



*Town Of Chatham*  
Department of  
*Community Development*

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BUILDING COMMISSIONER  
CHIEF ZONING OFFICER

DATE: March 21, 2011

MEMO TO: Terry Whalen, Principal Planner

FROM: Kevin S. McDonald, Director of Community Development

RE: Earth Removal Bylaws

With reference to the handwritten Comments on Proposed Earth Removal Bylaw that Hank Russian handed out to the Planning Board members at their Site Visit on March 1, 2011, I believe there are a few points about earth removal regulation here in Massachusetts that need to be clarified.

#### ENACTMENT

Mass. Gen. Laws, Ch. 40, § 21 (17) authorizes towns to enact bylaws or ordinances prohibiting or regulating the removal of soil, loam etc. Under this enabling legislation, these regulations can be adopted as general bylaws or ordinances. Of course, municipalities are also free to adopt zoning regulations which govern the removal and sale of loam, sand, gravel etc. However, these zoning bylaws or ordinances are, for the most part, construed to have the regulation, limitation or prohibition of earth removal "businesses" as their rationale. Under Chapter 40, §21 (17) there are a number of exemptions which are also generally considered operative even under regulations adopted as zoning measures.

March 21, 2011  
Planning Board  
Kevin S. McDonald  
Earth Removal Bylaw

## EXEMPTIONS

Chapter 40, § 21 (17) states that it shall not apply to “any soil, loam, sand or gravel which is the subject of a permit or license issued under the authority of the town or by the appropriate licensing board of such town or by the board of appeal, or which is to be removed in compliance with the requirements of a subdivision plan approved by the town planning board.” The Massachusetts State Building Code, 780 CMR and its enabling legislation also prohibit any other legislation from “usurping” the Code’s authority in the governance of all “methods and materials” having to do with the construction of structures. There are other regulations (e.g. Title V) which reserve to themselves alone the regulation of activities which include excavation and some necessary removal from a site of excess earth materials. Simply put, a town may not adopt regulations, zoning or otherwise, which limit the exempted activities noted above. Obviously, the excavation of a foundation hole for a legally permitted building is exempt as is the excavation for a duly permitted subsurface septic disposal system and so forth.

In addition, the State Zoning Act M.G.L. Ch. 40A, § 3, Subjects which zoning may not regulate; exemptions etc. states that “no zoning ordinance or bylaw shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code”. This, as above, is generally construed as covering all clearing, grading and excavation deemed necessary to construct a validly permitted structure on a lot.

## NON-PERMITTABLE ACTIVITIES

Further, many activities that are usually considered to not require formal permits could ostensibly run afoul of a multi-faceted clearing and grading bylaw, whether adopted under zoning or as a general bylaw. What about clearing and grading for modestly sized garden plots that are located in areas on lots that do not impact any environmental concerns? What about multiple, modestly sized garden plots on the same lot cleared over longer periods of time? This brings into play, in all instances, the “phasing” question of any of these activities, whether permissible or otherwise.

March 21, 2011  
Planning Board  
Kevin S. McDonald  
Earth Removal Bylaw

What if these activities are conducted over time so as to avoid any area or temporal limitations that may be inserted into a bylaw or ordinance?

In my opinion, any clearing and grading regulations we may wish to adopt here in Chatham should be better vetted than we have been able to do in the short time than the present discussions have allowed. In fact, as Peter Polhemus has alluded to in his remarks during these recent proceedings, we should probably direct our attentions to real life issues that clearly cause concern in a large class of people and point out direct deficiencies that need attention rather than coming at a perceived problem tangentially. If we are concerned about inappropriate or larger than necessary scales of clearing and grading, we should directly address those issues. I would submit that one direct and simple way to accomplish this task is to insert a requirement into our zoning bylaw that prohibits any clearing, grading, or excavation except as authorized by a validly issued permit. In conjunction with such a rule, it would be easy enough to add reference to and the requirement of a Site Alteration permit for those situations that are not covered by a construction permit.

I look forward to speaking with you further on this subject.

Attachment

CC: Terry Whalen, Principal Planner  
Lynn Thatcher, Assistant Planner  
Paula Liska, Central Permitting Coordinator  
Community Development Staff  
Board of Selectmen  
Zoning Board of Appeals  
Bill Hinchey, Town Manager  
Bruce Gilmore, Town Counsel

given to PB By H. Russian  
3/11/11

Re: Comment on Proposed Earthremoval Bylaw

- After reviewing several by laws dealing with earthremoval, it became clear to me that there are two different situations involved.

One is where removal is done for the construction of some structure or for a garden or similar change, and, the other is where sand, gravel, loam and/or minerals are removed offsite.

The quantity of cubic yards and/or square foot area should vary under each scenario.

Construction of a structure may REQUIRE more removal than allowing someone to remove sand, gravel, loam and/or minerals off site. allowing an area from which removal was made to appear stripped.

Kindly consider these scenarios so the bylaw proposed will not cause consequence which are not intended.