Ferry St.

TOWN OF MARSHFIELD
870 Moraine Street
Marshfield, Massachusetts 02050

MEMORANDUM

VIA FACSIMILE AND INTEROFFICE MAIL

March 23, 2009

TO: Zoning Board of Appeals

FROM: Robert L. Marzelli
Town Counsel

RE: Application for Special Permit and Variance
Grove and Ferry Street

This is in response to your request for comment as to the legal issues affecting the application of Peter Armstrong and Marshfield Youth Soccer for Special Permit, Site Plan Approval and Variance from parking requirements with respect to certain vacant land off of Grove and Ferry Streets. I have also been asked by the Town Engineer to comment on two specific questions in connection with this application, so I am copying him with this memorandum and am copying you with my memorandum to him. I have been provided with a site plan entitled "Restoration Plan, Grove Street, Marshfield, Massachusetts," dated February 29, 2008, revised October 21, 2008 and December 16, 2008, Prepared by Grady Consulting, LLC., which I understand to be the plan before the Zoning Board of Appeals.

I have previously reviewed two applications for an Earth Removal Permit with respect to the parcel in question, filed by Mr. Armstrong with the Board of Selectmen. As I understand the proposal the applicants intend to remove approximately 575,000 cubic yards of gravel from two lots located off of Grove and Ferry Streets. These lots are shown on the Marshfield Assessors' Maps as Lot H12-01-9A and G12-29-02 and are presently owned by Mr. Armstrong. After the sand and gravel has been removed, it is proposed that one of the lots, G12-29-02, become the site of two soccer fields to be used by Marshfield Youth Soccer, Inc. It is this latter part of the proposal that is before the ZBA.

A. Comments Based On Zoning Bylaw

1. In reviewing the site plan and the application I note that the parcel proposed for use as soccer fields after excavation of the earthen materials has no frontage on any "street" as defined in the Zoning Bylaw. The applicants have not applied for

a variance from the frontage requirements contained in Article VI of the Bylaw. Such a variance would be necessary for the proposed recreational use to receive a special permit and site plan approval.

2. As I am sure the Board is aware, earth removal of the nature and extent proposed by the applicants cannot be authorized under the Zoning Bylaw, but is governed by Article 20 of the General Bylaws, the Earth Removal Bylaw, administered by the Board of Selectmen. I am enclosing for your convenience two appellate court decisions, *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994) and *Old Colony Council-Boy Scouts of America*, 31 Mass. App. Ct. 46 (1991), which hold that earth removal of the scale proposed here cannot be considered as "incidental" to another allowed use. (See Exhibit A, attached). Therefore, if you choose to grant the relief requested, your decision should make clear that you are not purporting to authorize earth removal. Further, since as I understand it the use that is subject to your jurisdiction cannot be made without the proposed earth removal, any decision granting zoning approvals should be made conditional upon the applicants obtaining any necessary earth removal permits from the Board of Selectmen.

B. Comments Based On Non-zoning Legal Issues Related To Right to Access the Proposed Use

Because of a land swap between the Town and Mr. Armstrong in 2001, resulting from negotiations between Mr. Armstrong and the Conservation Commission, the proposal presents additional and somewhat unusual legal issues. I am enclosing a copy of the plan and deeds used in connection with that land swap. (See Exhibit B, attached).

Note that the deed from the Town to Mr. Armstrong contains the following language in the next to last paragraph: **"Said parcel is conveyed subject to the restrictions that said Parcel B is to be combined with Grantee's parcel D on the aforesaid plan and the combined parcel used solely for one single family dwelling with customary buildings and uses associated therewith and for buildings and uses associated with the keeping of horses and farming."** The combined parcels B and D, referred to in the deed from the Town to Mr. Armstrong, make up the parcel shown as Lot H12-01-09A on the site plan. The site plan shows a proposed 40-foot wide access easement being granted across the restricted parcel to serve the parcel which will be the site of the soccer fields. This proposed easement would violate the restriction contained in the 2001 deed from the Town, quoted above. Therefore a Town Meeting vote would be necessary to release the restriction, at least partially, to allow the easement to be granted by Mr. Armstrong.

Also note that the deed from Mr. Armstrong to the Town contains the following language in the fifth paragraph: **"Said parcel is conveyed subject to a '25.00 foot wide access easement' as shown on aforesaid plan, running from parcel D to Bridal Trail and Ferry Street...said reserved easement shall be appurtenant to and run**

with combined Lots B & D on said plan." The site plan proposes access to the parcel that will contain the soccer fields over this easement. Since the easement does not benefit the lot proposed as the location of the soccer fields, its use for that purpose would result in what is called "overloading" the easement. Again, Town Meeting action would be required to allow the easement over the Town-owned conservation land to be used to serve the parcel containing the soccer fields.

There remains one further difficulty with the use of the 25-foot easement where it crosses the so-called Bridal Path. As pointed out above, the deed from Mr. Armstrong to the Town purported to reserve an easement over the land being conveyed and the Bridal Path to reach Ferry Street. However, no recorded deeds have been provided which demonstrate the existence of rights to pass over the Bridal Path in the location of the easement shown the plan. Reserving in a deed a right one does not have does not create such a right. I am enclosing for your reference a copy of the 1951 vote of Town Meeting which revoked the authority of the Selectmen to sell portions of the old New Haven railroad rail bed and created the same as a bridal path. I am also enclosing a copy of Article 40 of the General Bylaws which prohibits operation of motor vehicles on the Bridal Path except for emergency use or Town vehicles. (See Exhibit C, attached). Again, absent evidence that Mr. Armstrong has a deeded right to the 25-foot access easement, Town Meeting action would be required to allow it to be used for crossing of the Bridal Path and other Town land to access the proposed soccer fields, or for access to the site for earth removal or construction of the fields.

