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February 22, 2010

VIA E-MAIL ONLY: Toohill@littletonma.org

Town of Littleton
Ms. Maren Toohill
Municipal Building
37 Shattuck St.
Littleton, MA 01460

RE: Aggregate Industries/Northeast Region, Inc./ Application for Site Plan Review

Dear Ms. Toohill:

On behalf of Aggregate Industries, enclosed please find our rebuttal to Attorney McGregor's letter to the Planning Board of February 11, 2010 setting forth his clients' objections to site plan approval. As set forth in our rebuttal, we believe that Aggregate has provided the information the Board needs to address and approve the application. Notwithstanding our conclusion that Aggregate is exempt from the provisions of the Water Resource Protection District, we reiterate our intention to voluntarily, and without prejudice, apply for a Water Resource Protection District special permit provided such application will not delay the completion of site plan review and the implementation of our client's project.

Please distribute the rebuttal to the members of the Planning Board, the Town Administrator and anyone else with a need to know. Thank you.

Very truly yours,

LAW OFFICES OF JERRY C. EFFREN

Jerry C. Effren

**Cc: Aggregate Industries/Northeast Region, Inc.
Thomas Harrington, Esq. (tom@miyares-harrington.com)**

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February 22, 2010

Mark Montanari, Chairman
Littleton Planning Board
Town of Littleton
37 Shattuck Street
Littleton, MA 01460

**Re: Aggregate Industries, 149 Ayer Road, Littleton
Application for Site Plan Review**

Dear Members of the Planning Board:

On behalf of site plan review applicant Aggregate Industries/Northeast Region, Inc. (“Aggregate”), we take this opportunity to respond to Attorney McGregor’s letter of February 11, 2010 (“the Letter”) in which he purports to represent “residents of the Whitetail Way neighborhood” (“the Residents”). The Letter asks this Board to deny Aggregate’s application for site plan review (“the Application”) on the grounds that Aggregate has allegedly not provided enough information for the Board to properly consider the Application and because, regardless of such information, Aggregate’s project as described creates risks for public health and safety that cannot be redressed with reasonable conditions. As noted below, Aggregate has provided the Board with the information Attorney McGregor claims is lacking and the information shows his clients’ concerns are entirely unfounded.

Attorney McGregor Should Identify His Clients

At the outset, we question whether Attorney McGregor’s as-yet unidentified clients would even have the “standing” to appeal this Board’s decision. See *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129 (1992) (Even a direct abutter in a zoning appeal “must establish – by direct facts and not by speculative personal opinion- that his injury is special and different... Subjective and unspecified fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.”). Aggregate contends that the Letter is based solely upon speculation and lacks the “direct facts” necessary to show the necessary “special and

different” harm by the approval of Aggregate’s site plan.

Aggregate is not Proposing to Increase the Degree of Its Use of the Property

The Letter states Aggregate’s request to “more than double its facility’s processing limit (from 690 tons/hour to 1,500 tons/hour)” will result in a dramatic increase in the degree of the use of its property with adverse effects upon the neighborhood.” Regardless of the merits of the contention (Aggregate believes there are none because the increased efficiencies and mitigating measures will result in no new effect on the neighborhood) Aggregate recently agreed with the Department of Environmental Protection to retain the existing operational limit of 690 tons/hour in its new air quality permit. Thus, the issue of an increase in the existing processing limit is now moot. The existing 690 tons hour limit will remain the same.

Aggregate is moving its plant simply to make it more efficient. Aggregate can better access its reserves with the reconfigured and updated equipment.

Massachusetts Case Law Recognizes That Non-conforming Quarries can be Expanded Without the Need for Special Permit

We take a moment to correct Attorney McGregor’s misperception that Massachusetts case law prevents a pre-existing, nonconforming quarry from expanding as a matter of right. Attorney McGregor cites *Burlington v. Dunn*, 318 Mass. 216 (1945) for the purported proposition but neglects to mention that two years following that decision, in *Town of Billerica v. Quinn*, 320 Mass. 687 (1947), the Supreme Judicial Court clarified *Burlington* as follows:

It does not necessarily follow from what has been said that an existing use for the operation of a stone quarry, for example, or a sand or gravel business, or even for the removal of loam can never be continued by increasing the area of excavation after the passage of a zoning ordinance or by-law excluding such use from the neighborhood. It is conceivable that a larger area than that previously excavated may have been devoted to the use by actual occupation of the land in a manner physically appropriating it to the use, as for example by means of structures, use for storage or ways, preparation of the ground, or even perhaps by fencing off the portion to be used, if the fencing had particular relation to the use. [citation omitted] We cannot attempt now to lay down a rule applicable to all cases.”

See also *Town of Seekonk v. Anthony*, 328 Mass. 236 (1952) (“The testing of the soil and the preparation for stripping that had preceded the adoption of the zoning by-law devoted the whole land ‘to the use by actual occupation of the land in a manner physically appropriating it to the use.’ ... It does not appear, as it did in *Town of Burlington v. Dunn* ... that the earlier stripping was confined to a small part of the land.” (citing *Town of Billerica v. Quinn*)).

We have represented Aggregate in matters of zoning in a number of municipalities for over twenty years. In our experience, Massachusetts courts have not addressed the issue of the right of a pre-existing, non-conforming quarry to extend the quarry perimeter in nearly sixty years. Other courts, however, have elaborated upon the theory announced in *Town of Billerica v.*

Quinn and it is now the majority opinion throughout the United States. In *Syracuse Aggregate v. Weise*, 51 N.Y2d 278 (1980) at 285, the highest court of New York commented upon the theory as follows:

By its very nature, quarrying involves a unique use of land. As opposed to other nonconforming uses in which the land is merely incidental to the activities conducted upon it [citations omitted] quarrying contemplates the excavation and sale of the corpus of the land itself as a resource. Depending on customer needs, the land will be gradually excavated in order to supply the various grades of sand and gravel demanded. Thus, as a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed. It is because of the unique realities of gravel mining that most courts which have addressed the particular issue involved herein have recognized that quarrying constitutes the use of land as a 'diminishing asset' [citation omitted]. Consequently these courts have been nearly unanimous in holding that quarrying as a nonconforming use cannot be limited to the land actually excavated at the time of enactment of the restrictive ordinance because to do so would, in effect, deprive the landowner of his use of the property as a quarry.

