Zoning Board of Appeals
Town of Brooklyn

In Re:	**Appeal of Wayne Jolley, d/b/a Brooklyn Sand & Gravel, LLC. Error in the decision or determination of the Zoning Enforcement Officer, Zoning Regulations, § 9.G.1.(1)(d)**	
Property:	**530 Wauregan Road, (Assessor's Map 30, Lots 97. 97-1 and 97-2)**	
On behalf of:	**Linda Trahan** **26 Maynard Road** **Brooklyn CT 06234**	**Pamela Lukin** **28 Maynard Road** **Brooklyn, CT 06234**
Date:	**Filed: May 17, 2023**	

Argument

Introduction

The applicant in this matter knows, as a matter of fact and law, that once the sand and gravel are removed from this piece of property, a stand-alone processing plant for raw materials cannot exist without obtaining a change in the zoning regulations or a variance from the Zoning Board of Appeals (ZBA). He claims that because he did the same thing before, he now has a right to do it again. What he does not claim is that any of the activity was legally permitted after 1972. [1] The applicant ignores the plain language of the Regulations and asks this body to abandon its common sense and utter the word "grandfather". This word will be repeated when he files for a permit - as he must do - once his current Special Permit ends. The word "grandfather" is not a talisman and has no magical powers – nor does it apply with respect to "gravel banks" or any of its associated activities.

This dispute arose because the applicant is unhappy with the changes to the Zoning Regulations. Since 1972, any excavation of gravel on this property has been authorized by a Special Permit. If no Special Permit authorized the activity, the use was non-conforming and illegal. The Special Permit issued in 2018 permit was coming to an end, and it was evident that the gravel and sand would soon be exhausted. The "gravel pit" would be nothing more than a

[1] See Brooklyn Zoning Regulations (BZR) §§ 9.A. through 9.I.

"pit".[2] Soon the entire property would have *to be reclaimed and restored* in accordance with the intent of the Regulations – and the applicant's prior promises. Zoning Regulations, § 6.O.1. [3]

Importing sand and gravel from other locations is a different activity; processing sand and gravel from any source is a different activity. The Regulations allowed the applicant to do both as *accessory uses* – all activity, however, was subject to a Special Permit and allowed under the Regulations (when that application was filed), the amount imported and processed on site was limited to the amount excavated from the property. Zoning Regulations, § 6.P. ¶ 2. These had also been a condition of the 2018 Special Permit. Both the Regulations and Special Permit required that the material imported and processed could not exceed the amount extracted from the ground.

Around that time, the applicant began his fight with city hall. He filed various requests to change the regulations as well as seeking variances to expand the accessory uses related to his gravel bank – specifically processing material from external sources.[4] When all these attempts failed, a Special Permit was issued subject to the new regulations. The applicant was unhappy with the Commission's decision and appealed it to the Superior Court. See, General Statutes. § 8.8. The internal confusion between the Commission and ZBA was enough to convince a judge that Condition 4 of the Special Permit was "unreasonable". See, *Brooklyn Sand & Gravel, LLC, v. Brooklyn Planning and Zoning Commission*, HHD-CV19-6119135-S.

History of Gravel Banks – Connecticut

Long before the applicant filed for his first Special Permit to continue an existing "gravel bank", the Native Americans were making use of the same resources to provide the structures and tools necessary for their survival.[5] Connecticut's complex geologic past provided our

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[2] These facts appear in the pleadings and record of a prior appeal. See, *Brooklyn Sand & Gravel, LLC, v. Brooklyn Planning and Zoning Commission, HHD-CV19-6119135-S.*

[3] This Section of the Regulations has remained substantially unchanged since 1972. It is intended to regulate the filling and removal of earth, sand, stone, gravel, soil, minerals, and other substances, so as to protect the public safety, health, and general welfare, including, but not limited to, the loss of land for subsequent uses, lowering of property values, traffic hazards, nuisances, unsightly operations, erosion, dangerous open pits, stagnant water bodies, and the unintended depletion of natural resources. *These regulations are designed to provide for the re-establishment of ground level, protection of the area by suitable cover and to ensure that, following excavation operations, land will be usable for subsequent allowable uses.* (Emphasis added).

[4] According to the pleadings in Mr. Jolley's various lawsuits, he has made contracts with related parties to import sand and gravel from nearby a nearby facilities for processing. To comply with the Special Permits, he reduced the internal excavation to process more gravel from external sources. Using the applicant's analogy, he was expanding the accessory use to extend the life of the *permitted use* – by creating an alternate use not authorized by the Regulations. See, Past, Pending, and Future Litigation, pp. 5-8.

