

# Q&A: Saxon Hill sand extraction & land transfer

*June 5, 2015  
Updated June 18, 2015*

## **What's happening with the appeal of the sand extraction operation in the RPD-I area of Saxon Hill?**

At its meeting on June 1, 2015, the Selectboard unanimously approved a settlement in concept with Allen Brook Development, Inc., which owns the majority of the land in the Resource Preservation District – Industrial (RPD-I) zoning district. The settlement resolves a legal action regarding land use in the Saxon Hill area.

The legal dispute relates to a sand extraction operation that the Essex Planning Commission denied in 2011. A former landowner wanted to extract sand from 54.3 acres in the RPD-I; when the Planning Commission denied the application, the landowner appealed the decision to the Environmental Division of Vermont Superior Court. The appeal was scheduled to go to trial on June 11, 2015.

With the settlement, Allen Brook will be able to extract up to 615,000 cubic yards of sand from a 27.5-acre area in the RPD-I. The operation will only take place on one cell of up to 6 acres in size at a time.

In return, the Town will receive approximately 245 acres for conservation and recreation purposes, as well as other benefits that are described below. The agreement confirms which areas of the RPD-I can be developed industrially and commercially, and which areas will remain undeveloped for conservation and recreation purposes. The land ratio of 40 percent industrial and 60 percent conservation/recreation remains unchanged. The prohibition on residential development in the RPD-I remains in place.

## **Is this settlement final?**

The terms of the settlement have been agreed to in concept. Agreement on certain logistics and details is still required. The Town and Allen Brook are awaiting the completion of a survey that will show the exact location of sand extraction and the land to be transferred to the Town, as well as the location of trails within buffer areas and the proposed parking areas. Once the survey is complete, the Town and Allen Brook need to apply to the Essex Planning Commission for a simple parcel subdivision that will allow the transfer of land to the Town. When the survey and deed are recorded in the land records and Allen Brook obtains an Act 250 permit amendment, the land will transfer to the Town and Allen Brook will receive its permit for sand extraction.

## **Where is this land, and what is the RPD-I?**

The Resource Preservation District-Industrial (RPD-I) zoning district was created in 1977 and covers 751.7 acres to the east of Sand Hill Road. Of that land, 40 percent is designated for industrial and commercial development. The remaining 60 percent, including 90 acres owned by the Essex Junction School District and leased to the Town, is designated for Conservation/Recreation purposes. The public has long had some access to the privately-owned portion of the land in the 60 percent, but the extent of that access has been subject to dispute.

## **What are the other components of the settlement?**

Allen Brook will pay the Town up to \$5,000 per year for the duration of the sand extraction operation. The money will be used to develop a management plan and contribute to trail

maintenance costs. The exact amount may change if the per acre assessed value of the land increases over the current assessment, but the Town and Allen Brook have agreed to the figure of \$5,000 if the current assessed value does not change.

Allen Brook will restate the public's right to access areas of the 60 percent conservation/recreation land that will remain under Allen Brook's ownership – these areas are typically associated with forested buffer areas in the northeast and southeast portions of the RPD-I. Additionally, Allen Brook will allow public access through parts of the 27.5-acre sand extraction operation area that are not undergoing sand extraction at any given time.

Allen Brook will be able to extend Thompson Drive in an area currently shown on the Town's zoning map. The exact location of the road may shift to avoid wetlands or other natural features.

Allen Brook will install a temporary parking area with 15 spaces off Thompson Drive. Once Thompson Drive is completed, Allen Brook will install a permanent parking area with 15 spaces.

Once sand extraction is complete and the land has been reclaimed, Allen Brook will deed the 27.5 acres to the Town. Another 27.5 acres on the southern part of the RPD-I, which will be classified as a "no-build" zone while sand extraction is taking place, will become available for industrial development upon completion of the sand extraction project.

Finally, Allen Brook has an option to purchase 75 acres that abut the RPD-I to the south, land known as the Kimo property. If the landowner exercises that option, 20 to 30 acres of the Kimo property abutting the RPD-I would be transferred to the Town.

