

To: Hamden PZC
From: M. Davis, Assistant Planner
Date: January 20, 2021
Subject: Paradise Landscaping Special Permit for Remedial Activities
82-92 Crestway

At the Commission's 1/12/21 meeting, I agreed to provide a staff report a few days in advance of the 1/26/21 PZC meeting. This is that report. It reflects my understanding of the circumstances as of the date the report was produced and so cannot incorporate changes in circumstances which may occur between that date and the 1/26/21 PZC meeting.

As or if necessary, staff will update the PZC in advance of 1/26/21 with any new information that might in some way relate to the contents of this report.

The recommendations made in this report are intended to accomplish or at least move towards, a resolution which fairly reflects the specific facts and circumstances, but which also reduces or eliminates the substantial burden these matters have had on department operations for well over two years. Staff asks for your support, which will allow us to move forward with regulation amendments and other essential work program tasks. Disposition of this matter in a more timely and effective way will also reduce the stress and conflict it has unfortunately created within the department.

General Background/Chronology

It seems that it would be helpful to review the events of the last few years, to provide necessary context for the recommendations staff is making in this report. The following is not by any means all-inclusive of every detail, but will hopefully provide some sense of the complexity involved and the level of effort necessary to date to manage the files.

- * Prior to making initial application for Site Plan/Special Permit approval for use of the Crestway site, Paradise Landscaping had been engaged in zoning violations regarding the use of its property in New Haven CT. These matters were well published in local media.
- * The initial application for Site Plan/Special Permit approval for the Crestway site was submitted to the P&Z office in late 2016. Following the submission and review of revisions, the application was approved by the PZC on 2/28/17. The scope of that approval is contained in the application use statement, in the approval motion and is further described in the PZC meeting minutes. The PZC at the time had concerns about the vagueness of the use statement, potential noise from material processing and other special permit considerations.
- * As standard practice, staff then began to work with the applicant to complete the general and specific post approval administrative tasks required prior to the issuance of a zoning permit for site work and/or building construction. Most of these tasks were pro forma, however, issuance of the ZP was delayed by the applicant's failure to sufficiently address certain utility related design and permitting requirements.
- * During this post approval process and prior to any ZP being issued, the owner was actively using the property and it was discovered that an illegal building permit had been issued by the former Building Official (August 2018) in violation of the zoning regulations, building code, town code and State Statute. Multiple inspections were carried out by Building Department staff, and the structure was more or

less completed, occupied and used, without any zoning approvals. The former Building Official did issue a stop work order as to the building, however that was issued in late 2020, well after the structure had been illegally occupied and used for apparent economic benefit by the owner for a substantial duration.

- * Illegal use of site during the Summer of 2018 included the storage, processing and disposition of tornado damage material in apparent violation of the terms of the FEMA grant the Town applied for in September of 2018 and later received in November of 2019 (this site and the adjacent Cube Smart site were not and are not, CT DEEP approved “Debris Management Sites.”) - see also FEMA “Record of Environmental Consideration” for project PA-01-CT-4385-PW-00121, dated 10/16/19.
- * These activities also resulted in a substantial encroachment onto one adjacent property (Cube Smart) and two smaller encroachments onto two other adjacent properties. Material was being processed, presumably for sale and the owner had brought equipment, vehicles and other materials to the property without required zoning permits.
- * Upon discovery of the violations in response to a complaint from a residential abutter, staff inspected the site and in September 2019, issued zoning orders to stop work. No appeals of these orders were taken and the owner continued to work on the site. These enforcement actions did not include an order to remove the material, only to stop work.
- * Based on the extent of the fill/grading violation, on 10/3/19 the ZEO and myself strongly recommended that the Town seek injunctive relief immediately. This suggestion was not supported and instead, staff was directed to meet with the owner, his attorney and his design engineer to help them figure out a path forward. Both myself and the ZEO at that time objected to this approach, but those objections were not supported. Staff was advised that the potential injunction option would be “held over (the owner’s) head” presumably to be pursued based on some action or inaction, timeframe or other criteria. Over the course of the next three months, staff engaged in multiple meetings, communications and other efforts designed to help the owner and his team resolve the violation. During this entire period, the owner continued to work on the site, to bring material to the site, process material, occupy and use the illegally constructed building and otherwise openly violate the zoning order.
- * Finally, after another site inspection confirmed (again) the on-going violations, in early 2020, at the request of myself and the ZEO, the Assistant Town Attorney filed a petition with the Court for an injunction (five months after the violation was discovered, no appeals were taken and the owner had apparent beneficial economic use of the property absent permits required by law.) In March of 2020, Covid effectively shut down the Courts for all of 2020.
- * Based on a decision that a special permit for grading/fill was the appropriate and necessary means to resolve the “stop work” order (again, no order was ever issued to remove the fill), the owner submitted the present pending “remediation” application in Feb/March of 2020. There were a number of critical deficiencies in the application and subordinate staff during mid 2020 generally recommended denial of the application. Processing the special permit was necessarily delayed for approximately five months due to the owner’s failure to resolve the question of potential inland wetland jurisdiction. In addition, subordinate staff noted concerns with respect to the sufficiency and potential implications of the “conditional” consent from Cube Smart, and the effect prohibitions on staff communicating with Cube Smart representatives would have on the department’s ability to accomplish a timely and efficient resolution. Regardless, for several months, staff was directed to avoid communications with Cube Smart and to allow the applicant’s attorney to be the exclusive point of contact with respect to coordinating application matters. This mandate was imposed despite the fact that we had already communicated directly with the local legal counsel for the other two directly impacted abutters.

