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December 13, 2017

Hancock "Griff" Fenton, Chairman  
Lamoine Board of Appeals  
Town of Lamoine  
606 Douglas Highway  
Lamoine, ME 04605

Re: Harold MacQuinn, Inc. –Appeal to the Board of Appeals  
Kittredge Pit – Gravel Extraction Permit

Dear Chair Fenton:

Enclosed is an administrative appeal from the November 14, 2017 decision of the Planning Board denying an application submitted by Harold MacQuinn, Inc. for a Gravel Extraction Permit.

An administrative appeal from the December 11, 2017 decision denying an application for a Site Plan Review Permit will be submitted upon receipt of the Planning Board's written decision in this matter.

Also enclosed is our firm's check payable to the Town of Lamoine in the amount of \$100.00 for the application fees (\$50.00 fee for each Appeal).

Thank you.

Sincerely,



Katie R. Foster  
KRF/leb  
Enclosures

cc: Paul MacQuinn, JR., President – Harold MacQuinn, Inc. (w/encl.)  
Stephen Salsbury, PLS (w/encl.)

**Town Of Lamoine  
Application for Variance or  
Appeal to the Board of Appeals**

Name of Appellant: Harold MacQuinn, Inc.

Mailing Address: P.O. Box 789

City or Town: Ellsworth, Maine 04605

Telephone (Home) \_\_\_\_\_ (Work): (207)667-4653

Name(s) of Property Owner: Harold MacQuinn, Inc.

The undersigned requests that the Board of Appeals consider one of the following:

X 1. **An Administrative Appeal.** Relief from the decision, or lack of decision, of the Planning Board in regard to an application for a Gravel Extraction Permit. The undersigned believes that (check one):

X an error was made in the denial of the permit

X the denial of the permit was based on a misinterpretation of the ordinance

\_\_\_\_\_ there has been a failure to approve or deny the permit within a reasonable period of time

\_\_\_\_\_ other \_\_\_\_\_

Please explain in more detail the fact surrounding this appeal (please attach a separate piece of paper). You should be as specific as possible so that the Board of Appeals can give full consideration to your case.

\_\_\_\_\_ 2. **A Variance.**

a. Nature of Variance: Describe generally the nature of the variance.

\_\_\_\_\_  
\_\_\_\_\_

In addition, a sketch plan of the property must accompany this application showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings, or alterations, and any natural or topographic peculiarities of the lot in question.

b. **Justification of Variance:** In order for a variance to be granted, the appellant must demonstrate to the Board of Appeals that the strict application of the terms of the zoning ordinance would cause undue hardship. There are four criteria which must be met before the BOA can find that a hardship exists. Please explain how your situation meets each of these criteria listed below:

1. The land in question cannot yield a reasonable return unless the variance is granted.
  
2. The need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood.
  
3. The granting of a variance will not alter the essential character of the locality.
  
4. The hardship is not the result of action taken by the appellant or a prior owner.

I certify that the information contained in this application and its supplement is true and correct.

Date: December 13, 2017



\_\_\_\_\_  
(Appellant's Signature)

Katie R. Foster, Esq.

Edmond J. Bearor, Esq.

Attorneys for Harold MacQuinn, Inc.

**Note to Appellant:** This form should be returned to the Chairman of the Board of Appeals. You will be notified of the date, time and location of the hearing on your appeal.

## HAROLD MACQUINN, INC. APPEAL OF PLANNING BOARD DENIAL OF GRAVEL EXTRACTION PERMIT APPLICATION

In February 2017, the Applicant submitted an application to the Lamoine Planning Board to obtain a Gravel Extraction Permit under the March 16, 2011 Lamoine Gravel Ordinance.

On November 14, 2017, the Planning Board denied MacQuinn's application finding that the Applicant had failed to present evidence that the proposed operation had met two of sixteen review criteria:

- 1. Will not unreasonably result in water pollution, nor affect adversely existing ground water, springs, or ponds;**

The Planning Board concluded, by a vote of 2-3, that the Applicant did not sufficiently demonstrate that the use will not unreasonably affect existing groundwater and the nearby Cold Spring. This determination was predicated on the Board's reliance on testimony of "three expert hydrology experts."

The Findings of Fact and Conclusions state, "[t]he Board considered the evidence submitted by three hydrology experts regarding the area's complex groundwater systems, and found that the requested excavation would not adequately protect the aquifer or the immediately adjacent, possibly connected Cold Spring recharge area."

However, during deliberations the members of the Planning Board who voted that the Applicant had failed to meet the above referenced review standard stated the following "rationales":

**Mr. Tadema – Wielandt:** "When human beings operate on earth they make mistakes. One mistake. Do you know how much gasoline it would take to completely ruin and make useless the entire aquifer? Not very much. I can't tell you whether it's quarts or pints, but you've got diesel trucks going in and out of there. You've got machinery going in and out of there."

**Mr. Bamman:** "I'm not so much concerned about the aquifer as I am about the perched water table for the Cold Spring Water system which is kind of independent from aquifer, I believe."

**Mr. Bamman:** "I believe we have too much at risk and too much of a chance for pollution or damage to the aquifer."

**Mr. Legere:** "I just didn't – I too wasn't sure – I don't know if this – I think reasonable steps have been taken, but do I think there is a risk? Yes. I do believe there is a risk for that perched table, so yeah."