Finally, I have located a 1956 deed from the Town, pursuant to Town Meeting vote, that grants a 40-foot right of way from the parcel proposed as the site of the soccer fields over the Bridal Path to Ferry Street. This is shown on the site plan, in outline form, lying to the west of Parcel H12-01-9A, (the combined parcel referred to above). Assuming the appropriate zoning relief is granted, this right of way could be used to access the parcel proposed as the site of the soccer fields. Assuming in addition to zoning relief the grant of an Earth Removal Permit, this right of way could be used in connection with earth removal operations on Parcel G12-29-02, (the soccer field parcel).

I trust this will help you in considering this unusually complex proposal. Please advise if you have further questions or it I can be of further assistance.

Cc: Town Engineer
Planning Board
Town Administrator

EXHIBIT A

574 N.E.2d 1014
31 Mass.App.Ct. 46, 574 N.E.2d 1014
(Cite as: 31 Mass.App.Ct. 46, 574 N.E.2d 1014)

Appeals Court of Massachusetts,
Plymouth.

OLD COLONY COUNCIL-BOY SCOUTS OF AMERICA
v.
ZONING BOARD OF APPEALS OF PLYMOUTH.
No. 89-P-1325.

Argued March 14, 1991.
Decided July 12, 1991.

Charitable organization petitioned zoning board of appeals to reverse decision denying special permit to enable organization to create new cranberry bog. Board denied relief. Organization appealed. The Superior Court, Plymouth County, James J. Nixon, J., denied relief. Organization appealed. The Appeals Court, Dreben, J., held that: (1) special permit was required, and (2) board's denial of special permit was not arbitrary or whimsical.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General.. Most Cited Cases
(Formerly 414k384)
Excavation of material was not incidental to construction and maintenance of cranberry bog and, thus, excavation did not fall within exception to special permit requirement for excavation incidental to and reasonably required in connection with construction of approved use where excavation involved removal of 460,000 cubic yards of fill over a two and one-half-year period.

[2] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
(Formerly 414k384)
Zoning board of appeals' refusal of special permit for removal of 460,000 cubic yards of earth in connection with construction and maintenance of cranberry bog on ground that there were not adequate and appropriate facilities was not arbitrary or capricious; road to be used was narrow gravel road, trucks to be employed were heavy and wide and, in some places, would not be able to pass each other, and removing that quantity of earth would entail 30 truck trips per day, five days a week, for two and one-half years.
****1014 *46** John H. Wyman, Plymouth, for plaintiff.

Jane M. O'Malley, for defendant.

Before BROWN, DREBEN and IRELAND, JJ.

DREBEN, Justice.

Old Colony Council-Boy Scouts of America (plaintiff) is a charitable organization which owns and operates a summer camp for Boy Scouts in Plymouth. To become more self-sufficient and lessen its reliance on external funds, it sought to create a new cranberry bog adjacent to an existing nonproductive bog on a portion of its campsite. The cost of constructing the bog would, under the plaintiff's plan, be paid for by the sale of excavated material to the site contractor,*47 who would construct the

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

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

When the plaintiff applied for a zoning permit,[FN1] the town's zoning agent refused to issue one on the ground that a special permit was required under § 301.06 of the zoning by-law. The plaintiff petitioned the zoning board of appeals (board) to reverse the decision of the zoning agent or, in the alternative, to grant a special permit for the proposed excavation. After the board denied both requests, the plaintiff unsuccessfully sought relief in the Superior Court pursuant to G.L. c. 40A, § 17. It now appeals from the judgment of the Superior Court. We affirm.

> FN1. A zoning permit is required for all excavations in excess of ten cubic yards to ensure that there is compliance with the "Natural Features Conservation Requirements," § 301 of the Plymouth zoning by-law.

**1015 [1] 1. *Zoning permit.* The plaintiff first claims that a special permit is not needed and that a zoning permit should be issued because its proposal falls within the exception provided in § 301.06 of the by-law. That section is part of the "Natural Features Conservation Requirements" of the by-law, the intent of which, as expressed in § 301.01, "is to prevent cumulative damage to landscape and topography and related valuable and non-renewable natural resources of the Town of Plymouth." Even for allowable uses a zoning permit is required so that, as stated in § 301.02, the building inspector "shall review applications for conformity with this section," that is, as few lasting changes in topography as possible are to be made.

Section 301.06, upon which the plaintiff relies, provides:

"Except when incidental to and reasonably required in connection with the construction of an approved *48 use ... no removal for sale, trade or other consideration, or for use on a separate site, of soil, sand, gravel, or quarried stone in excess of ten (10) cubic yards shall be allowed except by special permit.... Such special permit for excavation shall be subject to all applicable Environmental Design Conditions ... and ... the Board of Appeals may prescribe additional conditions and safeguards...."

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

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

Section 301.6 uses the word "incidental," a term which, when used in the context of zoning, often incorporates the concept "that the use must not be the primary use of the property but rather one which is subordinate and minor in significance." *Harvard v. Maxant,* 360 Mass. 432, 438, 275 N.E.2d 347 (1971), quoting from *Lawrence v. Zoning Bd. of Appeals of North Branford,* 158 Conn. 509, 512, 264 A.2d 552 (1969). The ordinary lexical meaning of "incidental" also connotes something minor or of lesser importance.[FN2] According this meaning to the *49 word "incidental," in our view, best

achieves the purpose of the special section of the by-law of which § 301.06 is a part.

> FN2. In Webster's Third New International Dictionary 1142 (1971), the first definition given of "incidental" is "subordinate, nonessential, or attendant in position or significance."
>
> In the American Heritage Dictionary 664 (1976), "incidental" is defined as "[o]ccurring as a fortuitous or minor concomitant: incidental expenses."

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

[2] 2. *Special permit.* "Under ...G.L. c. 40A, § 17, a court reviewing a decision of the board denying a permit does not possess the same discretionary power as does the board, and the decision of the board can only be disturbed 'if it is based "on a legally untenable ground" ... or is "unreasonable, whimsical, capricious or arbitrary".... To hold that a decision ...**1016 denying a permit is arbitrary ... whenever the board, on the facts found by the trial judge, could have granted a permit, would eliminate the board's intended discretion.' *Gulf Oil Corp. v. Board of Appeals of Framingham,* 355 Mass. 275, 277-278, 244 N.E.2d 311 (1969)." *Subaru of New England, Inc. v. Board of Appeals of Canton,* 8 Mass.App.Ct. 483, 486-487, 395 N.E.2d 880 (1979).

