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M E M O R A N D U M

TO: Windham Town Council and Town Manager

FROM: Kristin M. Collins and Stephen E.F. Langsdorf

DATE: June 12, 2018

RE: **Modification to Mineral Extraction Moratorium**

As you know, the Town of Windham is the Defendant in a recently filed lawsuit in which CSG Properties, LLC and Copp Equipment, LLC challenge the Town's decision to apply the Mineral Extraction Moratorium to prevent further processing of their application to conduct mineral extraction activities. This is unfortunate, because we believe the Council was clear at all times that its intent was to affect the proposed Copp activities.

The moratorium as currently written provides that:

“[t]his Moratorium Ordinance shall take effect immediately and, notwithstanding the provisions of 1 M.R.S. § 302, shall be applicable, to the maximum extent permitted by law and subject to the severability clause above, to all proceedings, applications and petitions not pending within the meaning of 1 M.R.S. § 302 as of April 17, 2018, the date upon which this Moratorium Ordinance was first discussed by Town Council.”

The Plaintiffs in their lawsuit claim that the moratorium is not applicable to their application, because it was “pending” as of April 17. They base this claim on the fact that the application had been through the staff review process as well as a sketch plan review prior to April 17, 2018. Pursuant to 1 M.R.S. § 302, an application is considered to be “pending” if “the reviewing authority has conducted at least one substantive review of the application.” The statute further provides that “a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.” Courts have further interpreted an application to be pending only once it has been deemed complete by the relevant authority.

We firmly believe that the Copp application was not “pending” as of the enactment of the moratorium because the staff and sketch plan reviews are preliminary steps. The final application had not been submitted to the Planning Board, so the Board could not have found it to be complete or performed any substantive review. As such, we do believe Town staff acted correctly in applying the moratorium to prevent further processing of Copp's application.

However, the Plaintiffs disagree, and it is our advice that it is better for the Council to correct any confusion within the Moratorium Ordinance rather than litigating these issues.

We recommend that the Council adopt the attached amendment to the Mineral Extraction Moratorium Ordinance, which clarifies that the moratorium applies to applications that were in the preapplication, staff review or sketch plan review phase as of April 17, 2018. This removes any question as to whether the Copp application is covered by the moratorium, and should therefore put an end to the litigation.

It is entirely legal for the Council to make a moratorium or any other ordinance applicable to applications that are undergoing review, whether preliminary or final. An ordinance can, through "clear and unequivocal language," be made applicable to pending proceedings. *Kittery Retail Ventures v. Town of Kittery*, 2004 Me 65, ¶ 20. An applicant can only challenge such an ordinance if the Town has acted in bad faith and with the intent to discriminate against a particular applicant. This moratorium was enacted in good faith, given the Town's established history of water quality problems and the fact that it has been trying to address development and water quality concerns on multiple fronts. There is no discriminatory intent that would prevent the moratorium, as amended, from being applied to the Copp application.

KMC:

PROPOSED COUNCIL ORDER
Re: Amendment to Moratorium Ordinance on Mineral Extraction
originally enacted April 24, 2018

WHEREAS, the Town Council adopted the Moratorium Ordinance on Mineral Extraction (“Moratorium”) on April 24, 2018;

WHEREAS, by its terms, the Moratorium as applicable to applications for permitting or approval of mineral extraction activities that were not pending as of April 17, 2018;

WHEREAS, the Town Council’s express intent was that the Moratorium would be applicable to and prevent further processing of any application that was in the staff review or sketch plan phase of review and had not been deemed complete by the reviewing authority as of the Moratorium’s enactment date; and

WHEREAS, to the extent there is any ambiguity regarding how the Moratorium Ordinance should be applied to an application in the preapplication, staff review or sketch plan phases of review, the Council wishes to resolve such ambiguity and prevent any further question;

NOW THEREFORE, the Town Council hereby ordains that the proposed amendment to the Mineral Extraction Ordinance dated June 19, 2018 shall be approved.

Emergency Declaration

The Town Council declares the existence of an emergency for the reasons set forth in the Moratorium Ordinance on Mineral Extraction, and for the further reason that it is imperative to remedy as soon as possible any ambiguity as to the applicability of the Moratorium.

