September 10, 2020

MEMORANDUM

From: Dwight Merriam, Counsel for Applicant Amy L. Eastman

To: Somers Zoning Commission

Re: Applications #20-009, 010, 011
Summary and Concluding Remark on All Three Applications

These remarks address the evidence presented, respond to certain unanswered questions, and provide final rebuttal on issues not previously covered in the two prior sessions of this hearing.

First, and foremost, it must be remembered that this process of an SUP for 40 Hallie Lane to excavate rock (#20-009), the rezoning of 5.45 acres from A to A-1 to enable the completion of the regrading (#20-010), and the SUP for 42 Hallie Lane and that portion formerly of 42 Hallie Lane now part of 40 Hallie Lane as a result of the boundary line adjustment to bring in 2,500 cubic yards of topsoil to finish the grading (#20-011) are all entirely consistent with what the town attorney has opined is necessary to fully comply with the regulations as the Zoning Commission has interpreted them. The applicant has done everything that has been asked of her. At the same time, to be perfectly clear, the applicant continues to strongly and steadfastly believe that she has a right to undertake this work without going through all that she has because the town has never, not ever as we discovered and demonstrated through sworn affidavits of the former town planner, Patrice Carson, and of the surveyor, Jay Ussury, that no private property owner has ever been required to go through this process. On information and belief, there are similar residential properties in town where presently more than 1,000 cubic yards of materials is being excavated without an SUP.

This process is one that the applicant willingly undertakes as her last best effort to reach an accommodation with the town, short of reopening the litigation on several fronts. We most strongly commend to your favorable review and approval all three applications. They are in the best interest of the town of Somers, and of the neighbors who will finally have in short order the completion of the work on the site with no more hearings, no more litigation, no more a neighbor acrimony. And, of course, this process benefits the Eastmans by bringing to a conclusion what has been for them a very difficult time. All they want to do is have a nice backyard where with their 10 children they can enjoy their wonderful home. They are 90% of the way there and with the approval of these three applications altogether, they will be done and the town will be done, and the neighbors will be done. The alternative of litigating these issues would be the worst possible thing for all concerned.

Most importantly, these three applications comply in all respects with the regulations. Application #20-009, the SUP to excavate at 40 Hallie Lane proposes the use of drilling and hydraulic fracturing. We have provided for the record a further opinion from the applicant's geotechnical engineers that there is no possibility of any adverse impact on any wells from this technique of drilling and fracturing. This is not blasting. This is not jack hammering.

The Connecticut Department of Energy and Environmental Protection guidelines (not statutes or regulations, just guidelines), which are also in the record, are marked as "draft" and they provide that in the case of blasting, not drilling and hydraulic fracturing, that wells within 500 feet should be considered for testing. The guidelines do not say they should be tested but only that with blasting testing be considered given the particulars of the blasting. Of course, what is proposed is not blasting, so the guidelines themselves do not apply.

There is nothing, absolutely nothing, that even suggests that testing of wells within 500 feet (of course, the testing wells beyond 500 feet is not recommended even with blasting) is warranted in any respect. There is one well that is 490+ feet from the very edge of the rock to be excavated and there is nothing that could adversely affect that well from what is proposed to be done and there is no need to test it. However, if the difference between an approval and a denial is the testing of that one well at just under 500 feet from the very edge of the rock to be excavated, then so be it. Impose the condition and the applicant will pay for the cost of the well test by a properly supervised consulting company and will pay for second well test two months after the conclusion of all the work.

Further, as to #20-009 please note that the letter from O'Reilly, Talbot & Okun Associates, Inc. dated September 9, 2020, points out once again, and I most strongly reiterate this at this time, that the constituents of concern, such as radon found in the water, are an entirely natural occurrence. They come and they go, they rise and they fall, they are there and then they are not, all because of natural conditions. Nothing that the applicant has done on her property has been the cause of any of the issues regarding constituents in the wells. There is no proof of anything to the contrary. No one has provided any expert testimony except the applicant. That expert testimony is uncontroverted that the prior activity has had no impact on the wells and that the proposed very minimal, absolutely minimal, activity of drilling and then simply breaking the rock with a hydraulic device could ever possibly affect any wells in the area. It is totally improper to even consider the denial of application #20-009 on the basis of any impact on the wells, because there is no impact.

As to #20-010, the application for rezoning, the Planning Commission did unanimously approve and recommend that the Zoning Commission rezone the 5.45 acres. Yes, one of the planning commissioners said that he thought it might be spot zoning, but he joined with the others in voting unanimously to recommend approval because it was completely obvious that the approval was warranted. All that this rezoning does is extend the A-1 zone at 40 Hallie Lane into a portion of the expanded 40 Hallie Lane created by the boundary line amendment. It is legally and factually wrong to even suggest that this is spot zoning. That argument is disingenuous. Both the A and the A-1 zone are considered under your Plan of Conservation and Development as low density residential. That doesn't change at all with the rezoning. The only thing that changes is that the applicant will now be allowed to remove excess rock material from the area on 40 Hallie

Lane where she will have permission to excavate pursuant to application #20-009 and move it a couple of hundred feet and regrade it onto the 5.45 acres to be rezoned. This is the best and most logical approach to resolving the issue of the final grading.