[5] See, LaVoie, Connecticut's Stone Chambers: What are They? Who Made Them? When? Why? (2021).

forefathers with a substantial mineral legacy. Significant deposits of iron ore, copper ore, garnets, marble, limestone, basalt, and brownstone have provided profitable mining operations not only in this state – but across the country. While the state's iron and copper industry ended, significant operations and resources continue to be mined to this day. Mining operations have a significant impact on the community, with the ability to provide jobs and financial stability to the residents. They also pose a substantial risk of catastrophic harm to life and property.

Sand and gravel form a different species of property with unique physical and abstract qualities. Trees, plants, and vegetables are all *living things* – an abstract quality that is "motivated" by some internal force – separate and distinct for any external forces directing its movement. Clay, copper, gold, gravel, and sand are *non-living things* that must be "extracted" from ground and moved elsewhere. It is the interaction of humans that changes the nature of things. Separating an apple from a tree and digging a shovelful of dirt are each motivated actions combining force and motion to produce different things. Once the thing, living or non-living, is separated from the earth – or the thing connecting it to the earth – it becomes a different form of property and subject to different rules. When fruit and vegetables are harvested, they can be bought, sold, or consumed. The trees remain, and the fields can be replanted with other plants.

The Nature of a Gravel Bank

A gravel bank is a combination of objects and forces. Fundamentally, it involves real property (land), the separation of sand and gravel from that land, processing the material, and moving it someplace else. Excavation is an *internal act* that separates the minerals from the ground. Once separated, it must be processed and moved. If it moves into the public domain it is subject to regulation by municipal, state, and federal authorities.

Each of these are separate activities: extraction, processing, movement, and storage. While an apple is different from a piece of gravel, both can be moved from one place to another, either can be used as a weapon, one can be eaten, and the other used to reinforce concrete. There are creative recipes for apples and multiple uses for sand and gravel. There are risks to farmers and agricultural workers that do not exist in the gravel pits and processing plants. Each activity has its own risks and rewards. The Regulations have always reflected the complex nature of human activity.

Since 1972, all three activities (extraction, processing, and movement) were authorized under a single Special Permit. [6] All three activities have a direct impact on the general welfare of the public and surrounding neighbors. Because sand and gravel are natural resources they are subject to depletion. As such, the statutes and regulations provide the authority to each municipality to balance the competing interests of property owners and the public in general. Any activity that conformed to the Special Permit was a conforming use of the property; any that did not was illegal – not a pre-existing non-conforming use. That has been the law since 1972. See, Brooklyn Zoning Regulations, Article III (Prohibited Uses); Article VI Gravel Banks; Article VIII (Non-Conforming Buildings and Uses) (1972 Ed.); Zoning Regulations § 6.O., Effective date May 25, 2023.

Zoning Regulations – Brooklyn, Connecticut

After 1972, every new application preserved any right to extract sand and gravel that existed before that date. From that point forward, every existing "gravel bank" was allowed to continue but was required to comply with the zoning regulations. The regulations back then applied to the *"expansion" of existing gravel banks* and as well as the *creation of new ones.* The term newborn, juvenile, adolescent, or adult are far more accurate descriptions of the existing *gravel banks* at the time the regulations went into effect. To the extent the term "grandfather" or any reference to a human being was employed, the regulations and laws were designed to let the poor creature die a natural death – not put it on life support at the public's expense.

Since 1972, landowners in the RA district have been able to create new gravel banks by obtaining a Special Permit. The landowner may continue that activity as long as the Special Permit exists and the landowner complies with its conditions. Any subsequent revisions of the Regulations did not affect the substantive rights that existed during the period any Special Permit was valid. It was understood then - and now - that a *Gravel Bank* - as a corpus (body) - whether a "twinkle in the eye of an expectant father", an adolescent, or an old man with grandchildren - would eventually expire. It doesn't matter whether the *Gravel Bank* was and infant or an old man

[6] This has since changed. Both uses are authorized but a Special Permit must be filed for each activity – excavation and processing. See Zoning Regulations, §§ 6.O. and 6.P.

in 1972, it existed then because a Special Permit authorized it and allowed it to survive.[7] Sand and gravel are the blood that drives that creature – regardless of its age. [8]

The Regulations have been updated throughout the years and were comprehensively revised between 2015-2019. The processing of gravel has always been considered an "accessory use" in a Gravel Bank. As such, the Commission has the *discretion* to allow this activity and the *authority* to regulate its scope. General Statutes, §§ 8-1 *et seq*; Zoning Regulations, § 1.A.