- * As had been the situation throughout the course of our efforts to gain compliance with the stop work order, the owner more or less continued use of the site in open and direct violation of the orders. During this period, the owner's agent raised concerns about the possible financial burden on his client from the LEP scope, as well as from potential fines and penalties that might be imposed by the Court via the injunction. A conditional request to agree to the injunction, proffered by the applicant's legal counsel was declined (i.e. the town would agree to allow removal of material, vehicles and equipment in exchange for the owner's agreement to the "stop work" order). By the owner's raising the issue of the LEP scope and costs, and the extent of possible fines and penalties, staff feels the Town is justified to investigate and determine the scope and nature of any economic gains realized by the owner via the open illegal use of the building and property.
- * Following receipt and posting of the "remediation" application, the Town received an intervention petition under 22a-19. Staff carried out tasks necessary to evaluate the claims made, including consultations with the DEEP and with Uconn's Cooperative Extension Service. That guidance led to the suggestions for testing protocols and the characterization and disposition of material. The applicant hired their own LEPs and these professionals have had extensive input into not only environmental matters, but engineering matters as well. Staff feels that the reasonable likelihood of impact exists (as evidenced in the fact that the testing requirement was included by the DEEP WEED in its EA), however it seems clear that the nature of this impact does not rise to the levels in 22a-19 that would trigger an affirmative finding and the need for alternatives analysis before action on the application. Despite this, staff does feel that the intervention has justified the imposition of testing protocols and provisions for material management with respect to the special permit standards in the zoning regulations.
- * In mid 2020, Attorney Porto submitted a request for public records pursuant to the FOIA. The Town Attorney has provided a partial response, however, staff is compiling responsive photos and short videos taken during site inspections and we hope to have those materials available to the applicant, intervenor and to the PZC in advance of the 1/26/21 PZC meeting. If possible, we would like to have them available to the public as well, via the town web site. These photos (over 100) and short videos (approximately 6-7) document the illegal use of the site, processing of material into firewood and changes to the site from the date more or less of the initial discovery of the violation, to the present.
- * In December of 2020, and with no prior notice, staff received a communication from Cube Smart's legal counsel (via the applicant's Attorney), noting objections to soil testing. Staff subsequently held a zoom meeting with the "CS" legal counsel and he indicated that he would most likely participate in the 1/26/21 PZC hearing. The timing of this and the potential impact it may have is unfortunate, and if the objection impacts the Crestway consent in any material respect, the department will be required to issue a separate enforcement action on CS to remove the bulky waste and stabilize the slope on their property.
- * With respect to the determination of possible or likely beneficial economic use, last week staff reached out to the tax assessor and tax collector for basic information, including whether or not the owner, since taking title to the property, has declared any business equipment or vehicles, or paid any taxes on same or on the illegal structure. Staff will provide the responses we have received, but it is reasonably clear that the owner did not make prompt and full declarations and thus has likely enjoyed the use of the property for economic gains not only related to the direct business activities conducted for over two years, but also the avoidance of taxes due to the Town of Hamden. As noted above, this information (as well as the answer to the question already asked as to legal place of business), are directly responsive to the applicant's concerns raised as to the costs of any town hired LEP and/or fines and penalties relating to the injunction.

- * The application for a major modification is a separate application and should be addressed separately as part of that record/proceeding. Accordingly, staff has prepared a separate report for the PZC on that application, including recommendations.

Additional Exhibits

At present, staff is working on compiling the following additional exhibits for the 1/26/21 hearing, should that hearing go forward:

- * Latest Town Engineer review memo
- * Assessor and Tax Collector documentation
- * FEMA Environmental Authorization requirements and related questions for applicant
- * Site Inspection photos/videos

Site Plan Requirements and Special Permit Criteria

The plans continue to be deficient, however, for reasons outlined below, staff does not feel that the focus of this matter is or should be, the technical details of a site plan. In fact, if anything, the focus on technical aspects of the application has distracted greatly from our ability to focus on the truly salient and important aspects. This same general point applies as well, but perhaps to a lesser degree, to the applicable special permit standards.

