

**MEMORANDUM**

**TO: Lamoine Zoning Board of Appeals**  
**FM: Edmond J. Bearor, Esq.**  
**DT: April 29, 2014**  
**RE: Doug Gott & Sons, Inc. Appeal filed on March 24, 2014**



This is an Appeal from the Planning Board’s denial of Doug Gott & Sons, Inc.’s Application for Site Plan Review approval. The Applicant’s proposal is for a maintenance garage and area to store equipment. The timber on the land has been harvested in recent years and, at this point in time, there is no significant regeneration of forest growth or other vegetative cover on the property.

The property is located next to land owned by Timothy Gott which is operated as a gravel pit. To the rear of the parcel are residential properties. As proposed by Gott, however, the 40’ x 80’ building and 20,000 square foot parking and storage area would not be visible and probably not even audible from abutting residential properties.

The developed improvements on the property and the activities conducted there would not be visible and likely not even be heard by abutting land owners because the elevation of the parcel, in preparation for construction of the proposed building and parking and storage area, will be excavated so that it is near level with the adjacent extraction operation. This will require the removal of approximately 70,000 cubic yards of material from the site prior to construction.

The Planning Board found that Doug Gott & Sons, Inc.’s Application met all of the General Review Standards found in Section J of the Site Plan Review Ordinance with the exception of the Standard J(1). This review criteria reads as follows:

“The landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of soil, and retaining existing vegetation during construction. After construction is completed, landscaping shall be designed and planted that will define, soften or screen the appearance of the development and minimize the encroachment of the proposed use on neighboring land uses.

Environmentally sensitive areas such as aquifers, significant wildlife habitat, wetlands, steep slopes, floodplains, historic buildings and sites, existing and potential archaeological sites and unique natural features will be maintained and preserved to the maximum extent.”

The Planning Board, according to its Minutes of March 4, 2014, determined that the removal of material from the property in preparation for the proposed development did not “minimize removal of vegetation or disturbance of soil.”

It is the Doug Gott & Sons, Inc.'s position that the Planning Board erred in its interpretation of Section J(1), for the following reasons:

1. The site is devoid of trees so minimizing tree removal was not an issue.
2. The disturbance of soil should be expected with any project.
3. The Applicant has determined that for business purposes it should have a facility such as the one it proposes in Lamoine.
4. The Applicant further believes that for ease of operations the facility should be at roughly the same elevation as the adjoining parcel from which it will be accessed. Furthermore, the access proposed by the Applicant is at a point that is as far as possible from any residences, thus lessening any impact the development might have on abutters.
5. It is not the Planning Board's role to redesign or reconfigure an Applicant's proposal such as the Planning Board has attempted to do here by suggesting that access to the parcel be from a location other than the existing extraction operation which is controlled by the Applicant and which already exists, even if it might reduce the amount of soil that is disturbed.

Furthermore, while it is well known that the Applicant had, in the past, proposed to extract material from this site, the proposal before the Planning Board which is now pending before this Board of Appeals, would result in extraction of less than 25% of the material which could be removed if a Gravel Extraction Permit was obtained by this Applicant. It is not the primary intention or goal of the Applicant to extract material from this property. It is simply the Applicant's desire to construct a 40' x 80' building with a 20,000 square foot parking and storage area adjacent to it and to access that property over land controlled by the Applicant, which won't require greater and needless construction for access and which is at a lower elevation.

So, since there is no issue about minimizing tree removal, it would appear the only issue is the amount of soil disturbed in construction of this project that caused the Planning Board to deny the Application. While the Ordinance requires that an applicant preserve the natural state, insofar as practicable during construction, the more important aspect of Section J(1) is that: "After construction is completed, landscaping shall be designed and planted that will define, soften or screen the appearance of the development and minimize the encroachment of the proposed use on neighboring land uses." Gott's proposal plainly meets this standard. As noted earlier, the development proposed by the Applicant will not be visible to adjoining residential land owners. It will probably not even be audible. It is, for all practical purposes out of sight, out of mind.

It is black letter law that the Purpose provisions of an ordinance are not Standards of Review by which an application is approved or denied. They are, however, intended to inform the Board and the Applicant as to the proper interpretation of the actual Review Standards. In this instance, the Lamoine Site Plan Review Ordinance, Section F. provides that: "The purpose of the site plan review is: to promote and protect the health, welfare and safety of the residents of the town of Lamoine." The Planning Board's denial of this Application, however, is not at all based on protecting the health, welfare or safety of residents. To the contrary, denial of the Application or

reconfiguring the proposed development simply to reduce soil disturbance, as suggested by some Planning Board Members, results in the buildings and operations being both visible and audible to adjoining residential land owners, which is inconsistent with the Ordinance objective of promoting health, safety and welfare of the residents of Lamoine.

As important as promoting public health, safety and welfare, is the obligation to interpret this Ordinance so as “[t]o balance the rights of landowners to use their land with the corresponding rights of abutting and neighboring landowners to live without undue disturbances from nuisances such as, but not limited to, noise, smoke, fumes, dust, odor, glare, traffic, storm water runoff or the pollution of ground or surface waters;”. In this instance, the proposed development will not infringe upon the quiet enjoyment of neighboring landowners. However, turning down the development proposed by the landowner is a denial of his right to use his property in a reasonable manner. This right (right of landowner to use his land) is often given a backseat by those who administer land use regulations. In this case, however, the right of the landowner to use his land and the protections the Ordinance affords abutters are both served by the Applicant’s proposal.

For the foregoing reasons, the Planning Board’s denial of this Application was arbitrary and capricious and its interpretation of the Ordinance an error of law. When the Appeals Board considers this appeal, please note that the Appeal provisions of this Ordinance do not require that the Board of Appeals grant any deference to the Planning Board’s decision. In other words, the Board of Appeals can make a fresh decision without regard the Planning Board’s finding. The Planning Board’s decision is not inherently correct. You can make an independent determination. See Section M of the Site Plan Review Ordinance.

Accordingly, the Applicant would ask that the Board of Appeals reverse the Planning Board’s denial of Doug Gott & Sons, Inc.’s Application on the grounds that it does meet the requirements of Section J(1) by preserving and enhancing the landscape and either issue a permit or order that the Planning Board issue a Site Plan Review Permit to the Applicant.