Past, Present, and Future Litigation

Even a discretionary act by a town or municipality may constitute a reckless disregard for the health and safety of its citizenry and the surrounding communities. Allowing an expanded use of this magnitude ignores the express language and intent of the statutes and regulations. It will not only affect members of this community, but it will also impact Plainfield, Canterbury, and Killingly as well. The failure to enforce laws is a tax on every citizen who complies with them. The town has a duty to enforce its existing laws and the failure to do may subject it to civil liability. See, General Statutes, § 52-557n (b)(7)(8).

The decision of either the Commission or the ZBA may be appealed to the Superior Court. There are two types of appeals: appeals as a matter of right; and appeals as a matter of discretion. Any aggrieved party may appeal the decision of the Commission or ZBA, *as a matter of right*, to the Superior Court. There, the trial court acts as an appellate tribunal and reviews the decisions of these bodies. The trial court's decision may be appealed to the Appellate Court. See, Practice Book, Chapter 81, General Statutes § 8-8(o); Rules of Appellate Procedure, §81-1. That is a *discretionary appeal* and rarely granted.

The ZBA should assume that the applicant will appeal any adverse action taken in this matter. It is his right to take this fight into the state and federal courts. The applicant should assume that his neighbors will continue to insist that town officials comply with the Zoning Regulations, and that he complies with the legal orders of the ZEO - as is their right.[9]

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[7] Prior to 2018, the property owner made no claim that any activity was "grandfathered" – all work was either authorized by a Special Permit or a non-conforming use after 1972.

[8] The term "Grandfathering" means that (1) a use, structure, or lot existed before zoning was enacted or amended, (2) the use, structure, or lot was legal but became non-conforming as a result of the zoning ordinance's enactment or amendment, (3) the use, structure, or lot will be allowed to continue even though it does not comply with the ordinance, but (4) *ordinarily it cannot be expanded or enlarged*. (Emphasis Added). The local regulations dealing with zoning vary widely.

[9] Any activity that interferes with the property rights of others may be a trespass or nuisance creating a private right against the applicant. See, *Boyne v. Glastonbury*, 110 Conn. App. 591 (2008). When injury to property

Appeal of the 2019 Permit [10]

A judicial decision may be changed by amending the law at issue or enacting a new law. This power is a core principle of democratic accountability and clear proof of the regulatory intent. The Zoning Regulations allow for the amendment to the regulations or a variance to the specific requirement. Zoning Regulations, § 9. Under the most recent updates, "processing" is wholly secondary to the separate activity of excavations. Zoning Regulations, § 6.P.2. (allows the processing of material on the site – but only that which is mined on site). [11] Zoning Regulations, §§ 9.F, 9.G.

These uses, since 1972, have required a Special Permit. Every amendment to the regulations has preserved only those granted by the Special Permit for so long as Permit existed. It covered an activity that had a beginning and end. Any rights established by a Special Permit existed between those two points in time. All future applications have been subject to Regulations existing at the time of the application. This has been the law since 1972. The town of Brooklyn's pleadings in that matter, including the petition for certification to the Appellate Court is a clear expression of the Commission's intent regarding this regulation. The regulations could have been amended at any time to allow a standalone processing facility – or to allow the applicant to process more material than could be mined. While that appeal was pending, the Commission removed any possibility of confusion.

The revisions in 2020 restrict the *processing of any outside material*. Only material mined on site may be processed. (Emphasis Added). The purpose of the regulations has always been to 1) *protect the public safety*, 2) *preserve the property of the residents*, 3) *to prevent the creation of hazards*, 4) and finally, *to restore the land so it will be usable for "residential, commercial, agricultural, or some other "allowable use"*. (Emphasis added). See, Brooklyn Zoning Regulations, Article III (Prohibited Uses); Article VI Gravel Banks; Article VIII (Non-

resulting from a trespass is remedial by restoration or repair, it is considered to be temporary. Mr. Jolley's action in these matters are an admission that he intends to maintain this nuisance – not abate it.

[10] *Brooklyn Sand & Gravel, LLC, v. Brooklyn Planning and Zoning Commission*, HHD-CV19-6119135-S. Notwithstanding the plain language of the regulations, the clear regulatory intent, the objection of the town, and outrage of the citizens, the applicant was able to convince this body is he does not need to comply with the regulations.

[11] During the pendency of the appeal to the Superior Court, the language of the regulations was amended to clarify this. More recently, the amendments have further clarified this issue. These changes will go into effect on May 22, 2023, and will apply to any application for a new Special Permit.