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

*50 Not only was the board warranted in determining that the removal of the material was not "incidental" to the creation of an allowed use, but it also had good reason to decide that adequate and appropriate facilities were not available for the proposed operation.[FN3] As the judge found, the road to be used was a narrow gravel road, the trucks to be employed were heavy and wide and, in some places, would not be able to pass each other. The board's refusal of a special permit for earth removal was not arbitrary or whimsical.

> FN3. The board also urges that § 407.17(D)(1) means that the "excavation and use" must both be on the property. Since we hold that the board was justified in concluding that the excavation was not "incidental," we need not reach this issue. We also need not reach other issues, including whether a special permit procedure exists in an "Aquifer Protection District."

Judgment affirmed.

Mass.App.Ct.,1991.
Old Colony Council-Boy Scouts of America v. Zoning Bd. of Appeals of Plymouth
31 Mass.App.Ct. 46, 574 N.E.2d 1014

END OF DOCUMENT

Westlaw.

641 N.E.2d 1334
418 Mass. 841, 641 N.E.2d 1334
(Cite as: 418 Mass. 841, 641 N.E.2d 1334)

Supreme Judicial Court of Massachusetts, Middlesex.

Kathleen B. HENRY
v.
BOARD OF APPEALS OF DUNSTABLE.
Argued Sept. 9, 1994.
Decided Nov. 16, 1994.

Town Board of Appeals denied landowner's application for permit to remove 300,000 to 400,000 cubic yards of gravel from steep grade on property to provide safer access to "cut your own" Christmas tree operation. The Superior Court, Middlesex County, Robert H. Bohn, Jr., J., entered judgment for landowner, and the Appeals Court, 36 Mass.App.Ct. 54, 627 N.E.2d 484, affirmed. On application for further appellate review, the Supreme Judicial Court, Abrams, J., held that the proposed gravel removal would not be "incidental" to agricultural or horticultural use of operating Christmas tree farm, and thus was subject to local zoning by-law prohibiting commercial earth removal.

Reversed and remanded.

West Headnotes

[1] Statutes 361 ⚿188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When statute does not define terms, court looks to the plain meaning of those terms.

[2] Zoning and Planning 414 ⚿279

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)1 In General
414k278 Particular Terms and Uses
414k279 k. Agricultural Uses; Farm; Nursery; Greenhouse. Most Cited Cases
Planting of evergreen trees for either saw cut operation or "cut your own" Christmas tree farm is within meaning of "agriculture" or "horticulture" for purposes of statute providing that no zoning ordinance shall unreasonably regulate or require special permit for use of land for primary purpose of agriculture or horticulture. M.G.L.A. c. 40A, § 3.

[3] Zoning and Planning 414 ⚿279

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)1 In General
414k278 Particular Terms and Uses
414k279 k. Agricultural Uses; Farm; Nursery; Greenhouse. Most Cited Cases
Proposed excavation of 300,000 to 400,000 cubic yards of gravel over period of three years from five acres of a 39-acre plot was not "incidental" to agricultural or horticultural use of land within statute providing that no zoning ordinance shall unreasonably regulate or require special permit for use of land for primary purpose of agriculture or horticulture, and thus removal was subject to local zoning by-law prohibiting commercial earth removal, even though landowner sought the gravel removal to remove steep grade of the land in order to allow safe access to "cut your own" Christmas tree operation involving annual crop of 700 to 1,000 Christmas trees. M.G.L.A. c. 40A, § 3; Dunstable, Mass., Zoning By-Law § 15.

[4] Zoning and Planning 414 ⚿301

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)2 Accessory Uses and Buildings

414k301 k. Accessory Uses in General. Most Cited Cases
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.

[5] Zoning and Planning 414 ⇨301

414 Zoning and Planning
414V Construction, Operation and Effect
414V(C) Uses and Use Districts
414V(C)2 Accessory Uses and Buildings
414k301 k. Accessory Uses in General. Most Cited Cases
Determining whether activity is incidental to permissible activity on zoned property is fact-dependent inquiry, which both compares net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and permissible primary uses, and focus is on the activity itself and not on such external considerations as property owner's intent or other business activities.
**1334 *841 Robert J. Sherer, Boston (Francis A. DiLuna with him) for plaintiff.

Richard W. Larkin, Town Counsel, for defendant.

**1335 Tara Zedeh, Sp. Asst. Atty. Gen., for Dept. of Food and Agriculture, amicus curiae, submitted a brief.

Before LIACOS, C.J., and WILKINS, ABRAMS, NOLAN and LYNCH, JJ.

ABRAMS, Justice.

We granted the defendant board's application for further appellate review to consider its claim that the excavation and removal of 300,000 to 400,000 cubic yards of gravel from a hilly five-acre portion of the plaintiff's thirty-nine acre plot is not incidental to an agricultural or horticultural*842 use of the land and therefore is subject to the local zoning by-law prohibiting commercial earth removal. See generally § 15 of the zoning by-law of the town of Dunstable.

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

The board denied the permit on the ground that the removal operation would be "injurious, noxious or offensive to the neighborhood" within the meaning of the applicable by-law. The plaintiff appealed to the Superior Court on the parties' stipulation of facts. A Superior Court judge determined that the proposed use was exempt from regulation by the Dunstable zoning by-law, under G.L. c. 40A, § 3 (1992 ed.),[FN1] as incidental to an agricultural use, and that the plaintiff could proceed with the earth removal operation. The Appeals Court affirmed. *Henry v. Board of Appeals of Dunstable,* 36 Mass.App.Ct. 54, 627 N.E.2d 484 (1994). We allowed the board's application for further appellate review. We reverse the judgment of the Superior Court.