TOWN OF WINDHAM
MORATORIUM ORDINANCE ON MINERAL EXTRACTION

Proposed Amendment June 19, 2018

WHEREAS, the town of Windham (hereinafter “the Town”) has experienced a steady increase in residential and commercial development which requires reexamination of compatibility of these types of uses and certain higher impact land uses;

WHEREAS, the Town adopted an updated Comprehensive Plan on June 13, 2017 and the Town is in the process of reviewing and amending the Town’s ordinances in keeping with the goals and strategies set forth in said Comprehensive Plan;

WHEREAS, existing zoning districts in the Town which allow for mineral extraction also allow for a variety of residential and commercial uses;

WHEREAS, water bodies located within the Town, including but not limited to Sebago Lake, Little Sebago Lake, Pleasant River, Black Brook, Otter Brook, Colley Wright Brook, Inkhorn Brook, Little Duck Pond, Highland Lake, and Forest Lake have been found to be impaired or threatened due to the effects of nonpoint source pollution;

WHEREAS, quarrying, mineral extraction and related blasting activities often produce noise, dust and runoff which may be incompatible with residential and commercial development;

WHEREAS, the significant clearing and earth moving associated with quarrying and mineral extraction may lead to increased runoff and both surface and groundwater pollution;

WHEREAS, the existing mineral extraction standards codified at Section 600 of the Town’s Land Use Ordinance have not been reevaluated since 2010 and therefore do not adequately account for recent residential and commercial development and water quality concerns;

WHEREAS, the existing mineral extraction standards do not include any regulations regarding blasting activities apart from state law;

WHEREAS, permitting of such mineral extraction activities pursuant to the current Land Use Ordinance could pose serious threats to the public health, safety and welfare of the residents of the Town by conducting such mineral extraction activities without adequate provisions for issues of safety, noise, vibration, dust, groundwater protection, setback distances, land use compatibility, and screening;

WHEREAS, after hearing public input on the matter, there is strong support for this Moratorium Ordinance;

WHEREAS, the Town will require at least one hundred eighty (180) days to develop and implement the necessary amendments to the Land Use Ordinance, and possibly to other ordinances of the Town, to adequately address the impacts of mineral extraction activities; and

WHEREAS, in the judgment of the Town Council, these facts justify the enactment of the present moratorium pursuant to 30-A M.R.S. § 4356 because the application of the existing Comprehensive Plan, Land Use Ordinance and other applicable Town ordinances are inadequate to prevent serious public harm from mineral extraction activities within the Town;

NOW, THEREFORE, the Town of Windham hereby ordains that a MORATORIUM is hereby imposed for a period of one hundred eighty (180) days on any new mineral extraction or blasting that is not currently permitted by written permit received from the Town, approved and/or under construction.

For the purposes of this Moratorium, “mineral extraction” shall be defined as set forth in Section 300 of the Land Use Ordinance, and “blasting” shall be defined as “the use of explosives to break up or otherwise aid in the extraction or removal of a rock or other consolidated natural formation, as associated with Mineral Extraction.”

BE IT FURTHER ORDAINED, that the Planning Board, Board of Appeals, the Building Inspector/Code Enforcement Officer and all Town agencies and all Town employees shall neither accept nor approve applications, plans, permits, licenses, and/or fees for any new activities governed by this Moratorium Ordinance for the period of time described below;

BE IT FURTHER ORDAINED, that any provisions of the Town’s ordinances that are inconsistent or conflicting with the provisions of this Moratorium Ordinance are hereby repealed to the extent that they are applicable for the duration of the moratorium hereby ordained;

BE IT FURTHER ORDAINED, that this Moratorium Ordinance may be extended by the Town Council, after notice and hearing, for additional 180-day periods if the Council finds that:

1. The problem giving rise to the need for this Moratorium Ordinance still exists; and
2. Reasonable progress is being made to alleviate the problem giving rise to the need for this Moratorium Ordinance;

BE IT FURTHER ORDAINED, that to the extent any provision of this Moratorium Ordinance is deemed invalid by a court of competent jurisdiction, the balance of the Moratorium Ordinance shall remain valid;

BE IT FURTHER ORDAINED, that, in view of the facts cited herein, this Moratorium Ordinance shall take effect immediately and, notwithstanding the provisions of 1 M.R.S. § 302, shall be applicable, to the maximum extent permitted by law and subject to the severability clause above, to all proceedings, applications and petitions not pending ~~within the meaning of 1 M.R.S.A. § 302~~ as of April 17, 2018, the date upon which this Moratorium Ordinance was first discussed by Town Council. For the purposes of this Moratorium Ordinance, an application shall not be considered “pending” until a final application has been deemed complete by the reviewing authority. Consideration during a pre-application meeting, staff review process or sketch-plan review shall not qualify an application as “pending.” This Moratorium Ordinance shall remain in effect for 180 days from the date of enactment, unless sooner repealed or extended by the Town Council.

Emergency Declaration

The Town Council declares the existence of an emergency because the Code of Ordinances is insufficient to prevent serious environmental and public harm that could be caused by new mineral extraction and blasting activities within the Town, thereby necessitating a moratorium to provide an opportunity for the Town to review and amend its Ordinances to mitigate the potential impact and harm of mineral extraction and blasting activities .

In accordance with Article II, Section 11(D) of the Town Charter, this Moratorium shall be enacted as an emergency ordinance. It shall stand repealed as of the sixty-first (61st) day following enactment, unless the Town Council shall have acted to reenact it.