Here, the affidavits of former employees and representatives of San Vel, as well as the opinions of the Building Inspector and the past Town Manager, contained in our earlier Memorandum to the Board submitted February 5, 2010, demonstrate that the quarry was in major operation prior to zoning and certainly prior to 1982, the year of the first Water Protection District ordinance. Based upon such evidence, it is beyond dispute that the locus at 149 Ayer Road was "devoted ... to the use by actual occupation of the land in a manner physically appropriating it to the use." prior to 1951 (year of first zoning ordinance) and certainly prior to 1982 (year of the creation of the Water Resource Protection District). This very Board, in its hearings on its approval of the Whitetail Way subdivision in 1994, addressed the fact that the existing wall of the active quarry would, in fact, continue to extend across the property as part of normal operations in upcoming years. (See Minutes of Board Meeting Whitetail Subdivision, December 1, 1994, page 2, addressing the fact that the quarry wall is expected to continue to expand over the next 25 years, attached hereto as Exhibit A).

**Nothing in the Caselaw Suggests that a Non-conforming Use Cannot be Expanded
By the Upgrading of Existing Structures**

Attorney McGregor also incorrectly cites *Vokes v. Avery E. Lovell, Inc.*, 18 Mass. App. Ct. 471 (1984) for the purported proposition that "[a] prior non-conforming use may not be enlarged or expanded through the addition of structures unless the requirements of the Littleton Zoning Bylaw are followed." What *Avery* actually said was: "... the existence of a lawful non-conforming use does not permit the erection of additional **buildings** for the expansion or enlargement of that use unless permitted by the zoning by-law." *Avery*, foot note 21.

Aggregate is not seeking to construct any additional buildings. Aggregate is not aware of any law recognizing that equipment upgrades for a non-conforming industrial plant are per-se subject to current zoning requirements. In fact, Massachusetts cases have consistently held that a

legal, non-conforming industrial plant may upgrade its equipment without the need for special permit even when it results in greater production, so long as the use satisfies the *Powers* test. See *Wayland v. Lee*, 325 Mass. 637 (1950) (gravel pit using improved methods and machinery); *Building Inspector of Seekonk v. Amaral*, 9 Mass. App. Ct. 869 (1980) (increased use of junkyard); see also Bobrowski, *Handbook of Massachusetts Land Use and Planning Law* (Second Ed. 2002), section 6.04(B) (“... a nonconforming use may be improved and made more efficient as long as the changes are ‘ordinarily and reasonably adapted to the original use and do not constitute a change in the original nature and purpose of the undertaking.’” (citation omitted)). As shown in our earlier Memorandum the Building Inspector for the Town of Littleton correctly issued past building permits for up-graded conveyor equipment which require concrete foundations. There is no difference in the quality of the present equipment upgrades compared with those the Building Inspector approved in 1993.

Aggregate Does not Claim the Right to Ignore the Town of Littleton Zoning By-Law

The Residents accuse Aggregate of asserting a right of “carte blanche to do whatever it pleases without regard for zoning laws.” This is not true, unfair and inflammatory. Aggregate acknowledges that its pre-existing, non-conforming rights are limited by the “Powers” test, as noted in our prior Memorandum to the Town, and that its operations are subject to the exercise of appropriate oversight under the jurisdiction of other municipal boards such as the Board of Health and the Conservation Commission.

Aggregate Satisfies the “Powers” Test

Without any specific facts, the Residents accuse Aggregate of failure to satisfy the second and third prongs of the *Powers* test. They simply assert that: “The proposed relocation of the material processing equipment and stockpiles of processed materials will result in the facility having a far greater effect on the residents of Whitetail Way. The primary effects would be increased noise levels, invasive lighting, and the aesthetic deterioration of the neighborhood views....” Again, their concerns are general and subjective, lacking in the kind of specificity necessary for judicial standing. *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129 (1992).

Aggregate has submitted an un-rebutted noise evaluation showing that noise will not exceed applicable limits. The fact that the noise study did not include noise monitoring at each and every location on Whitetail Way does not detract from its conclusions; noise studies do not, and cannot, include noise monitoring at each and every possible location. The proposed berm extension will completely shield the interior of the property, including lighting, from neighborhood view, and the Residents have no specific information to the contrary.

The Residents have not, and cannot show, “a difference in the quality or character, as well as the degree of use” (*Powers* second prong). Nor can they show that the proposed equipment upgrade and relocation will produce an effect “different in kind” on the neighborhood. *Powers* at 653. Their inability to demonstrate any objective adverse impact is not surprising given this Board’s extraordinary and unique efforts during the approval of the Whitetail Way subdivision to warn potential and actual buyers of lots in the subdivision of the operations of the quarry and its

likely impact on the neighborhood. The Board's Form F Covenant with the developer of the subdivision, a copy of which is attached hereto as Exhibit B, includes the following requirements:

12. The applicant/owner agrees to include the following notice in the purchase and sale agreements for all of the lots in Whitetail Way Subdivision:

“Notice to potential purchasers of lots in the Whitetail Way Subdivision. You should be aware of the proximity of Middlesex Materials Corp. to the subdivision. The nature of Middlesex Materials Corp. operations include the quarrying and movement of aggregate materials (crushed stone) for the construction industry which involves blasting and the operation of heavy equipment. Noise and vibration from blasting and the sound of heavy equipment may be perceptible on some or all of the lots to a point that would be unacceptable to some individuals.

Prospective purchasers should evaluate the particular lots under construction during normal working hours and seek the input of residents currently living in the area as part of their decision making process.”