FN1. General Laws c. 40A, § 3 (1992 ed.), reads in pertinent part: "No zoning ordinance or by-law shall ... unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture [or] horticulture...."

I. *Facts.* We summarize the following from the parties' stipulation of facts. Kathleen B. Henry

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

For the past several years, the plaintiff has used a portion of this property to cultivate 1,000 trees to restore the forest and to begin a Christmas tree farm. After consulting experts, ***843** the plaintiff realized that a "cut your own" Christmas tree farm would be much more profitable than a saw log operation. During winter, neither mechanized farming equipment nor customers of a "cut your own" operation would be able safely to have access to the proposed five acre area unless the steep grade of the land, created by an esker, is leveled by removing 300,000 to 400,000 cubic yards of gravel.

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

[1][2] II. *Incidental use.* Because § 3 of the Zoning Act, G.L. c. 40A (1992 ed.), does not define "agriculture" or "horticulture," we look to the plain meaning of those terms in deciding whether the plaintiff's activity is agricultural. See, e.g., *Building Inspector of Peabody v. Northeast Nursery, Inc.*, 418 Mass. 401, 405, 636 N.E.2d 269 (1994). The planting of evergreen trees for either a saw cut operation or a "cut your own" Christmas tree farm is within the commonly understood meaning of agriculture or ****1336** horticulture. The board does not contend otherwise.

[3] The board asserts that the plaintiff's proposed earth removal does not qualify for the exemption because it is a major independent commercial quarrying project, separate and apart from any agricultural or horticultural use. Two statutory provisions provide guidance in interpreting whether the scope of the agricultural use exemption for a proposed evergreen farm includes an initial, large-scale excavation project. First, G.L. c. 128, § 1A (1992 ed.), defines "agriculture" and "farming" to include practices by a farmer on a farm incident to or in conjunction with the growing and harvesting ***844** of forest products.[FN2] Second, G.L. c. 61A, § 2 (1992 ed.), defines "horticultural use" to include uses "primarily and directly" related to or "incidental," and "customary and necessary" to commercial raising of nursery or greenhouse products and ornamental plants and shrubs.[FN3] Thus, the scope of the agricultural or horticultural use exemption encompasses related activities. Because the proposed excavation of 300,000 to 400,000 cubic yards of gravel is not primarily agricultural or horticultural, the issue is whether the proposed excavation is incidental to the creation of a "cut your own" Christmas tree farm.

> FN2. Section 1A provides in part: " 'Agriculture' and 'farming' shall include ... the growing and harvesting of forest products upon forest land ..., and any practices, including any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations...."
>
> FN3. Section 2 provides: "Land shall be deemed to be in horticultural use when primarily and directly used in raising ... nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling such products in the regular course of business or when primarily and directly used in raising forest products under a pro-

> gram certified by the state forester to be a planned program to improve the quantity and quality of a continuous crop for the purpose of selling such products in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products and preparing them for market."

[4][5] Uses which are "incidental" to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law. 2 E.C. Yokley, Zoning Law and Practice § 8-1 (4th ed. 1978). An accessory or "incidental" use is permitted as "necessary, expected or convenient in conjunction with the principal use of the land." 6 P.J. Rohan, Zoning and Land Use Controls, § 40A.01, at 40 A-3 (1994). Determining whether an activity is an "incidental" use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses. In analyzing the plaintiff's proposed earth removal***845** project, the focus is on the "activity itself and not ... such external considerations as the property owner's intent or other business activities." *County of Kendall v. Aurora Nat'l Bank Trust No. 1107,* 170 Ill.App.3d 212, 218, 120 Ill.Dec. 497, 524 N.E.2d 262 (1988).

The word "incidental" in zoning by-laws or ordinances incorporates two concepts: "It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance.... But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use." *Harvard v. Maxant,* 360 Mass. 432, 438, 275 N.E.2d 347 (1971), quoting *Lawrence v. Zoning Bd. of Appeals of N. Branford,* 158 Conn. 509, 512-513, 264 A.2d 552 (1969).

The plaintiff's activity meets neither aspect of an incidental use. The proposed gravel removal project is a major undertaking lasting three or four years prior to the establishment of the Christmas tree farm. That project cannot be said to be minor relative to a proposed agricultural use nor is it minor in relation to the present operation. Nor can ****1337** the quarrying activity be said to bear a reasonable relationship to agricultural use. *Jackson v. Building Inspector of Brockton,* 351 Mass. 472, 221 N.E.2d 736 (1966) (construction of new building to operate agricultural machine on farm in residential district was reasonably related to farming activities and thus permitted under zoning ordinance). We conclude that the net effect of the volume of earth to be removed, the duration of the project, and the scope of the removal project are inconsistent with the character of the existing and intended agricultural uses.

We think that the plaintiff's case is governed by *Old Colony Council-Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth,* 31 Mass.App.Ct. 46, 574 N.E.2d 1014 (1991). In *Old Colony Council,* the Boy Scouts of America applied for a permit under a Plymouth zoning by-law to excavate 460,000 cubic ***846** yards of earth in order to create a cranberry bog near a campsite in a "Rural Residential District." *Id.* at 49, 574 N.E.2d 1014. The Plymouth zoning board of appeals denied the application on the ground that a special permit was required for such an excavation project. The plaintiff appealed to the Superior Court which affirmed the denial of the permit. The Appeals Court also affirmed on the ground that, considering the volume of earth to be excavated, the duration of the project, and the funds involved, the excavation was not incidental to the proposed cranberry bog. *Id.* (because "the proposal involved the removal of 460,000 cubic yards of fill over a two and a half year period and an excavation which would provide substantial funds in excess of

the cost of constructing the bog, the judge was warranted in upholding the boards's conclusion that the excavation of material was not incidental to the construction and maintenance of a cranberry bog").