Staff Comments/Recommendations and Proposed Administrative Actions

The time has come to move this matter forward and to do that in a way that best represents the Town's interests. This includes protecting the legitimate interests of those victimized by the owner's willful, open and egregious violations. Staff's recommendations and proposed administrative actions are based on the obvious fact that this is not by any means a conventional site plan/special permit application for a grading/fill operation. Unfortunately, we set in motion a process that was in my opinion flawed from the beginning by trying to use an entitlement process as the basis for a mandate necessary to remedy a serious zoning violation. This has undermined our ability to succeed and the process is further complicated by the fact that the violation we are seeking to remedy (illegal bulky waste landfill), has never been the subject of any zoning enforcement action. Furthermore, we have 6,000 yards of illegal fill on an abutter's property. Lastly, it may be likely that some of that fill was related to tornado recovery, or at the very least, it was brought to the site without any zoning approvals and in violation of State environmental regulations.

Attorney Porto has quite understandably objected to my recommending to this Commission that it not apply the "standard" decision process, should the application go forward. Specifically, in light of the relevant facts and the nature of this matter, I do not believe it is at all prudent nor is the PZC under any obligation, to "negotiate" the terms of any potential special permit approval with this applicant (or any applicant, frankly). What I am recommending, if the applicant goes forward, is that the PZC complete the public hearing, deliberate on the record and direct staff to draft a decision accordingly, absent any post hearing participation by this applicant (or the intervenor).

I firmly believe that this approach is justified, warranted, necessary and completely legal. No applicant has any legal claim to negotiate the terms of any action a PZC might take and you are under absolutely no

obligation to keep the hearing open and to engage the applicant in that manner. I would not be so sanguine if in fact this was a “conventional” special permit application, but it is clearly anything but. I would be less concerned if the applicant had immediately and fully complied with the stop work order and had done so for the duration of this matter. Therefore, I believe that taking a different approach is completely justified.

This is the first essential point I wanted to make, as it sets the foundation for the remaining recommendations.

1. The applicant should withdraw this application. If the applicant declines, I recommend the PZC complete and close the hearing on 1/26/21, deliberate on the record, leading to a consensus, directing staff to either draft a denial or an approval with or without conditions deemed necessary by the PZC to allow for the proper and efficient implementation of the remedial program.
2. Staff will issue additional enforcement actions against and upon both Cube Smart and Paradise seeking removal of the illegal waste and appropriate stabilization of the sites. As noted, the Town has never issued an enforcement order to either party for the removal of the material and stabilization. If either or both parties refuse to comply we can petition for injunctive relief, promptly.
3. The remedial program the applicant has proposed can still be used as the basis for the remediation program, and any related costs incurred will not “go to waste.”
4. Legal counsel will disassociate the “stop work” injunction with this special permit application and proceed to an evidentiary hearing as soon as possible, seeking the maximum possible fines and penalties as a way to make taxpayers whole. There is more than sufficient evidence to justify the injunction and to support substantial fines and penalties.
5. Staff will ask the PZC to initiate action to revoke or suspend the existing approval for use of 82-92 Crestway (this recommendation has already been made by the former Town Planner).
6. Staff will issue a zoning enforcement order for the use of 72 Crestway.
7. Staff will direct our legal counsel to immediately take the lead on communications with Cube Smart legal as a means of seeking an expeditious and full remedy of the violations.
8. Staff will request a formal accounting from the Assessor and the Tax Collector and will provide that report to the PZC (if timely) and certainly to the Court as to the pending injunction request.
9. Staff will provide a brief summary report to the State of CT DEEP WEED, again soliciting their assistance and possible pre-emptive jurisdiction.
10. Staff will direct the PZC’s legal counsel to refer any facts or documentation having potential implications on the FEMA Grant to the Mayor and Town Attorney.
11. If necessary, staff will solicit informal guidance from independent state certified LEPs with respect to the proposed remedial program, in consultation as necessary with the Purchasing Agent, legal counsel and any other appropriate offices.

Staff feels that these recommendations, taken together, will better position the Town to resolve outstanding issues more expeditiously, with less disruption to the department’s operations, and in a way that more appropriately reflects the essential nature of the violations.

Copy to (via email):

J. Porto, Esq., Agent for applicant
T. Lee, Esq. Assistant Town Attorney
Legal Agent for Cube Smart

H. Masi, Hamden ZEO
M. Austin, Hamden Town Engineer
Hamden Tax Assessor
Hamden Tax Collector
R. Isner, CT DEEP WEED
L. Garrett, Intervenor
B. Pellegrino, Esq., agent for (2) abutters
Abutting homeowners