13. All deeds to lots in the Subdivision shall reference this covenant therein.

The Form D Certificate of Approval of the Whitetail Way subdivision, a copy of which is attached hereto as Exhibit C, states:

13. The developer shall include in the deed of all the lots in the subdivision a notice stating that an active quarry is located nearby and does conduct periodic blasting operations and that the homeowners should expect to hear the blasts and feel the vibrations. It shall be sufficient for the deed to refer to this Form D certificate of approval (covenant) and the Form F covenant recorded herewith.”

Attached here as Exhibit D is a sample deed of one of the lots of the Whitetail Way subdivision, granted to Jon and Claire Kazanjian for 7 White Tail Way, dated April 30, 2009. As this Board requires, the deed contains the following language:

This conveyance is made subject to and with the benefit of matters referred to in the Form D Certificate of Approval of a Definitive Subdivision Plan dated December 5, 1994 and recorded with said Deeds at Book 25296, Page 102 AND in the Form F Covenant dated December 30, 1994 and recorded with said Deeds at Book 25296, Page 99. Reference is hereby made to these recorded documents for information regarding the fact that an active quarry is located nearby by and does conduct periodic blasting operations and that the homeowners in Whitetail Way Subdivision should expect to hear the blasts and feel the vibrations.

Based upon the such warnings, residents of Whitetail Way subdivision should not be now

heard to complain that Aggregate is repositioning and upgrading its quarry equipment to take better advantage of its quarry reserves. As noted above, it is inherent in quarry operations that the focus of rock extraction and the equipment used to extract and process the rock will move within the overall quarry locus. This Board, in its wisdom, issued the appropriate warnings to all interested buyers so that they would not be in a position to complain about normal quarry operations.

Water Resource Protection District

The Residents take exception to Aggregate's claim that it is exempt from the requirement of a Water Resource District Special permit by reason of its pre-existing, non-conforming status. As noted in our earlier Memorandum, the Water Resource District was created in 1982, long after Aggregate's predecessor in title began extensive quarry operations. In the 1990's the Building Inspector issued building permits for plant upgrades without requiring the need for a Water Resource Protection District special permit. Where the proposed equipment upgrades and relocation satisfy the *Powers* test, the facility is exempt from the requirements of the District.

Aggregate's Application is not Incomplete

The last page to the Letter identifies eight material items it claims Aggregate has not addressed and calls upon the Board to reject the Application for the lack of necessary information. As noted below, however, Aggregate has addressed each area and is willing to supplement its information at the Board's request.

1. With regard to "Information on the type and volume of traffic that will be entering and exiting the site, including the size and payload of trucks", Aggregate has communicated such information verbally with the Board and has also submitted a traffic route map. Essentially, the proposed equipment upgrade and relocation will not effect the existing traffic.
2. With regard to "Information on the number of additional trips per day generated by the Project", the plant relocation is not expected to generate additional trips to or from the facility. As always, the number of trips per day will vary depending upon economic conditions on ongoing projects.
3. As to "Information regarding on-site circulation of traffic, including the location and frequency of loading and/or unloading", on February 11, 2010, Aggregate submitted a traffic route map to the Board. The Board should notify Aggregate should it require additional information.
4. Regarding "Traffic study detailing off-site traffic impacts" there will be no such impacts. Existing truck routes, exits and entrances, traffic volume, etc. will all remain the same.
5. As to "Information regarding impacts to water quality", Aggregate has communicated that the facility discharges stormwater via a one point source discharge and will continue to do so via the same point. The facility has an existing stormwater management system that will continue to be used during and after the plant relocation. Stormwater discharge is permitted

under Aggregate's National Pollution Discharge Elimination System Multi- Sector General Permit (NPDES MSGP). Sampling is conducted as required by the permit and has been in compliance and will continue to be in compliance because there will be no material changes to the discharge .

6. As to noise, Aggregate has submitted a report from Tech Environmental showing that the facility will be in compliance with state and local noise regulations. All necessary measures will be taken to ensure we are in compliance with these regulations. Additionally, the neighborhood is well protected from excessive noise by the Board of Health's separate jurisdiction over noise control

7. On February 11, 2010, Aggregate submitted an exterior lighting plan to the Board showing compliance with all lighting requirements. Although the Board appeared to be pleased with the plan it asked Aggregate to revise it to show the new berm. The new berm is expected to further protect the neighborhood from exterior lighting. In light of the request, Aggregate is in the process of revising the plan.

8. As to "Information regarding the adequacy of proposed screening", Aggregate has discussed, as part of its long-term plans, extending the berm around the entire facility. An existing berm is currently being extended to help screen between the relocated plant and White Tail Way. Aggregate has notified the Board it would like to plant on top of the berm but is waiting for feedback from the Town and/or neighbors as to the preferred type of trees and shrubs.

Conclusion

The Residents have not submitted any specific information in support of their conclusion that this Board cannot approve Aggregate's site plan with reasonable conditions. Their Letter does not progress beyond a generalized fear that somehow they will suffer by the effects of the plant upgrade and relocation. Should the Board require additional material information, Aggregate will be happy to provide it.

Very truly yours,

LAW OFFICES OF JERRY C. EFFREN

Jerry C. Effren

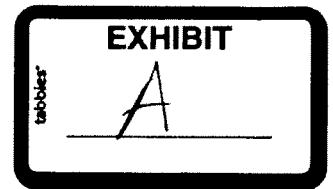
cc: **Aggregate Industries/Northeast Region, Inc.**
Thomas Harrington, Esq.

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TOWN OF LITTLETON
PLANNING BOARD

MINUTES OF CONTINUED PUBLIC HEARING
WHITETAILED WAY DEF. SUBDIVISION

DECEMBER 1, 1994



MEMBERS PRESENT: Janet LaVigne, Chairman; Bill Oakland, Vice Chairman; Mark Montanari, Clerk; Maren Toohill and David Campbell members

MEMBERS ABSENT: None

The Chairman opened the hearing at 9:00 P.M. Present were Bill Murray of Ross Associates and developer Roddy Palmer. It was noted that at the last hearing there was discussion regarding detention ponds. The Conservation Commission wants wet bottom basins. This will not affect the elevation of the outlet pipe, but will change the bottom elevation.