The town attorney opined on the record at the continuation of the hearing that the applicant had a legal right to a variance in this activity of relocating the excavated rock material, but going back to the Zoning Board of Appeals for a variance instead of rezoning is totally unnecessary and to a degree abusive. Rezoning is the right thing to do, to simply extend the area of A-1 for this reconfigured lot.

The question was raised as to why 9+ acres was added to 40 Hallie Lane but only 5.45 acres are to be rezoned. As explained during the continuation of the hearing, to have carved out just that 5.45 acres in the boundary line adjustment would have left fragments of 42 Hallie Lane and multiple lots, potentially requiring a re-subdivision application and all that comes with that. The logical, orderly, regularly-shaped expansion of 40 Hallie Lane by 9+ acres makes all the sense in the world.

Then, the decision was made to absolutely minimize to the fullest extent possible the area to be rezoned to just that area with a rock would be regraded. That's why it ends up with 5.45 acres of rezoning. 42 Hallie Lane is taxed as undeveloped woodland and minimizing the rezoned area protracts that classification and facilitates leaving the balance of 42 Hallie Lane as it is. That is good for the neighbors.

If anything, the A zone is a bit of an anomaly in the town regardless, as the town attorney pointed out during the second portion of the public hearing. A relatively small area is in the A zone.

Now, finally as to #20-011, the second SUP which will enable bringing in 2,500 cubic yards of topsoil to complete the grading, a couple of critical points need to be made.

First, there is a strong argument that no special use permit is even required to bring in the 2,500 cubic yards of topsoil because it doesn't constitute excavation, or filling, or removal. It would not constitute filling because there is nothing to be filled; it is just adding several inches of topsoil over a regraded surface. But, the applicant has chosen to attempt to meet every potential requirement of the Zoning Commission and has made this application accordingly.

The principal concern regarding #20-011, the bringing in of this topsoil to finish the landscaping, is the access. It has been demonstrated on the record that the access by Hallie Lane is a very poor second choice to using the easement from Mountain Road. Indeed, Hallie Lane cannot even be characterized as an alternative.

Hallie Lane is a residential street with several homes fronting on it, the frontage at 40 Hallie Lane lot is less than what would permit strict compliance with the regulations, and the driveway is simply impossible to use for bringing up any heavy equipment because it is narrow and twisting and turning all the way up the steep hill. Most importantly, as to the Hallie Lane, the dump trucks bringing in topsoil would have to be among the smallest available in order to get up

that driveway and that would at least double the number of trips and substantially increase the number of days of activity.

The easement has been used, by everybody's acknowledgment, for three years for bringing in equipment and working on the site. The proposed SUP #20-011 would end the use of that easement for this project in just 30 working days as required to bring in the 2,500 cubic yards.

A question was raised concerning the sightlines at Hallie Lane and the easement and testimony has been provided both by Jay Ussury and through photographs that the access at the easement is preferable in terms of public safety.

Finally, we address once and for all the question of the so-called 100-foot setback required from the rear property line or side property line for the access road.

First, the regulations obviously contemplate a commercial operation with many years of operation, not just 30 days, but many, many, in fact unlimited, years of operation of a commercial quarry. The regulation has no meaning and no use when it comes to this private residential lot landscaping project. Indeed, as I noted at the outset, no one has ever been required the town of Somers to make these SUP applications for a private residential lot.

Second, the facts are these. The applicant's property doesn't front on Mountain Road. In fact, 42 Hallie Lane does not have any frontage on any public street. The boundary doesn't start until 400 feet in from Mountain Road. The easement is entirely on the Fiore property. The Fiore's have granted written permission to the applicant to encroach within 100 feet of the property line. They have the permission from the Fiore's and that in itself constitutes a waiver of any requirement that they stay 100 feet back.

An essential and dispositive fact is that there is no side yard or rear yard where the easement is located because the boundary of the easement property does not start until 400 feet in from Mountain Road and past the Clark's property. The Clark's have no basis to complain about a 100-foot setback from a side yard or rear yard because the easement is not along a side yard or rear yard of 42 Halley Lane.

Importantly, this Commission has all of the authority it needs to choose the best access and the best access is unquestionably that on the easement. Coupled with a 30-working-day restriction on the use of that access to bring in the 2,500 cubic yards, the public's interest and the interest of the Clark's are fully protected. It is astounding to the applicant that the Clark's are trying to convince the Commission to deny these applications because all the denial will do is invite open warfare between the town, the Eastmans, and the neighbors, and that is the last thing than any of us should want.

These three applications comply with each and every respect with your regulations. They ought to be approved. To deny them would contravene the rule of law. The applicant urges you, in every way that she can, to give these three related applications your fullest consideration,

respect her willingness to subject herself to this process, and accept her offers of reasonable conditions on the time periods within which the work should be completed.

Thank you.

Respectfully submitted,