negligent misrepresentation issues.⁵

² Griff at 175.

³ Griff at 176, Court of Appeals citing a line of cases supporting its holding that the "noise alone was noxious, and is a commonly understood justification for regulating the use of land to limit this type of nuisance." See Boston v. Back Bay Cultural Assn., 418 Mass. 175, 180, 635 N.E.2d 1175 (1994), quoting from Ward v. Rock Against Racism, 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("the city 'ha[s] a substantial interest in protecting its citizens from unwelcome noise' "); Kinchla v. Board of Appeals of Falmouth, 11 Mass.App.Ct. 927, 927, 415 N.E.2d 882 (1981) (board of appeals did not exceed its authority in denying a motel a special permit to build an outdoor swimming pool, based on its conclusion that noise generated by people using the proposed pool would have an adverse effect on the neighborhood); McIntyre v. Selectmen of Ashby, 31 Mass.App.Ct. 735, 736, 741-742, 584 N.E.2d 1137 (1992) (no error of law where a board of selectmen found that noise and dust created by the proposed excavation activity would constitute a nuisance and be detrimental to the adjacent property and neighborhood).

⁴ Griff at 177.

⁵ Paul D. Doherty v. Town of Ashland, 86 Mass. App. Ct. 1112 (2014). (attached).

**APPENDED MATERIAL: LETTER FROM DAVID NORMAN RE: SITE PLAN #SP3-17 AT 346
WASHINGTON STREET, RECEIVED 2/5/18 (PAGE 3 OF LETTER)**

Pembroke Planning Board

A business owner/land user (D&D) relied on assurances from the town of Ashland that grinding of mulch (though not otherwise allowed in the zoning district) would be allowed as "ancillary to the preparation of mulch for retail sale at the site." D & D sought to expand its retail landscaping supply business into mulch production, and initiated the purchase of a fourteen-acre parcel of land in the town of Ashland for that purpose. The land was zoned as "Commercial A," meaning that permissible uses for the property are primarily retail or other sales and services. Industrial manufacturing and saw mill uses were not permitted in Commercial A zones. During a meeting that included D & D, D & D's real estate broker, and the town building inspector, Robert Hill, Hill was asked if mulch grinding was considered an industrial manufacturing or saw mill use, as those uses were allowed only in areas zoned for industrial use. Hill advised D&D that mulch grinding would be allowed and offered two flawed rationales: 1) the land had been used that way in past, so it could be used that way again; and 2) the activity would be considered "ancillary" to the retail sale of mulch, which was a permitted use in the Commercial A zone.

After receiving these assurances, as well as a signed, written confirmation from Hill of that assessment, D & D purchased the property for \$1.6 million. D & D borrowed \$3.5 million for the purchase and related improvements. Several weeks after the grinding commenced, D & D received a cease and desist order from Hill indicating that the mulch grinder on the property was a "piece of equipment considered to be an Industrial Use which is not permitted in a Commercial A Zoning District under the Ashland Zoning Bylaws."⁶ D & D objected and appealed to the town's zoning board of appeals (board), which upheld the order.

As it relates to the immediate Application, this case supports the idea that grinding and chipping operations must be compliant in its own right and cannot be allowed as ancillary to some other compliant use, e.g., retail mulch sales. The case also helps to dispel that notion that anecdotes about prior use of land, rather than the Bylaws, is the applicable standard.

Over the last couple months have heard at least two town officials offer opinions that the proposed uses should be allowed because "it's always been industrial" or because (paraphrasing) old man so-n-so used it for this or that back in the day, etc. Notably, neither of these people sits on the Planning Board, which actually does have jurisdiction of questions appropriate use.

Agricultural Exemption:

To meet the agricultural exemption, the primary use must be agricultural, i.e., in this case, growing and harvesting of trees (whether that is forestry or silviculture).⁷

Wood chipping or grinding is not "Forestry" or "Lumbering," as those terms are generally defined, and therefore it does not appear to be recognized as agricultural activity under the statute.⁸

⁶ Doherty at 1112.

⁷ Mass. Gen. Law Ch. 128 §1A.

⁸ Mass. Gen. Law Ch. 128 §1A. See dictionary (Merriam-Webster.com) definition of "lumber": "a: timber or logs especially when dressed for use; b: any of various structural materials prepared in a form similar to lumber." Definition of "Lumbering" under the Federal regulations: 29 CFR 780.215 - Meaning of forestry or lumbering operations ("The term forestry or lumbering operations refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber,

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Just as wood chipping is not agricultural under the statute, it also is not agricultural under recent, relevant case law.⁹ The applicant may try to distinguish the *Cotton* case and say that it does not apply because Cotton was grinding dead wood and not planted and harvested trees, as the Applicant now plans to do. That is a valid distinction, but the *Cotton* case says that chipping of dead wood is not an agricultural use; it stops short of saying that, had there been a forestry operation, Cotton's chipping and grinding would have been an agricultural use. Instead, The Court is careful to mention that the chipping was not "incidental to any other agricultural or farming use." Therefore, the *Cotton* case is highly applicable to this Application (despite the obvious factual distinction) as there will be chipping that is not agricultural on a stand-alone basis and will only be agricultural if it is incidental to a primary agricultural use. There are several cases that support the idea that product must be planted and harvested to have an agricultural use, but there are no cases (I have found) expressly holding that the chipping or grinding, even of planted/harvested trees, is an agricultural use.