The Blasting Study done by Haley & Aldrich showed that ground vibrations and air blast over-pressures at the proposed homes within the Whitetail Way subdivision can be controlled by the quarry blasting contractor to levels which should not adversely impact the structures. Recommendations were that conditions include a requirement to notify prospective home owners of the presence of the quarry and , that a notice be included in the deed of all homes built in the subdivision stating that the quarry is located nearby and they conduct periodic blasting operations. The homeowners should expect to hear the blasts and feel vibrations, but that precautions are being taken by the quarry to keep vibrations below safe levels so that damage is not incurred. It is also recommended that the Fire Department require monitoring of vibrations be undertaken at the closest residential structures in the subdivision, to ensure that vibrations are kept below safe limits. It is also recommended that the Middlesex Company should consider a public relations program to educate residents of the controlled blasting procedures being implemented and the controls in place to reduce blasting related impacts. Mrs. LaVigne said that the Fire Chief is satisfied and that his concerns are addressed. Mrs. LaVigne read a letter from the Board of Health dated 11/29/94 which was received 11/30/94 stating that they do not approve the plan. The Board discussed the issues which the Board of Health objected to. Distances were measured from the closest wall of the quarry to the 100 foot wetland buffer. The Board of Health noted that there was no data in the blasting report regarding dust. Mrs. LaVigne said that it wasn't in the scope of the work they had asked them to look into. Mr. Cassinari asked about fugitive dust. Mrs. LaVigne asked what this was. Mr. Cassinari said it is dust from the site itself (M.M.C.). Mr. Cassinari said that no data was supplied as to damage to sewage disposal systems, other natural affects, such as causing structures to crack, etc. Peter Cassinari asked what is the information as to where blasting will exacerbate other outside conditions (natural items). Mr. Cassinari said that he received the information on the 28th, that is why their letter was submitted on the 29th. Mr. Cassinari asked does the situation exacerbate by blasting. Mr. Oakland said that the information is given to them to comment on.

Developer Roddy Palmer said that the scope of the blasting study was to determine if any additional construction techniques needed to be undertaken and the study answers the question. Peter Cassinari asked if this was ok, then why are they suggesting drywall construction. Mrs. LaVigne said that no additional structural requirements were recommended for the design of the homes. The report states blasting at the quarry can be done within acceptable limits. Peter Cassinari asked where does it say this. Mrs. LaVigne said in the report it states this. Mrs. LaVigne then proceeded to read the conclusions of the Blasting Evaluation.

Mrs. LaVigne asked Mr. Palmer if he is using drywall. Mr. Palmer said that he is using 50/50 drywall and plaster. Mrs. LaVigne said that the first page of the Board of Health letter said the subdivision is located in an area that is an annoyance to the residents. On page 2 of the blasting report, it states that the blasting consultant estimated the closest proposed quarry high wall, if the wall were to be extended to the 100 foot wetland buffer will be about 900 - 1000 feet away. This is the absolute worst case. This is proposed the next twenty five years or so. Mr. Oakland said that this is the absolute worst case. Janet LaVigne noted that people will be able to use their property lines because the 900-1000 foot measurement is on the MMC side of the wetland. Mrs. LaVigne asked what is the distance the Board of Health is looking for? Mr. Cassinari said they are looking for definitive distances. He said that no data supplied on the impact of dust, etc. Mrs. LaVigne asked what does the Board of Health want? Mr. Cassinari said the impact from the dust, blasting, fugitive dust, and an analysis of what is in this dust. Mrs. LaVigne asked isn't the Board of Health going through this with M.M.C.? Mr. Cassinari said they are looking for other factors and mentioned that demolition materials are brought onto the MMC parcel site also. Mrs. LaVigne asked what kind of analysis is he talking about. Mr. Cassinari said asbestos and lead at this point, but not limited to this. Mr. Palmer said the scope of the blasting study was only to measure effects of blasting on the structures. Mrs. LaVigne asked Mr. Mancuso if asbestos is brought onto the MMC site. Mr. Mancuso said no. Mr. Cassinari said that materials from building demolition contain lead and asbestos. Mr. Montanari asked why is the Board of Health asking the developer to do this? Mr. Cassinari said that according to Chapter "81U" the Board of Health is going forward with pursuing these concerns. Mr. Montanari asked Mr. Mancuso if "wet" crushing was being done. Mr. Montanari what kind of dust this creates now, isn't it a minimal amount? Mr. Mancuso said yes. Mrs. LaVigne asked if there is any disposal of asbestos or lead. Mr. Mancuso said no, not from M.M.C. Mr. Cassinari said that according to CMR 16.04, the Board of Health gets notified they are doing this. Mr. Cassinari said that they were just notified by M.M.C. Mr. Cassinari said that 16.05 I5 or I3 includes demolition of materials/bridges/road materials. The D.E.P. encourages use of this materials on roadways. Mr. Mancuso said as long as it meets state regulations it can be used just as it is, and it can be mixed with aggregate. Mr. Cassinari said that regarding sewage disposal system damage, there is no data. Mrs. LaVigne asked what data is the Board of Health asking for. Mr. Cassinari said more information is needed. Mr. Oakland said that this issue was only addressed because the Planning Board asked. Mrs. Toohill said that the Planning Board study was for one concern only and now the Board of Health has other concerns, the Board is trying to quantify this.

Mrs. LaVigne said that these are the choices because the Board of Health has stated disapproval of the subdivision:

1. Close the hearing and disapprove the subdivision;
2. Continue the hearing, this being the only subject open for discussion pending the Board of Health hearing, or;
3. As Mr. Palmer suggested that the Board vote to approve the plan because this response by the Board of Health is not timely. He said that according to Chapter 41U July was the initial filing date and that at the last meeting the only outstanding item was giving the Fire Chief time to review the blasting report.