**Remind me about the history of this issue, why it was in court, and how the settlement was reached.**

In December 1991 the Essex Planning Commission approved a sand extraction operation on a 97.2-acre site in the southeastern portion of the RPD-I. Several site plan amendments to the sand extraction operation were subsequently granted in accordance with provisions of the 1991 approval that required the applicant to return to the Planning Commission for approval prior to entering each new extraction cell. In February 2002, the Planning Commission extended the 1991 approval for another 10 years.

In 2010, Forestdale Heights, Inc., which owned much of the land in the RPD-I until late 2014, applied for a new sand extraction operation on 54.3 acres in the zoning district. Following the Planning Commission denial in 2011, Forestdale Heights appealed the decision to the Environmental Division of Vermont Superior Court. The appeal sought to overturn the sand extraction denial, and also alleged that the RPD-I was an unconstitutionally vague zoning district.

Rather than immediately ruling on the appeal, a judge ordered the Town and Forestdale Heights to go through a formal mediation process, which failed. The two sides then attempted informal mediation, and through this process developed a proposed settlement that was rejected by Essex voters in March 2014. That proposal would have allowed for some residential development and reduced the amount of industrial land. In return, the Town would have received approximately 245 acres for conservation and recreation purposes.

Following the March 2014 vote, the appeal returned to court. In September 2014 the judge denied Forestdale Heights' motion for partial summary judgment and upheld the legality of the RPD-I as a zoning district. He did not rule on the sand extraction. Forestdale Heights attempted to immediately

appeal the Judge's denial of its motion for partial summary judgment to the Vermont Supreme Court, but that attempt also was denied by the Judge.

When Allen Brook purchased most of Forestdale's land in late 2014, it also was assigned Forestdale's rights to the appeal of the sand extraction operation. Allen Brook approached the Town with another attempt at resolving the litigation before trial, and the two sides were able to reach the settlement described above.

**Why did the Selectboard agree to this settlement now?**

The Selectboard unanimously decided that the settlement was in the best interests of the Town. The settlement addresses many of the concerns residents voiced about the previous proposal, including residential development, the loss of industrial land, and trail and forest maintenance costs. The settlement resolves the question of public access to the RPD-I lands. Both the Town and Allen Brook avoid the uncertain outcome of a trial and the cost of continuing litigation.

**How come residents were not able to vote on this proposal, as they were with the proposal that would have changed the 2014 Town Plan? It seems as if this decision intentionally excluded the public.**

This is a legal matter, and the Selectboard represents the Town on legal matters. Oftentimes, that requires the Selectboard to make decisions that do not go out to a public vote. With the 2014 proposal, the Selectboard appointed a working group to attempt mediation. The proposed settlement reached by the working group and Forestdale Heights required a Town Plan change (to allow residential development in the RPD-I), which by law required approval from voters. Because the current settlement did not require a Town Plan change, it is within the Selectboard's authority to resolve the legal matter without a town-wide vote. The Selectboard unanimously felt that resolving the appeal on the conceptual terms negotiated was in the best interests of the Town.

**Residents voted 'no' to the last settlement proposal in 2014. Why would the Selectboard ignore that vote to make this settlement?**

The settlement reached by the Selectboard in 2015 is different than the one rejected by voters in 2014. Rather than ignoring voters, the Selectboard took into consideration the concerns raised by residents prior to the 2014 vote, and kept those concerns in mind while working toward the current settlement:

- Residents voiced concerns about residential development in the RPD-I; the 2015 settlement does not allow for any residential development.
- Residents said they did not want to see a reduction in industrial land; the latest proposal will not result in any loss of industrial land.
- Residents were concerned about permanently losing 45 acres of mature forest in the "heart" of the RPD-I to commercial/industrial development; the latest proposal allows 27.5 acres of the forest to be impacted, and once reclaimed, those acres will return to Town ownership, where they will regrow to maturity as permanent conservation/recreation land.
- Residents had concerns about the cost of maintaining publicly-owned land; now, Allen Brook will pay the Town up to \$5,000 annually for maintenance during the life of the sand extraction operation. The amount of \$5,000 was determined based on the per acre assessed value of the property; if that value changes from the current per acre assessment, the exact amount of the payments will shift accordingly.