Wood chipping is not agricultural on a stand-alone basis, so it would have to be done incidental to the primary agricultural use proposed (growing and harvesting trees) in order for the activity to be exempt from the PZB (zoning, noise, odors, frontage, traffic, etc.). Cutting existing trees that were not cultivated or planted by the Applicant is not agricultural.¹⁰

It would likely take several years before the Applicant could plant new growth, harvest that new growth, and document the gross sales or volume ratios required under Mass. Gen. Law Ch. 40A §3. Assuming, for argument, that at some time in future the requisite ratios are met, the Applicant would only be allowed to engage in wood chipping (without otherwise complying with the PZB) as an operation incidental to the forestry operation.

Activities incidental to the primary agricultural use can, possibly, be eligible for the agricultural exemption, but wood chipping and grinding would not be incidental in this case. To be incidental, an activity must be subordinate and minor in relation to the primary agricultural use.¹¹ Wood chipping and grinding clearly is the primary proposed use of the lots and cannot be characterized as subordinate to the forestry (agricultural) operation by any measure (gross sales, volume, time of operations, cost of operations, etc.). Indeed the Board should note that the Applicant only amended his Plan to include some forestry operations late in the process, after substantial opposition from

logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations" (my emphasis).

⁹ *Cotton Tree Service, Inc. v. Zoning Board of Appeals of Westhampton*, 89 Mass.App.Ct. 1136 (2016).

¹⁰ *Building Inspector of Peabody v. Northeast Nursery, Inc.*, 418 Mass. 401, 405 (1994) (sale of nursery products not planted or cultivated on the premises not agriculture or horticulture).

¹¹ Uses which are incidental to permissible activity on zoned property are permitted as long as incidental use does not undercut plain intent of zoning by-law, and word "incidental" in zoning by-laws or ordinances incorporates two concepts: use must not be the primary use of the property, but one which is subordinate and minor in significance; and there must be reasonable relationship with the primary use, such that the incidental use is attendant or concomitant (my emphasis). *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994).

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abutters related to Impact Standards, and for no discernable purpose other than to attempt to invoke the agricultural exemption and avoid the PZB. It is not appropriate for the agricultural exemption to be "manipulated and twisted into a protection for virtually any use of the land [simply because] some agricultural activity [is] maintained on the property."¹²

Even assuming, for argument, that the Applicant could get past all these hurdles, i.e., that the wood chipping either is agricultural or is incidental to the primary agricultural use of forestry/silviculture, the gross sales or volume thresholds and ratios set out Mass. Gen. Law Ch. 40A §3 still must be met in the past tense, i.e., "have been produced by the owner or lessee . . ."¹³ The Board simply does not have sufficient facts before it to recognize the agricultural exemption at this time.

Notice Requirement for Amendments to Site Plan

The Applicant has amended its site plan several times and since the site plan must be included in the abutters notice, it would make sense that each amendment to the site plan should be sent to abutters.

Deficiencies of Site Plan

- The Site Plan is required to include information about the current "record owner," but it does not.
- The Site Plan is supposed to depict driveways and roads on the premises, but it does not.
- The Site Plan does not include Lot E12-14, but instead treats the whole plan as being on Lot E12-12. This plan, in fact, does include more than one lot¹⁴ and because it is more than one lot, it is not allowed to rely on a common driveway.

Common Driveway:

As defined in the PZB (Section II, Definitions) a common driveway is "A path or drive . . . over which vehicular access to a way is gained from the interior of more than one lot. For purposes of this Bylaw, common driveways shall not be allowed in any zoning district within the town."

Seeking a Fair Result

The Applicant is not the current owner of 346 Washington Street and therefore should not be significantly harmed if this application were denied or modified to disallow certain non-conforming

¹² *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994). 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**" (my emphasis.)

¹³ Mass. Gen. Law Ch. 40A §3.

¹⁴ The two lots may be taxed as "one lot" for administrative convenience, because the town only has a single tax rate.

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operations. Such a result might even have a financial benefit as the basis for a downward purchase price adjustment. As the Applicant stated in the January 22nd meeting, Smith & Sons plans to continue its chipping operations at its current Marshfield location and remains under contract (or some type of agreement) that affords them the right to continue doing so.

We respectfully request that the Board deny the Application in its current form or substantially modify any resulting permit to ensure no non-conforming uses with respect to Impact Standards, particularly noise and odors. Finally, we request that any reasonable methods to mitigate adverse impacts be considered and imposed, including, but not limited to: restrictions on hours/days of operation, a requirement of police details at peak traffic times, noise mitigation, odor control, and fire prevention/protection procedures and equipment.

Thank you for your time and attention to this matter.

Respectfully Submitted



David Norman
15 Pleasant Street

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The attachments noted below, comprising an additional 18 pages, are not included in these minutes, but are attached to the copy of the letter in the project's file at the Office of the Planning Board.

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Attachments:

Mass. Gen. Law Ch. 40A §3

Mass. Gen. Law Ch. 128 §1A

Henry v. Board of Appeals of Dunstable, 418 Mass. 841 (1994).

Cotton Tree Service, Inc. v. Zoning Board of Appeals of Westhampton, 89 Mass.App.Ct. 1136 (2016).

Town of Uxbridge v. Stephen M. Griff, 68 Mass. App. Ct. 174 (2007).

Paul D. Doherty v. Town of Abland, 86 Mass. App. Ct. 1112 (2014).