In its reasoning, the Appeals Court stated the plain meaning of "incidental" to be "something minor or of lesser importance." *Id.* at 48 & n. 2, 574 N.E.2d 1014, quoting Webster's Third New Int'l Dictionary 1142 (1971) ("subordinate, nonessential, or attendant in position or significance") and American Heritage Dictionary 664 (1976) ("[o]ccurring as a fortuitous or minor concomitant: incidental expenses"). Applying this definition of "incidental" use, the court then considered the net effect of the proposed activity on the surrounding area.

In our view, the Appeals Court in *Old Colony Council, supra,* correctly considered the "net effect" that the proposed cranberry bog would have had in the rural residential area and concluded that the effect was so great that the excavation could not be said to be incidental (or attendant or minor) to the cranberry bog. *Id.* at 49, 574 N.E.2d 1014 (given amount of gravel to be excavated, estimated duration of excavation of project, and profit to be made from the excavation, excavation was not incidental to proposed cranberry bog). Interpreting accessory use provisions to require both that an incidental use be minor relative to the principal use and that the incidental use have a reasonable relationship to the primary one is essential to preserve the power and intent of local zoning authorities.***847** Any other construction of the statute would undermine local zoning by-laws or ordinances. Applying the same reasoning to this case, considering the amount of gravel to be removed, the duration of the excavation and the monies to be realized from the excavation, the removal of gravel cannot be said to be minor or dependent on the agricultural use.[FN4]

> FN4. The Appeals Court cited, 36 Mass.App.Ct. 54, 58, 627 N.E.2d 484 (1994), out-of-State cases in support of its conclusion. See, e.g., *Atwater Township Trustees v. Demczyk,* 72 Ohio App.3d 763, 596 N.E.2d 498 (1991) (excavation to create lake and track for horses on fifteen year old horse farm held incidental to agricultural activity); *VanGundy v. Lyon County Zoning Bd.,* 237 Kan. 177, 699 P.2d 442 (1985) (quarrying rock to construct pond for irrigation was incidental to primary agricultural activities). However, in each of the cited cases, the net effect of the "incidental" use was minor in comparison to the primary use, especially because the agricultural use predated the excavation. Furthermore, to the extent that those cases are inconsistent with the result we reach, we decline to follow them.

The magnitude of the plaintiff's mining operation, if permitted, would be "a de facto quarry operation to be carried on in violation of the [Dunstable] zoning [by-law]." *County of Kendall v. Aurora Nat'l Bank Trust No. 1107, supra* 170 Ill.App.3d at 219, 120 Ill.Dec. 497, 524 N.E.2d 262. We conclude the special***1338** permit was properly denied because, "[t]o hold otherwise would be to allow the statutory exemption to be manipulated and twisted into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property. The [town's] zoning power would thus be rendered meaningless. The Legislature cannot have intended such a result when it created a protected status for agricultural purposes." *Id.*

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

So ordered.

Mass.,1994.
Henry v. Board of Appeals of Dunstable
418 Mass. 841, 641 N.E.2d 1334

END OF DOCUMENT

EXHIBIT B

170931
Received & Recorded
PLYMOUTH COUNTY
REGISTRY OF DEEDS
10 DEC 2001 10:43AM
JOHN R.BUCKLEY, JR.
REGISTER
Bk 21089 Pg 229-230

QUITCLAIM DEED

Peter Armstrong, Trustee of P.A. Realty Trust, u/d/t dated May 17, 2000, recorded Plymouth County Registry of Deeds Book 18531, Page 10.
of Marshfield, Ma.
for consideration paid and in full consideration of a **$1.00**

Grants to Town of Marshfield, a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts with a principal place of business at 870 Moraine Street, Marshfield, Plymouth, County, Mass.

WITH **QUITCLAIM COVENANTS**
a certain parcel of land situated off the easterly side of Ferry Street in Marshfield, Plymouth County, Mass., being shown as ***"PARCEL E"*** on a plan of land entitled," **COMPILED PLAN OF LAND IN MARSHFIELD MA., BEING A SUBDIVISION OF PARCELS H-12-01-01B & G12-29-03, GROVE & FERRY STREETS, DRAWN FOR P.A. REALTY TRUST, SCALE 1"=80", 19 MARCH 2001, REVISED 11 APRIL 2001,** said plan drawn by Stenbeck & Taylor, Inc., and to be filed herewith.

Said parcel containing 87,320 sq. ft. of land according to said plan.

Said parcel is conveyed subject to a "25.00 foot wide access easement" as shown on aforesaid plan, running from parcel D to Bridal Trail and Ferry Street Said easement is for all purposes for which roadways are commonly used in the Town of Marshfield, including but not limited for access and egress, installation and maintenance of utilities from Lot D on said plan to Ferry Street, said reserved easement shall be appurtenant to and run with combined Lots B & D on said plan.

The land conveyed hereby is further subject to the restrictions that it shall be held under the care, custody and control of the Conservation Commission of the Town of Marshfield and used solely for those purposes authorized by Massachusetts General Laws Chapter 40, Section 8(c) as it now exists or may hereafter be amended, and for no other purposes.

Provided however that portion of Lot E South of aforesaid right of way and easement labeled **"Drainage Easement"** on said plan shall be used for drainage purposes and be under the care and custody of the Department of Public Works for the Town of Marshfield.

For Grantors title see deed recorded Plymouth County Registry of Deeds Book 18531 Page 15.

TRUSTEE CERTIFICATE

I hereby certify that I am the sole Trustee of P.A. Realty Trust u/d/t dated May 17, 2001, recorded Plymouth County Registry Deeds Book 18531 Page 10, that said Trust has not

been revoked or amended except as of record and that I am authorized and directed by the beneficiaries to execute and deliver the within deed for the consideration stated.

Witness may hand and seal this 16th day of November, 2001.

Peter Armstrong Trustee
Peter Armstrong, Trustee

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss November 16, 2001

Then personally appeared the above named **Peter Armstrong, Trustee** as aforesaid and acknowledged the foregoing instrument to be his free act and deed before me.

Notary Public
My Commission Expires

OFFICIAL SEAL
ROBERT J. BARRETT
NOTARY PUBLIC - MASSACHUSETTS
My Comm. Expires 7-22-2005

We, the undersigned Board of Selectmen of the Town of Marshfield, hereby approve the receipt of the within deed under Mass. G. L. c.40 Sec. 8(c) as requested by Conservation Commission.