Conforming Buildings and Uses) (1972 Ed.); Zoning Regulations § 6.O., Effective date May 25, 2023. [12]

Pending Federal Litigation [13]

On February17, 2021, the applicant filed a federal lawsuit claiming he now has a constitutional right "to process sand and gravel imported from locations outside the town of Brooklyn, Connecticut property". [14] This "constitutional right" is predicated on the following facts alleged in that complaint: "22. *Upon information and belief*, in or around 1972, the Town adopted zoning regulations; and 23. Because Plaintiffs and their predecessors imported sand and gravel excavated from other locations prior to the adoption of the Town's zoning regulations, the importation of such material was a preexisting, nonconforming use at the time the Town adopted zoning regulations. Plaintiff's Complaint, ¶¶ 22. and 23. (Emphasis added).

These allegations demonstrate either ignorance of the law or a willful attempt to confuse the federal court. The 1972 regulations are a matter of public record and exist independently of counsel's "information and belief". They became effective at 12:01 A.M. on May 24, 1972. See 1972 Zoning Regulations. This activity (operation of a gravel pit) has been allowed on this property since 1972, and any activity since that time exists only *because it was allowed by Special Permits* issued in accordance with the regulations. Any authority to continue a use connected with a "gravel bank" applied to any excavations *after that date*. A flag in the ground and pre-dug hole protected any existing activity – going any further has always required a special form of permission that exists within the temporal confines of a Special Permit. Zoning Regulations, § Article VI (5-24-72).

If the applicant has not completed any excavation *that began prior to 1972*, he needs to provide some explanation for his failure to do so – both to the Commission and the federal court. Every excavation since that date, and every activity pertaining to that activity was required to be done in accordance with a Special Permit. Any activity done without that permission was

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[12] Under the earlier regulations, the processing of gravel was treated under the sections defining prohibited uses. These involve other state and federal statutes and regulations and deal with activities once the sand and gravel have been separated from the earth. It must be stored, processed, and moved inside the lot and into the stream of commerce. Once the dirt and gravel become moveable they become a different "thing", and subject to different laws, rules, and regulations.

[13] *Brooklyn Sand & Gravel, LLC & Wayne Jolley v. Town of Brooklyn*. Case 3:21-cv-00193-JCH (pending U.S. District Court, District of CT).

[14] A Motions for Summary Judgment is now pending in this matter. If granted, the federal case will be dismissed; if denied, it will proceed to trial and the applicant will have to make his case to a judge or jury.

unlawful, not protected by the regulations, and unauthorized. The terms and conditions of each Special Permit defined the rights and duties of the applicant during that period. These were temporal and related to a specific time, a specific area, a beginning, and an end.

Like any other "license" it may be renewed, but any rights bestowed have always been temporal in nature.[15] Each Special Permit obtained since 1972 defined the limits of some activity. If these Special Permits were not enforced, and the applicant exceeded the limits or violated any of the terms, it did not create a right, nor did it allow him to continue the illegal activity. Instead, not only did he expose himself, but the agents of the town to civil liability.

Relevant Law

Processing material has always been allowed as an accessory use *in conjunction with the operation of a "gravel bank"*. Zoning Regulations, § 8.0. As a matter of common sense, separate and distinct uses of property are involved – all of which are common law nuisances and subject to the rights of the municipality and adjoining property owners. Blasting in connection with clearing and quarry operations have all been subject to permits issued by the Commission and State or Local Fire Marshal since 1972. See, Zoning Regulations, Article III, ¶ H. (Prohibited Uses) (1972). All the other hazards and dangers that were Prohibited Uses were subject to these regulations. The Special permits were designed to control the dangers of nuisance and trespass caused by these activities. See, See, Zoning Regulations, Article III, ¶¶ A. – G. (Prohibited Uses) (1972).

Authority of the Zoning Board of Appeals

The Zoning Board of Appeals (ZBA) is authorized and established pursuant to Chapter 124 of the Connecticut General statutes. Its powers and duties are outlined in Section 9 of the zoning regulations. The ZBA has the authority to review the actions of the Zoning Enforcement Officer (ZEO) or allow a variance to the strict application of these Regulations. See, Zoning Regulations, §§ 9.G.1.1 (Order of ZEO) and 9.G.1.2. (variances). The ZBA does not have the authority to change the regulations. That power is specifically reserved for the Commission. See Zoning Regulations, § 9.F. *et seq*.