Mr. Cassinari said they received the blasting report on November 28, 1994. On November 1st plan revisions were received. Town Counsel has told them they have 45 days from this date to respond. There is a difference of opinion between the Planning Board and Board of Health as to when the 45 days commences and ends.

Mr. Palmer said that the law is clear; it states "45 days from the time of filing". It does not mention revisions. He said he has done a lot of research on case law since receiving this information. Mr. Cassinari said that if changes to the plan occur then the clock starts again for the Board of Health. Mr. Murray said that changes made are not substantial and only relate to the layout of the road. All of these issues have been before the Board since day one. Mrs. LaVigne said that they are concerned that comments do not have to do with changes made during the process. Mr. Murray said the blasting study only addresses action occurring off site and asking them to pay for studies off-site relating to another business or land is not appropriate. He asked if the capping off of the dump had to go through this? Mr. Cassinari said they can't equate this with a quarry. Mr. Montanari said that anything they are asking for they knew in July. They knew there was dust emitted then. Mr. Oakland said the reason the blasting study was done was because this was the Fire Chief's request and the Board of Health was copied about this at that time. He could better sympathize with the Board of Health if they had commented within the first 45 days to at least some degree. Mr. Cassinari said that Town Counsel said they have a 45 day period with each revision. Mrs. LaVigne said that the position the Board of Health has taken puts the Planning Board in the position of either turning down the project or approving it; action must be taken tonight. Mrs. Toohill said they must disapprove the subdivision on the Board of Health objections. Mrs. LaVigne said that the Planning Board has two legal opinions in writing on this and must decide which one to interpret.

Mr. Palmer has a copy for the Planning Board of his attorney's opinion regarding his position. His attorney feels that Mr. Cassinari is pushing the time frame of the 45 days with the filing of a definitive plan. A letter to the Planning Board from Mr. Palmer's attorney was read for the public.

Mrs. LaVigne said that based on the November 29th letter from the Board of Health, the letter outlined five reasons for disapproval of the plan, one option is: Is developer willing to grant an extension of time to satisfy the Board of Health? Mr. Palmer said that he is not comfortable at this time; he is willing for the Planning Board to deliberate on the facts, but beyond that he is not

comfortable. Mrs. LaVigne double checked that he would not grant an extension and Mr. Palmer said that he would like to go by M.G.L. 81U regulations. The second option is the Planning Board can disapprove. The third option is they can approve the subdivision based on the fact that the Board of Health's response is not timely. Mr. Cassinari said that there can be another option. Mrs. LaVigne said there are no other choices that the Board can make. Mr. Cassinari said that he was told by Town Counsel's two attorneys that a revision starts the clock again. They have a statement from the blasting consultant that MMC is an annoyance. Mr. Cassinari asked wouldn't it seem logical that revisions would be subject to 45 day comments? Mr. Murray said the revisions were submitted on October 13, 1994. Mrs. LaVigne said the reasons of the Board of Health's disapproval were not affected by the road layout changes. Mr. Cassinari said nothing addresses specific distances of roadway. Mrs. LaVigne said they are on the plan. Mr. Cassinari says the study only references approximate differences. Mrs. LaVigne said approximate does not mean "872", she would say it means 900 feet. Mr. Cassinari said approximate goes on to 900-1000. He also said that the report is sprinkled with "mights/abouts", etc., and coupled with the consultant's own submissions. Mr. Cassinari also says the report evaluated drywall construction. Mrs. LaVigne asked the developer if it would be possible to use all drywall in construction. Mr. Palmer said it is a possibility. Mr. Palmer said that the State law is in effect for distances between houses and quarries and they have doubled this distance.

Mr. Eckel of Spartan Arrow said that the study seems to be the first thing identifying the quarry as being an annoyance and gives the Board of Health jurisdiction as a "nuisance". This report documents this and the Board of Health is responsible for this. Before this report there was no submission. Mr. Oakland said that there was documentation on August 28, 1994 of an annoyance and for potential problems that were copied to the Board of Health then. He said that "annoyance" and "nuisance" are not alike. The plans have had added the words "adjacent quarry". Mr. Murray said that they submitted an analysis that blasting occurred and this is not a new item. Mr. Murray said one of the problems is that the Board of Health's issue is that they want to know the exact distances between the houses and the quarry and this was not the intent of this study. It did meet the Fire Chief's comments in a timely manner (August 28th). Mr. Cassinari asked how do you determine seismic vibrations as not being part of the subdivision review process? Mr. Murray asked how does off-site problems affect the roadway being approved? Mr. Montanari said other issues have been going on all along with no comment before this. This process has been going on for over three months. Mrs. LaVigne said that if blasting is a problem now the concern the Board of Health has regarding the blasting causing damage to water pipes should be causing pipes at Spectacle Pond Road to be bursting. Mr. Cassinari said he doesn't know what the strata is between the quarry and Spectacle Pond Road. Mr. Oakland said that according to Town Counsel's letter, second paragraph, in this instance the Planning Board must disapprove, however, as the Board of Health did not hold a public hearing. This doesn't draw the conclusion that the Planning Board cannot approve or disapprove the subdivision. Mr. Cassinari said they still have time for a public hearing. Mrs. LaVigne said that they can either approve or disapprove and then the developer will take action. Mr. Palmer said hopefully that they are not trying to be inflexible and to go with these issues before another hearing would be far more damaging than addressing these risks. Bob Eckel said these are issues that address concerns.

The Board was polled as to whether they agree with the 45 day comment period of the original submittal or from each latest revision. Mrs. Toohill said she feels they do a good job working with other boards and she says that she would agree with 45 days from filing of revisions. Mrs. LaVigne said she would agree with 45 days comment period from filing of the original plan. Mr. Montanari said he would agree with 45 days comment from filing of the original plan. Mr. Oakland said he also would agree with 45 days from filing of the plan. David Campbell said he would agree with 45 days from filing of the original plan also. Mr. Cassinari asked are they affording an opportunity to have a public hearing?

