



MERIDIAN

LAND SERVICES, INC.

CIVIL ENGINEERING | LAND SURVEYING | PERMITTING | SOIL & WETLAND MAPPING | SEPTIC DESIGN | ENVIRONMENTAL

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www.MeridianLandServices.com

July 22, 2022

03077.05

Jay Chrystal
Village Brook, LLC
14 Ben Farnsworth Road
Brookline, NH 03033
(603) 321-7800
jwchrystal@gmail.com

Re: Housing for Older Person Development; 23 Main Street; Map H Lot 42
Excavations Permits RSA 155E

Dear Mr Chrystal

At the July 21st Brookline Planning Board Hearing, the question was raised whether an 'Excavation Permit' under the auspices of NH RSA 155E was required to be issued. As such Meridian Land Services, Inc (Meridian), has researched the applicability of the aforementioned permit, and issued the following opinions.

The 'Excavation Site Plan Review Regulations, Nov 7, 1989; Town of Brookline, NH' § IV 'Projects Requiring a Permit', states the following:

'Any excavation of earth unless specifically exempted by either RSA 155-E:2 or specifically excepted in Section V of these regulations.'

§ V of the regulations 'Exceptions From an Excavation Permit' states the following:

A. The following projects are deemed to be an exception from a permit:

- 1) Incidental excavation of earth that will not remove more than 1,000 cubic yards of earth from the site. In the event that the project will result in the removal from the site more than 1,000 cubic yards, the project will be considered incidental provided that all of the required state and local permits have been issued.*
- 2) Excavation that is incidental to agricultural activities, normal landscaping or minor topographical adjustment as defined in Section III of these regulations. In the event that the project will result in the removal of more than 1,000 cubic yards from the site, the regulator shall determine what is incidental.*
- 3) Excavation from a granite quarry for the purpose of producing dimension stone, if such excavation requires a permit under RSA 12-E (Mining and Reclamation)*

Section V.A.1, is consistent with permit exceptions, as indicated in RSA 155E:2-a which states:

I. No permit shall be required for the following types of excavations:

- a) Excavation that is exclusively incidental to the construction or alteration of a building or*



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structure or the construction or alteration of a parking lot or way including a driveway on a portion of the premises where the removal occurs; provided, however, that no such excavation shall be commenced without a permit under this chapter unless all state and local permits required for the construction or alteration of the building, structure, parking lot, or way have been issued.

With the accepted idea of being incidental to construction meaning and intended that such removal of materials is necessary to make reasonable use of the property, as further explained in 'RSA 155E: The Law Governing Earth Excavations; a Handbook for NH Municipalities; Southwest Regional Planning Commission, 1999', which has the following:

By definition, in order for an activity to be "incidental", it must be subordinate and accessory to the principal use. How to make that determination can be based on a variety of factors, such as the land area involved in the use, the extent of activity that takes place, or the length of time the incidental use would be carried out.

An example of the kind of dilemma that can be faced by the Planning Board is this: Someone owns a piece of property that is virtually all steep slopes with usable earth materials. The landowner wants to develop the property but can't do anything with it until the slopes are graded - which means taking out the earth materials first. The landowner claims that he really doesn't intend to excavate, but until he does, he can't make good use of his property, therefore this excavation would be incidental to the planned principal use, and not subject to a permit. The issue for the Planning Board is that the scale of such an operation - even if it is an "indirect" result of another project - will have the same potential impacts as if it were intended. So what does the Planning Board do?

First of all, in order for any such excavation to be granted the exemption, the landowner must have all applicable state and local permits in hand PRIOR TO excavation - for example, a building permit or a Site Specific permit from DES. And, even assuming that the "incidental" test can be met, the Planning Board still has the ability to decide that the level of intensity and potential for safety concerns is great enough to warrant strict compliance with the standards of RSA 155-E, regardless of the issuance of a permit.

While a town is not pre-empted from having more stringent standards than those required by RSA 155E, the court decided that municipalities cannot frustrate state authority, including those exceptions listed in the RSA, as ruled in 'Guildhall Sand & Gravel c Town of Goshen.

As such it is our opinion based on standards set forth in RSA 155E that a excavation permit is not warranted, as the removal of materials is 'incidental' to making reasonable use of the property. Additionally, the Brookline excavation regulations under § IV specifically excepts requiring permit if it is 'incidental' as listed under § V.A.1, and as further ruled in the cited case law. As such the only permits necessary are those required for the development itself, which include Town of Brookline Site Plan Approval, NHDES Septic and Alteration of Terrain Permit, and NHDOT Driveway Permit.



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Should you have any questions or require and additional information, please contact me at your convenience.

Sincerely,
Meridian Land Services, Inc.

Douglas V Brodeur, PE
Project Manager

cc: Randy Haight