7-22-05

James J. Fitzgerald

Peter J. Mullen

Michael A. Maresco

Michael Maresco

170932
Received & Recorded
PLYMOUTH COUNTY
REGISTRY OF DEEDS
10 DEC 2001 10:43AM
JOHN R.BUCKLEY, JR.
REGISTER
Bk 21089 Pg 231-232

QUITCLAIM DEED

Town of Marshfield, a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts with a principal place of business at 870 Moraine Street, Marshfield, Plymouth, County, Mass.

for consideration paid and in full consideration of a **$1.00**

Grants to Peter Armstrong, Trustee of P.A. Realty Trust, u/d/t dated May 17, 2000, recorded Plymouth County Registry of Deeds Book 18531, Page 10.
of Marshfield, Ma.
WITH **QUITCLAIM COVENANTS**
a certain parcel of land situated on the westerly side of Grove Street in Marshfield, Plymouth County, Mass., being shown as ***"PARCEL B"*** on a plan of land entitled," **COMPILED PLAN OF LAND IN MARSHFIELD MA., BEING A SUBDIVISION OF PARCELS H-12-01-01B & G12-29-03, GROVE & FERRY STREETS, DRAWN FOR P.A. REALTY TRUST, SCALE 1"=80", 19 MARCH 2001, REVISED 11 APRIL 2001,** said plan drawn by Stenbeck & Taylor, Inc., and to be filed herewith.

Said parcel containing 43,505 sq. ft. of land according to said plan.

Said parcel is conveyed subject to a "25.00 foot wide non-motorized access easement" as shown on aforesaid plan. Said easement is for pedestrian access and egress between Grantors Lots A & C on aforesaid plan.

Said parcel is conveyed subject to the restrictions that said Parcel B is to be combined with Grantee's Parcel D on aforesaid plan and the combined parcel used solely for one single family dwelling with the customary buildings and uses associated therewith and for buildings and uses associated with the keeping of horses and farming. Any commercial agricultural use of said Parcel B shall be subject to the provisions of the Marshfield Zoning By-Laws regardless of the size of the combined Parcel. No other additional land is to be added to the combined parcel that will be accessed thru Parcel B and on said plan. Said restriction will expire fifty years from date of this instrument.
For Grantors title see deed recorded Plymouth County Registry of Deeds Book 1800 Page 301

For authority see certified copy of Town meeting so to attached herewith.

The provisions of Chapter 44, Section 63A, of the General Laws have been fully complied with in this conveyance.

In witness whereof said **Town of Marshfield** has caused its Corporate Seal to be hereto affixed and this instrument to be signed, acknowledged and delivered in its name and behalf by James J. Fitzgerald, Peter J. Mullen and Michael Maresco , its Board of Selectman, hereto duly authorized, this 17 day of November, 2001.

Town of Marshfield

James J. Fitzgerald

Peter J. Mullen

Michael Maresco

COMONWEALTH OF MASSACHUSETTS

Plymouth, ss November 15 , 2001

Then personally appeared the above-named James J. Fitzgerald, Peter J. Mullen and Michael Maresco , its Board of Selectman, as aforesaid, and acknowledged the foregoing instrument to be the free and deed of the Town of Marshfield, before me.