There was discussion regarding the Board of Health public hearing. Mrs. Toohill said "if you hold a public hearing and get it resolved, then the Planning Board would vote to approve. Mr. Cassinari said there was no way a hearing could be held since the receipt of the blasting report. Mr. Montanari said that the Board of Health is asking the Planning Board to determine when the clock starts. Mrs. LaVigne said these issues are not from the Blasting Study. These existed before this and were not commented on until now. Mr. Cassinari said he would hope the Board would not put people in harm's way. Mr. Murray said this subdivision meets all the criteria of the subdivision rules and regulations. If it doesn't meet those standards it cannot be approved by the Town for a residential subdivision. Tim Simpson asked "his home that was built recently, what is the difference from these concerns on one house versus an entire subdivision of homes?" Mr. Cassinari said he doesn't know and can't answer. Mr. Montanari said that the Board of Health's concerns are dust, etc. Mr. Cassinari said they have received reports of complaints of shaking windows, china falling off shelves, etc. Mrs. LaVigne asked what about the example of water main/gas main, etc., and blasting. The utilities are not effected. Walter Clancy said this could be solved by an extension of time. Mrs. LaVigne said they can't do this. Mr. Clancy said he would rather this than intimidation of the Boards by the developer, and he is disappointed that this isn't going to be disapproved. He said that he questions part of the Haley and Aldrich report. He asked who paid for this and ordered this study. The Planning Board said they ordered it and the developer paid for it. Mr. Clancy said he disputes the dust report and stated that there is a dust problem. He said the study addresses human response, others are not addressed. Mrs. LaVigne said it is not in the scope of work that was asked for by the Planning Board. Mr. Clancy said that the study being done is outside of what is the problem. Mrs. LaVigne said the Fire Chief requested this study within the 45 days comment period.


Mr. Cassinari asked if the developer paid for this. The Board noted that this was stated that he did. Mr. Clancy asked what was the cost. The Board said \$1000.00. Mr. Cassinari asked were seismic reading done by someone else. Mrs. LaVigne said yes by Vibration Consultants for M.M.C. Mr. Clancy said that this is hardly an unbiased study. Mrs. LaVigne said this was raw data only. M.M.C. gave the Planning Board authorization to talk to Vibration Consultants and blasting reports were obtained from the Fire Chief. Mr. Eckle said new environmental issues for the Board of Health to study would include radon gas such as that found in homes on Spartan Arrow area.

HEARING CLOSED:

December 1, 1994

Mr. Oakland made a motion to close the hearing. The motion was seconded by Mr. Campbell and the Board voted all in favor of the motion. The hearing closed at 10:50 p.m.

APPROVED:



Mark Montanari, Clerk

phwt1201

EX 25296 099

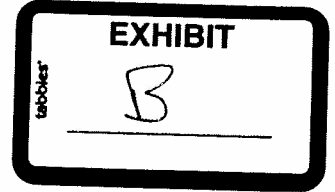
Covenant - Whitetail Way
Definitive Subdivision

December 1994



PLANNING BOARD
P.O. BOX 1305
Littleton Massachusetts 01460

Handwritten signature/initials



FORM F

COVENANT

The undersigned, Fram Navels Realty Trust (Tidan Corporation) of 21 Vose Road, Westford, MA, hereinafter called the "Covenantor" having submitted to the Planning Board of the Town of Littleton a definitive plan of a subdivision entitled "Whitetail Way", Littleton, Massachusetts, Submission: made by David Ross Associates, Inc., 17 W. Main Street, Ayer, MA 01432, do hereby covenant and agree with said Planning Board and the successors in office of said Board pursuant to General Laws (Ter. Ed.) Chapter 41, Section 81-U, as amended, that:

1. The covenantor is the owner of record of the premises shown on said plan;
 2. This covenant shall run with the land and be binding upon the executors, administrators, heirs, assigns of the covenantor and their successors in title to the premises shown on said plan;
 3. The construction of ways and the installation of municipal services shall be provided to serve any lot in accordance with the applicable Rules and Regulations of said Board before such lot may be built upon or conveyed, other than by mortgage deed, provided that a mortgagee who acquires title to the mortgaged premises by foreclosure or otherwise and any succeeding owner of the mortgaged premises or part thereof may sell any such lot, subject only to that portion of this covenant which provides that no lot so sold shall be built upon until such ways and services have been provided to service such lot;
 4. Nothing herein shall be deemed to prohibit a conveyance subject to this covenant by a single deed of the entire parcel of land shown on the subdivision plan or all lots not previously released by the Planning Board without first providing such ways and services;
 5. No lot shall be built upon until released by the said Planning Board;
- No soil shall be removed from the site until a permit is applied for and is obtained from the Board of Selectmen if necessary;
- The construction of all the road and the installation of the road and installation of all municipal services shall be completed in accordance with the applicable rules and regulations of the Board within 24 months from date of endorsement;

PROPERTY ADDRESS
SPECTACLE ROAD RD, LITTLETON

PAGE 092

25296

SEE PLAN IN RECORD BOOK

04/21/95 PLAN NUMBER: 00000314

010.00

133

MSD 04/21/95 10:05:20

8. Maintenance and repair of Whitetail Way, as may be necessary, of the drainage systems and roadway, all as shown on the aforementioned plan, shall remain the responsibility of Covenantor or its heirs, successors and assigns, until such time, if, as, and when the Town of Littleton shall accept Whitetail Way as a public way. In the event that the Covenantor or their heirs, successors and assigns shall fail to maintain and repair the drainage system, and roadway as set forth above, the Town of Littleton shall have the right to make such repairs and inspections as may be necessary and assess the costs thereof to the Covenantors. The Town of Littleton shall have the right to inspect the drainage systems, and subdivision way for the purposes of determining compliance with this provision;
9. This covenant shall take effect upon the approval of said plan.
10. The recording of this covenant shall be made prior to the recording of the plan and reference to said covenant shall be placed upon the said plan;
11. The applicant/owner agrees to provide all snow plowing, maintenance and repairs to Whitetail Way until such time as the roadway has been accepted as a public way by the Town of Littleton;
12. The applicant/owner agrees to include the following notice in the purchase and sale agreements for all of the lots in Whitetail Way Subdivision:

"Notice to potential purchasers of lots in the Whitetail Way Subdivision. You should be aware of the proximity of Middlesex Materials Corp. to the subdivision. The nature of Middlesex Materials Corp. operations include the quarrying and movement of aggregate materials (crushed stone) for the construction industry, which involves blasting and the operation of heavy equipment. Noise and vibration from blasting and the sound of heavy equipment may be perceptible on some or all of the lots to a point that would be unacceptable to some individuals.

Prospective purchasers should evaluate the particular lots under consideration during normal working hours and seek the input of residents currently living in the area as part of their decision making process."

13. All deeds to lots in this Subdivision shall reference this covenant therein.

IN WITNESS WHEREOF, the undersigned, covenantor as aforesaid, does hereunto set his hand and seal this 30th day of December, 1994.

FRAM NAVELS REALTY TRUST

Richard W. Lewis Trustee
Covenantor RICHARD W. LEWIS, Trustee

Warren R. Palmer, Jr.
Warren R. Palmer, Jr.

234 Littleton Road, Westford, MA
Address

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

December 30, 1994

Then personally appeared the above-named RICHARD W. LEWIS, Trustee as aforesaid and acknowledged the foregoing instruemnt to be his free act and deed, before me

Joseph W. Hobman
Notary Public
My Commission Expires: 12/29/00

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Littleton Planning Board

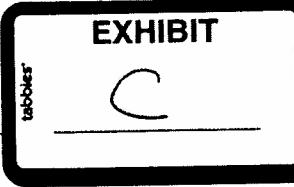
Janet C. LaVigne
Del S. Agble
William J. Calla
Maven A. Tookill
February 2, 1995



PLANNING BOARD # 25296-102
P.O. BOX 1305
Littleton Massachusetts 01460

Whitetail Way Definitive Subdivision

ms



FORM D

CERTIFICATE OF APPROVAL OF A DEFINITIVE SUBDIVISION PLAN

DATE: DECEMBER 5, 1994

TOWN CLERK: MARY CRORY

Dear Madam:

The Littleton Planning Board hereby certifies that at a meeting of said Board on December 1, 1994, at which a majority and quorum were present, following public hearings on August 18th, September 22nd, October 13th, November 10th, and December 1, 1994, pursuant to notice published in the Littleton Independent on August 4th and August 11th, 1994; it was **VOTED four to one (Mrs. Toohill voting against)**: That a plan of a definitive subdivision called: **WHITETAILED WAY**, located off Spectacle Pond Road and Spartan Arrow, dated July 27, 1994, drawn by David Ross & Associates, Inc., registered as an engineer or land surveyor, submitted for the Board's approval by Fram Navels Realty Trust, c/o Tidam Corporation, 21 Vose Road, Westford, MA 01886, owner/applicant, be and hereby approved on condition that prior to the Board's endorsement of its approval thereon, the subdivider shall furnish guarantees to the Planning Board as provided in Section 356C of the Subdivision Regulations that except as otherwise expressly provided in Section 81-U of Chapter 41, M.G.L., no lot included in such plan shall be built upon or conveyed until the work on the ground necessary to serve such lot has been completed in the manner specified by the Subdivision Regulations of the Town of Littleton or a performance bond or other security in lieu of completion has been accepted by the Planning Board. This approval is subject to the following conditions to the approval and additions agreed to in these hearings:

1. From the requirements of Section 249-32.B - Standard definitive plan contents, to allow the definitive plans to be at a scale other than 1" = 40", as the size of the site makes the depiction of the entire site at that scale unmanageable; **GRANTED**;
2. From the requirements of Section 249-32.F.(1). - Other submittals to allow the depiction of the cross-section of the roadway to be at schematic scale, as depicted in the Construction Details, sheet 12 of 19; **GRANTED**;

SEE PLAN IN RECORD BOOK 25296 PAGE 092

04/21/95 PLAN NUMBER: 00000314
MSD 04/21/95 10:09:21 134 12.25

Form D

December 5, 1994

2

Whitetail Way Definitive Subdivision

3. From the requirements of Section 249-89.C. - Fire Alarm System, to waiver the construction of the Fire Alarm System as it is not provided on adjacent streets and is not generally in use throughout the Town; **GRANTED**;
4. From the requirements of Section 249-89.D. - Planting, to allow homeowners to provide plantings for individual lots; **NOT GRANTED**;
5. From the requirements of Section 249-51G to allow pipe velocities in excess of 9 feet per second; **GRANTED**;
6. From the requirements of Section 249-85.B(1) to allow less than thirty six inches of cover over drain lines; **GRANTED**;
7. The island on Whitetail Way shall be landscaped with a minimum twenty (20) 3" caliper pin oaks and red pines with winter rye planted under the trees. The outer ten (10) feet of the island shall be covered with a minimum of 60 low growing pfitzer junipers 8-12 inches in height;
8. Street trees shall be planted in accordance with subdivision rules and regulations with at least three (3) different varieties to be alternated when planted. All trees shall be a minimum of 2.5" caliper.;
9. Street Lights shall be installed by the developer as shown on the plan;
10. Sidewalks shall be installed by the developer as shown on the plan;
11. Signs shall be installed on each approach to the island as shown on the plan;
12. The applicant/owner reserves and makes drainage easements over, under and across strips of land 20 feet wide, for the purpose of installing, maintaining, repairing or replacing drainage facilities, and which easement shall include, the right to enter upon, remove, deposit, slope bank and maintain material filling or support, which may be deemed necessary for the construction, reconstruction, and protection of any adjoining way, road or drainage system. The applicant/owner also grants access to the Water Department over the drainage easement for access to Parcel C&D; and
13. The developer shall include in the deed of all the lots in the subdivision a notice stating that an active quarry is located nearby and does conduct periodic blasting operations and that the homeowners should expect to hear the blasts and feel vibrations.