The Planning Board's Findings of Fact and Conclusions are not reflective of the "rationale" upon which the members of the Planning Board based their decision to vote no. The conclusion that the Applicant did not meet this review criteria was based on the belief of a number of Planning

Board members that there was “some risk” – which is not the legal standard, nor is it the standard articulated by the Ordinance.

The Planning Board did not point to any evidence to support the premise that the requested excavation would not adequately protect the aquifer or the immediately adjacent, possibly connected Cold Spring recharge area. Instead they chose to dismiss the testimony of the Applicant’s expert, Michael A. Deyling of Summit Environmental Consultants, Inc. and a peer review report that was requested by the Planning Board, paid for by the Applicant, as part of the prior application. The peer review, conducted by Robert G. Gerber of Ransom Consulting, Inc. recommended the installation of a number of additional monitoring wells. The Applicant installed all of the recommended monitoring wells and the evidence continues to support the contentions of the Applicant’s expert.

## **2. Will not adversely affect surrounding properties.**

The Planning Board concluded, by a vote of 2-2, that the Applicant did not sufficiently demonstrate that the use will not adversely affect surrounding properties.

The Findings of Fact and Conclusions state, “[b]ecause of the proposed use’s potential impact on private and public water supplies, and its close proximity to residences, the local school and establishments at Lamoine Corner, resulting in increased noise, truck traffic, dust and particulate production, the Applicant did not meet its burden of proving that the proposed use would not adversely affect surrounding properties.”

Contrary to the above stated rationale, in other review criteria the Planning Board concluded that the proposed use will not adversely affect public ways, as traffic will not be increased and that the application is in compliance with Section 8, which states: “[a]ll gravel extraction operations shall conform to the following applicable standards. The gravel pit owner is ultimately responsible for ensuring that these standards are met.” The Planning Board made a positive determination that the standards were met for: groundwater protection, hours of operation, and noise.

Planning Board members stated the following “rationales” regarding their decision to vote against the application meeting this review standard:

**Mr. Bamman:** “I just feel like it’s – living in close proximity to a gravel pit I know that there’s just a lot of noise and there’s a lot of truck traffic and I think that a lot of people have felt that it’s going to get worse under this scenario than it was before. I’m not relating it to property values. I’m relating it to quality of life issues; it is my rational.”

**Mr. Legere:** “I feel unless that – unless I’m given proof that what’s underneath the existing area is needed because of the type of sand it is that can’t be accessed anywhere else, then I don’t deem it necessary to open it up even more. I don’t think it’s worth the risk and opening it up and moving closer and closer to the center of town.”

The deliberations proceeded and whether or not the Planning Board could impose certain conditions or ask the Applicant to provide additional evidence in order to meet each of these review criteria was discussed. Upon consideration of this, Mr. Bamman offered the following:

**Mr. Bamman:** “There’s no question that this one is very subjective. It’s not really quantitative. It’s qualitative. So we’re dealing with qualitative issues. The only thing I could think of would be to maybe increase the buffer along that south wall a little bit more so that the operation isn’t quite so close to the school and the church and all the houses on Lamoine Corner if at all possible is the only remedy I can think of.”

The Town of Lamoine ordinance fails to articulate the quantitative standards necessary to transform the unmeasured quality “will not adversely affect surrounding properties” into specific criteria objectively usable by both the Planning Board and the Applicant in gauging the impact of the proposed use on this area of Town. The Court has previously addressed this issue in *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987) when it stated:

“[t]he lack of specific standards in the Yarmouth ordinance permits the Board to go beyond its proper quasi-judicial function. Rather than restricting itself to its narrow task of finding whether a proposed ‘special exception’ use satisfies defined factual requirements, the Board can roam at large in policy-making. The Board on each application for a special exception is free to express a legislative-type opinion about what is appropriate for the community. . . . The absence of standards to control the authority delegated to the Board is inconsistent with the principle that ‘[t]here should be no discretion in the Board . . . as to whether or not to grant the permit if the conditions stated in the ordinance exist. That determination should be made by the legislators.’ *Stucki v. Plavin*, 291 A.2d 508, 511 (Me. 1972). *See also Cope v. Town of Brunswick*, 464 A.2d 223, 227 (Me. 1983). The ordinance opens the door to favoritism and discrimination by permitting the Board to grant or deny special exceptions for reasons that are unconnected to the ordinance but that masquerade as quasi-judicial findings of fact. *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968).”

Here, the record of the deliberation clearly reflects that the Planning Board, in reaching the conclusion that the Applicant fails to meet the criteria that it will not adversely impact surrounding properties, acknowledged that this criteria is qualitative and fails to establish any criteria by which the Board can make a factual or quantitative determination on this issue.

The Findings of Fact suggest the Board’s reliance on a study conducted by 29 local Realtors in which, “[a] majority of the 10 respondents indicated that, **in their opinion**, the gravel operation would have a negative impact on the value and marketability of nearby properties.” (Emphasis added.) The Town of Lamoine property tax records, the only quantitative measure available for this standard, were submitted by the Applicant and provide no basis or evidence that the value of surrounding properties has been

impacted, in the nearly 20 year time period that a gravel pit has been active at this location.

The issues raised in the accompanying appeal of the denial of Harold MacQuinn, Inc.'s Site Plan Review Application are incorporated herein. The accompanying appeal will be filed upon receipt of the Planning Board's written decision regarding the denial of Applicant's Site Plan Review application on December 11, 2017.

Harold MacQuinn, Inc. contends that the Standard of Review on appeal for the Gravel Pit Ordinance is a *de novo* hearing on the issues raised on appeal.