Notary Public Beverly A. Wiedemann

My Commission Expires

5-24-06

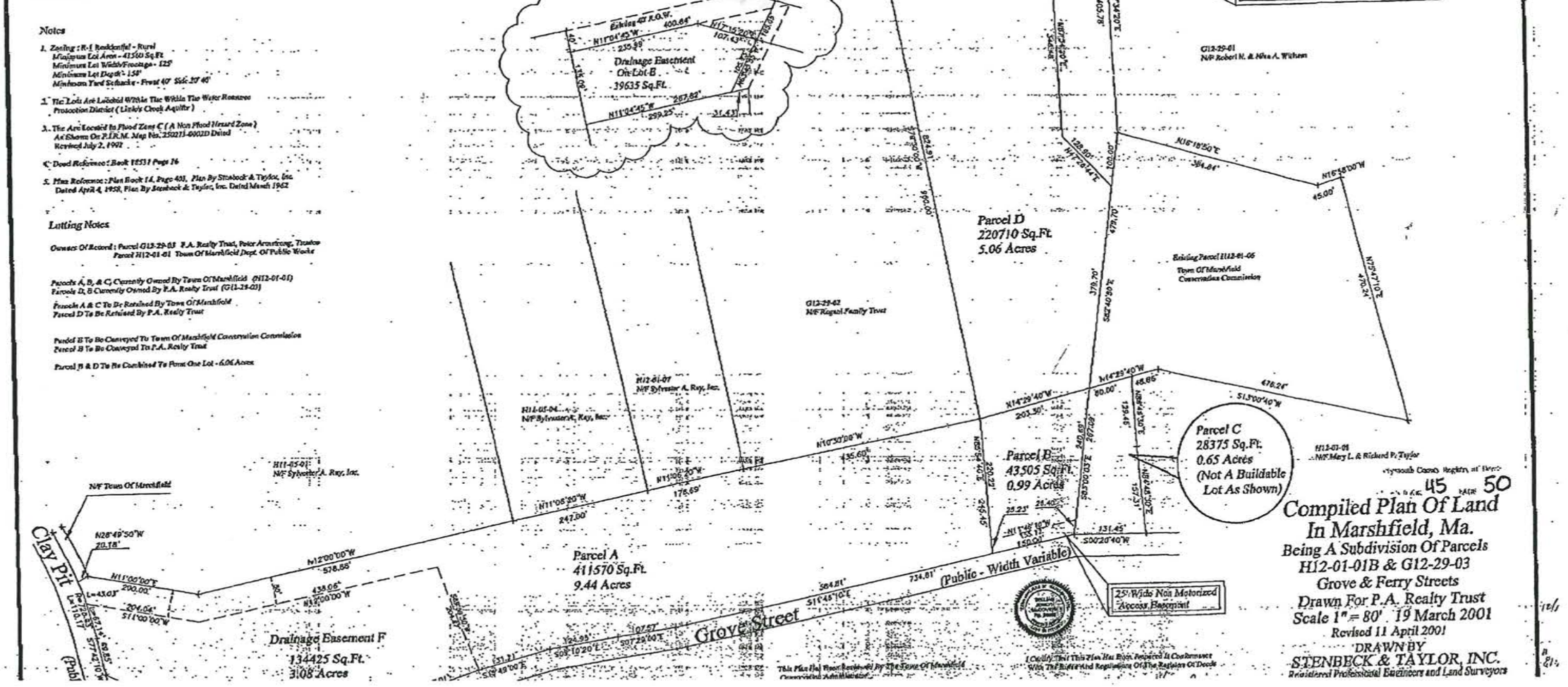
Notes
1. Zoning : R-1 Residential - Rural
Minimum Lot Area - 43560 Sq.Ft.
Minimum Lot Width/Frontage - 125'
Minimum Lot Depth - 150'
Minimum Yard Setbacks - Front 40' Side 20' 40'
2. The Lots Are Located Within The Within The Water Resource Protection District (Little's Creek Aquifer)
3. The Are Located In Flood Zone C (A Non Flood Hazard Zone) As Shown On F.I.R.M. Map No. 250273-0002D Dated Revised July 2, 1992
4. Deed Reference : Book 18531 Page 16
5. Plan Reference : Plan Book 14, Page 403, Plan By Stenbeck & Taylor, Inc. Dated April 4, 1958, Plan By Stenbeck & Taylor, Inc. Dated March 1962
Lotting Notes
Owners Of Record : Parcel G13-29-03 P.A. Realty Trust, Peter Armstrong, Trustee
Parcel H12-01-01 Town Of Marshfield Dept. Of Public Works
Parcels A, B, & C Currently Owned By Town Of Marshfield (H12-01-01)
Parcels D, E Currently Owned By P.A. Realty Trust (G13-29-03)
Parcels A & C To Be Retained By Town Of Marshfield
Parcel D To Be Retained By P.A. Realty Trust
Parcel E To Be Conveyed To Town Of Marshfield Conservation Commission
Parcel B To Be Conveyed To P.A. Realty Trust
Parcel B & D To Be Combined To Form One Lot - 6.06 Acres
Drainage Easement On Lot B 39635 Sq.Ft.
Parcel D 220710 Sq.Ft. 5.06 Acres
Parcel A 411570 Sq.Ft. 9.44 Acres
Parcel B 43505 Sq.Ft. 0.99 Acres
Parcel C 28375 Sq.Ft. 0.65 Acres (Not A Buildable Lot As Shown)
Drainage Easement F 134425 Sq.Ft. 3.08 Acres
25' Wide Non Motorized Access Easement
Grove Street (Public - Width Variable)
Clay Pit
N/F Town Of Marshfield
H11-05-01 N/F Sylvester A. Ray, Inc.
H12-01-07 N/F Sylvester A. Ray, Inc.
G13-29-02 N/F Rogal Family Trust
G13-29-01 N/F Robert H. & Nina A. Wilson
Existing Parcel H12-01-06 Town Of Marshfield Conservation Commission
H12-01-01 N/F Mary L. & Richard P. Taylor
Plymouth County Registry of Deeds 45 PAGE 50
Compiled Plan Of Land In Marshfield, Ma.
Being A Subdivision Of Parcels H12-01-01B & G12-29-03
Grove & Ferry Streets
Drawn For P.A. Realty Trust
Scale 1" = 80' 19 March 2001
Revised 11 April 2001
DRAWN BY
STENBECK & TAYLOR, INC.
Registered Professional Engineers and Land Surveyors
I Certify That This Plan Has Been Prepared In Conformance With The Rules And Regulations Of The Registers Of Deeds
This Plan Has Been Received By The Town Of Marshfield Conservation Administrator

EXHIBIT C

To the Town of Marshfield
Gentlemen:

It is requested that a military substitute be appointed to the Board of Health during my absence commencing November 1, 1951. This absence is a result of official Naval orders to me dated 2 October 1951. (Pers-B114m1-shb-1-22686.)

Respectfully,
JAMES A. McLAUGHLIN
LCDR MC USN

Acting under the authority of Section 5 of Chapter 803, Acts of 1950, we, the Board of Selectmen, Town Clerk, Town Treasurer, and Moderator of the Town of Marshfield, do appoint JOHN W. COOK, D.M.D., to serve in the place of James A. McLaughlin, Member of the Board of Health now unable to perform his duty by reason of service in the armed services of the country.

Marshfield, Mass.

October 29, 1951

CHARLES C. LANGILLE — Board of Selectmen
NELSON C. TRINDALL — Selectmen
SHIRLEY R. CROSSE — Town Clerk and Town Treasurer,
GARDNER W. FREEMAN — Town Moderator

SPECIAL TOWN MEETING
November 19, 1951

Meeting was called to order at 8:00 o'clock in the afternoon by the Moderator, Gardner W. Freeman. The following Tellers were appointed by the Moderator, Gardner W. Freeman, and sworn in by the Town Clerk, Shirley R. Crosse: Howard Stedman, Maurice A. Hall, E. Freeman Damon, Richard A. Melvin.

A count of the voters at this time revealed 101 voters. There being a quorum, the meeting was declared in order.

The Warrant was read by the Town Clerk, Shirley R. Crosse.

The Advisory Board Report was read at this time by Joseph A. Hagan, Chairman, and was as follows:

Article 1. Transfer of $6,500 from Public Welfare account to Old Age Assistance account—Approved.

Article 2. Approved.

Article 3. To raise and appropriate $5,530.00 by transfer from available funds in the Treasury—Approved.

Article 4. To authorize the payment of $30.55 from Board of Health funds—Approved

Article 5. Approved.