Within any corporate body, there is an "inner monologue" about regulatory laws between those who make them, those that enforce them, those subject to them, and those interpreting them. When the language is unclear or does not explicitly resolve a factual question, an

"adjudicative body" is tasked with the job of resolving it. The state laws and regulations must be applied to specific facts and imprecise laws. The Zoning Enforcement Offer is charged with enforcing the regulations and performs her duties with the knowledge of the town planner, the members of the commission, and, obviously, the town attorney. The acts of the ZEO are subject to review by both the Zoning Commission and the Zoning Board of Appeals. The ZBA stands in place of the Zoning Enforcement Officer to the extent that it deals directly with the subject of the appeal. See, Zoning Regulations, §§ 9.G.2.1-4.

In this appeal, the Board acts as a reviewing body to determine whether there has been an "error in the order, requirements, decision, or the determination of any official charged with the enforcement of these Regulations". [16] As such, it is a mixed question of law and fact. While the ZBA may reverse, affirm, or modify the order, *it cannot change the plain language of the regulations*. (Emphasis added). As such, it appears the applicant will still be required to apply for a Special Permit after this body has made its decision. Zoning Regulations, §§ 1; 2; 3.C; 8; 9; and 10.C.

The Applicant Failed to Meet His Burden

The evidence presented to the ZEO was clearly not sufficient to grant the relief requested as a matter of fact and law. It was the burden of the applicant to establish his right, not the town's duty to defeat it. The ZEO made numerous requests from the applicant for direct evidence. Rather than doing so, the applicant produced a litany of anecdotal tales, irrelevant memories, unsubstantiated hearsay, along with the claims of people who have bought, sold, or moved gravel into and out of the property over the past seventy years or so. The applicant did not provide the ZEO with any of the information she requested – business records and invoices specifically pertaining to the activities involved.

More importantly, none of those letters established that the applicant had a Special Permit that allowed the described activity during that that period. Instead, the ZEO witnessed an open and dusty gravel pit, and a property owner with no intention of complying with the intent of the Zoning Regulations - *to restore it to "an agricultural, residential, or some other use".* See, 1972 Zoning Regulations, Article VI, § 1; See also, Zoning Regulations, §§ 6.O. ¶ 1; 6.P. ¶ 1.

[16] See, Letter dated March 6, 2023, from the Zoning Enforcement Officer to the applicant.

Conclusion

With each permit that has been filed since 1972, some plan of restoration must have been submitted by the applicant – either Mr. Jolley or some other person connected to the property. Each of those applications contained promises to the town, the neighbors, and all the residents of Brooklyn that someday this activity would end, and the area restored to something less non-conforming. Any promises that have been made have not been honored. Every Special Permit was issued on his promise that "someday" this property would be restored in accordance with the town's plan of development.

Rather than honor his promises to the Town, the applicant went out and made promises to other people – related parties, no less – legal contracts with others to do things he had no right to do. Now he sues the Town in federal court for interfering with these contracts. [17]

Since 2019, Mr. Jolley has made no secret that his intention is otherwise. Prior to that time, his silence on this matter was deafening. Now he has finally revealed his true intent. This is not the type of grandfather anyone needs or wants in their neighborhood or town. His intent has always been to say anything needed to obtain permission - and do as little as possible to satisfy his obligations. This is even more apparent from the position taken in prior and pending litigation. His legal claim to the status of "grandfather" is laughable in anything other than a biological sense. The regulations are crystal clear.

Every permit issued between 1972 and now was subject to a Special Permit and subject to the Zoning Regulations in effect during their existence. The ZEO made repeated attempts to obtain evidence that was never produced by the applicant. It does not exist. Any activity the applicant could prove would have been either have been a conforming use of the property if the Special Permit authorized it, or an illegal, non-conforming use. Instead, the applicant continues to submit a steady diet of the same useless, irrelevant, and immaterial information that no one is disputing.[18] Should this body conclude that the ZEO's action was illegal under such a clear regulatory mandate, it may result in actionable harm to the citizens of this town, as well as expose the town to zoning appeals and civil litigation.

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[17] *Brooklyn Sand & Gravel, LLC & Wayne Jolley v. Town of Brooklyn*. Case 3:21-cv-00193-JCH (pending U.S. District Court, District of CT); Plaintiff's Complaint, ¶¶ 114 – 119.

[18] See, Letters submitted in support of applicant's appeal.

The dust and noise caused by gravel banks are subject to the laws of trespass and nuisance. They are authorized by the regulations because of their overall value to the community and respect to the owners to exploit those resources. They are tolerated because they are expected to be temporary – to end when the activity is complete. Once the sand gravel are gone, it will be time to find some other use for that property. That has been clear since 1972 and long overdue.

Respectfully Submitted:

Linda Trahan; Pamela Lukin

By _____

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