IT SHALL BE SUFFICIENT FOR THE DEED TO REFER TO THIS FORM D CERTIFICATE OF APPROVAL (COVENANT) AND THE FORM F COVENANT RECORDED HEREBY.

Form D
December 5, 1994

Whitetail Way Definitive Subdivision

Appeals, if any, shall be made pursuant to M.G.L. Chp. 41, Section 81-U, and shall be filed within 20 days of the filing of this decision with the Town Clerk.

Josette LaVigne
Walter J. Montuori

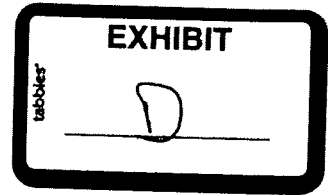
Paul S. Cobble

William S. Cobble
Planning Board

A true copy, attest:

Mary Crory
Mary Crory, Town Clerk

- Date December 6 1994



RETURN TO:
BARSH AND COHEN, P.C.
70 WELLS AVENUE
NEWTON, MA 02459

2009 00074987
Bk: 52680 Pg: 536 Doc: DEED
Page: 1 of 2 04/30/2009 02:22 PM

MASSACHUSETTS EXCISE TAX
Southern Middlesex District ROD # 001
Date: 04/30/2009 02:22 PM
Ctrl# 122450 12498 Doc# 00074987
Fee: \$2,713.20 Cons: \$595,000.00

MASSACHUSETTS QUITCLAIM DEED INDIVIDUAL (LONG FORM) 882

R.D. Kannard Homes, Inc., a corporation duly established under the laws of Massachusetts, having a mailing address of PO Box 1321, Littleton, Massachusetts 01460

for consideration paid, and in full consideration of Five Hundred Ninety Five Thousand And 00/100 (\$595,000.00) DOLLARS

grants to Jon Kazanjian and Claire N. Kazanjian, as husband and wife as tenants by the entirety of 62 Waverly Oaks Road, Waltham, Massachusetts 02452 with quitclaim covenants

(Description and Encumbrances, if any)

The land with the buildings thereon, in Littleton, Middlesex County, Massachusetts, shown as Lot 4 on a plan of land entitled "WHITETAIL WAY" Definitive Subdivision of Land in Littleton, Mass, prepared for Tidan Corporation, Scale: 1" = 40', July 1994, David E. Ross Associates, Inc., Civil Engineers, Land Surveyors, Environmental Consultants, P.O. Box 361, 17 W. Main Street., Ayer, Mass. 01432; said Plan recorded with the Middlesex South District Registry of Deeds as Plan No. 314 of 1995 at Book 25296, Page 92, and to which Plan reference is made for a more particular description of said Lot 4.

Excepting and excluding from this conveyance the fee in Whitetail Way as shown on said Plan but there is hereby granted to Grantee and its successors and assigns the right to use Whitetail Way for all purposes for which streets and ways are commonly used in the Town of Littleton in common with Grantor and others who may be or become entitled thereto.

Said Lot 4 containing 40,648 square feet, more or less, according to said plan.

The within conveyance is made subject to a Proposed Temporary Slope Easement and Proposed Drainage Easement, all as shown on plan referenced above.

This conveyance is made subject to and with the benefit of matters referred to in the Form D Certificate of Approval of a Definitive Subdivision Plan dated December 5, 1994 and recorded with said Deeds at Book 25296, Page 102 AND in the Form F Covenant dated December 30, 1994 and recorded with said Deeds at Book 25296, Page 99. Reference is hereby made to these recorded documents for information regarding the fact that an active quarry is located nearby and does conduct periodic blasting operations and that the homeowners in Whitetail Way Subdivision should expect to hear the blasts and feel vibrations.

Whitetail Way Littleton

This conveyance is subject to and with the benefit of any easements, restrictions, covenants or rights of way of record, if any there may be, to the extent there same may affect the within granted premises.

The within conveyance does not constitute all or substantially all of the assets of the grantors corporate assets.

Meaning and intending to describe and convey said premises conveyed to the Grantor by Deed dated March 20, 2008 and recorded with the Middlesex County (Southern District) Registry of Deeds in Book 50911, Page 119

Witness my hand and seal on April 30, 2009.

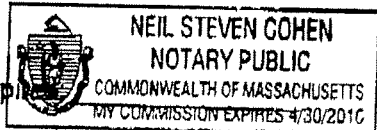
R.D Kanniard Homes, Inc.

Roger D. Kanniard
by: Roger D. Kanniard, President & Treasurer

Commonwealth of Massachusetts

Middlesex, ss.

On this 30th day of April, 2009, before me, the undersigned notary public, personally appeared R.D. Kanniard Homes, Inc. - Roger D. Kanniard, proved to me through satisfactory evidence of identification, which were Massachusetts Drivers Licenses, to be the person(s) whose name(s) is signed on the preceding document and acknowledged to me that he signed it voluntarily for its stated purposes.



My Commission expires

Notary Public:

CHAPTER 183, SEC. 6 AS AMENDED BY CHAPTER 467 OF 1981

Every deed presented for record shall contain or have endorsed upon it the full name, residence and post office address of the grantee and a recital of the amount of the full consideration therefor in dollars or the nature of the other consideration therefor, if not delivered for a specific monetary sum. The full consideration shall mean the total price for the conveyance without deduction for any liens or encumbrances assumed by the grantee or remaining thereon. All such endorsements and recitals shall be recorded as part of the deed. Failure to comply with this section shall not affect the validity of any deed. No register of deeds shall accept a deed for recording unless it is in compliance with the requirements of this section.