Article 6. To revoke the authority previously granted the Selectmen insofar as it concerns a strip of the old railroad right of way 60' wide—Approved.

A True Copy Attest:
Patricia A. Pires
Town Clerk

Article 7. Approved.

Article 8. Since the greatest number of voters next Annual Town Meetin

Article 1. Voted to able funds in the Public the sum of $6,500.00.

Article 2. Voted to School at Marshfield Hill House for Company No.

Article 3. Voted to the E & D Account (Surp the amount of $10,417.00 ing of March 1951, as th bridge from Marshfield to providing Scituate approv

Article 4. Voted to of Health funds the sum Dr. James A. McLaughl Chapter 803 of the Acts

Article 5. Voted to Corn Hill Avenue to Cor

Article 6. Voted t Selectmen, to sell Railro road Property defined as

A 60' wide previously town, neare Electric Co. to South Ri

Article 7. Voted to ferring to the E & D (S special appropriation ba

New Police Cr
Police Station
Warning Signa
Air Horn—Bra
Tree Departme
Visiting Nurse
Beach Street Im
Highway Depa
Webster and I
Water Departm

Article 7. Approved.

Article 8. Since the chief consideration is the convenience of the greatest number of voters, it is recommended that action be deferred to the next Annual Town Meeting.

Respectfully submitted,
MARSHFIELD ADVISORY BOARD
Joseph A. Hagar, Chairman
Charles K. Parker, Secretary

Article 1. Voted to raise and appropriate, and transfer from available funds in the Public Welfare Account to Old Age Assistance Account the sum of $6,500.00.

Article 2. Voted to instruct the Selectmen to turn over the North School at Marshfield Hills to the Fire Department to be used as a Station House for Company No. 2.

Article 3. Voted to raise and appropriate from available funds in the E & D Account (Surplus Revenue) the sum of $5,530.00 to supplement the amount of $10,417.00 voted under Article 13 in the annual town meeting of March 1951, as the town's share toward the construction of a new bridge from Marshfield to Humarock at a cost of approximately $155,420.00, providing Scituate approves of their share.

Article 4. Voted to raise and appropriate, and transfer from Board of Health funds the sum of $30.55 for the salary of a military substitute for Dr. James A. McLaughlin, on the Board of Health, as provided under Chapter 803 of the Acts of 1950.

Article 5. Voted to authorize the Selectmen to change the name of Corn Hill Avenue to Corn Hill Lane.

Article 6. Voted to revoke the authority, previously granted the Selectmen, to sell Railroad Property, as it applies to that section of Railroad Property defined as follows:

A 60′ wide section, 30′ each side, from the center of what was previously the track bed; from a point now owned by the town, nearest the Seaview Garage and the Plymouth County Electric Co. transformer station, in Sea View, and extending to South River Street, and establish same as a bridle path.

Article 7. Voted to authorize the Accountant to close out by transferring to the E & D (Surplus Revenue) account the following unexpended special appropriation balances:

New Police Cruiser—1950	217.10
Police Station Investigation and Rep.	15.60
Warning Signal—Hills	75.84
Air Horn—Brant Rock	236.88
Tree Department—Truck	260.10
Visiting Nurse Car	67.00
Beach Street Improvement	.85
Highway Department Car	150.00
Webster and Marshall Avenues	2.07
Water Department Truck	260.00

A True Copy Attest:
Patricia A. Sides
Town Clerk

VI. EMERGENCIES

The notice required by Section II, Paragraph 1 of this By-Law shall not apply to emergency projects necessary for the protection of the health or safety of the citizens of Marshfield and to be performed or ordered to be performed by an administrative agency of the Commonwealth or by the Town. Emergency projects shall mean any projects certified to be an emergency by the Conservation Commission if only this By-Law is applicable. In no case shall any removal, filling, dredging or alteration authorized by such certification extend beyond the time necessary to abate the emergency.

VII. SEVERABILITY

The invalidity of any section or provision of this By-Law shall not invalidate any other section or provision hereof.

Amended by Article 33, 1988 ATM

ARTICLE THIRTY EIGHT - No Fires on Beach

No fires shall be built on any beach area including the dunes in the Town of Marshfield without a written permit from the Fire Department. Said permits shall be restricted to cookouts using charcoal or bottled gas as a fuel. All permit holders shall be responsible for the cleaning and restoration of the fire area. No person shall stockpile wood or any combustible material on the beach areas and dunes.

Adopted by Article 55, 1970 ATM
Amended by Article 22, 1975 ATM

ARTICLE THIRTY NINE - Water on Public Street or Private Way

No person shall pipe, or otherwise deposit, in or upon any public street, public place, or private way open to the public, any water or substance which may freeze or otherwise create a hazardous condition. If, after notice from the Department of Public Works to correct the hazardous condition, such person shall fail to do so, a fine of no more than Fifty Dollars ($50.00) per day for every day the violation continues shall be imposed. This may be recovered on complaint in the District Court, which sum shall enure to the use of the Town.

Amended by Article 27, 1982 ATM

ARTICLE FORTY - Motor Vehicles on Bridle Path

No person shall operate any motor powered vehicle on the Bridle Path (as designated by Article 6 of the 1951 Special Town Meeting) except for emergency use or use by Town vehicles. The penalty for violations of the foregoing shall be in a sum not exceeding three hundred dollars ($300.00) for each offense and may be recovered on complaint in the District Court, which sum shall enure to the use of the Town.

Adopted by Article 87, 1974 ATM
Amended by Article 17, 2006 ATM

ARTICLE FORTY ONE - No Salt Zone

No sodium chloride, calcium chloride or other chemicals, except sand, shall be used on the following town owned and/or town maintained streets for winter road protection:

Old Ocean Street
Mount Skirgo Street
Old Mt. Skirgo Street
Parsonage Street (from Webster Street to Ocean Street)
School Street (from Forest St. to Old Main St. Extension)
Old Main Street Extension
Forest Street (from Furnace St. to School St.)
Furnace Street (from Forest St. to Ferry St.)