**In what other ways does this settlement differ from the March 2014 proposal?**

In addition to no residential development, no loss of industrial land, a smaller impact to the forest, and payments for maintenance, the landowner will construct a parking area for public use. The 2014 proposal would have resulted in 50 acres of Kimo property going to the Town; with the current proposal, the Town will take ownership of 20 to 30 acres of the Kimo property if Allen Brook exercises its option to purchase that property.

**Will the sand extraction occur in the 60 percent area designated for conservation/recreation purposes, or in the 40 percent area set aside for industrial development?**

The sand extraction will take place within the area designated for conservation, but a similar-size area (27.5 acres) within the industrial zone will be designated as a “no-build” area until the new sand extraction area has been deemed reclaimed by the Town. Once the area is reclaimed, ownership will transfer to the Town and become part of the permanent conservation/recreation land.

**Why is the Selectboard allowing sand extraction in the conservation land?**

The proposed 54.3-acre sand extraction operation that is presently before the Vermont Superior Court, Environmental Division is located on conservation land. The Selectboard has agreed to allow sand extraction on a smaller area within this same location. The 60/40 boundaries have been fluid in the past, so the Selectboard did not believe it was doing something extraordinary by allowing this extraction in a conservation zone, provided it returns to permanent conservation status once reclaimed.

**With this settlement, where will the boundaries be for the conservation/recreation and the industrial land in the RPD-I?**

Once sand extraction is complete and the land is reclaimed, the 27.5 acres will revert to town ownership and the 27.5-acre no-build zone will become available for industrial development. At that time, the delineations of industrial land and conservation/recreation land will approximate those shown on the current zoning map.

**The *Official Zoning Regulations* adopted in 2014 do not allow for sand extraction in the RPD-I. Why did the Selectboard agree to allow sand extraction?**

The current version of the *Zoning Regulations* does not list sand extraction as an allowed use, but sand extraction could be considered under the previous version of the *Zoning Regulations*. Because the sand extraction operation was proposed under the previous *Zoning Regulations*, it is subject to review under those regulations. If the judge ruled in favor of the landowner, Allen Brook would have been allowed to extract sand from up to 54.3 acres. The Selectboard decided that allowing sand extraction on 27.5 acres was a better alternative than having extraction happen on 54.3 acres, particularly when combined with the other benefits of the settlement.

**The *Town Plan* and the *Zoning Regulations* speak about the importance of the forest in Saxon Hill, as well as the conservation of the area’s natural resources. Isn’t it bad for conservation to allow clear cutting and sand extraction on 27.5 acres of the forest?**

Not all 27.5 acres will be cleared at once. Sand extraction will occur on no more than 6 acres at a time.

The Selectboard believes the settlement will ensure stricter conservation of the Saxon Hill Forest in the long-term by permanently identifying undevelopable land. Although the zoning map shows a 60/40 delineation of conservation and industrial land, the permanency of those boundaries was unclear. The judge referred to that uncertainty when he upheld the legality of the zoning district, and even the Planning Commission denial letter for the 54.3-acre sand extraction operation

acknowledged, “The Town attorney has advised staff that this shift (of the 60/40 boundaries) is arguably permissible by the Planning Commission without the need to modify the *Official Zoning Map*.”

The settlement accomplishes objectives of the 2011 Town Plan:

- **Objective 11.13.1:** While maintaining the 60/40 split reserved for conservation/recreation uses, the Town should work with the landowner to establish fixed boundaries of land to be considered for development and land to be protected for recreation/conservation use.
- **Objective 11.13.2:** The Town shall evaluate options to purchase or otherwise permanently preserve 60 percent of large contiguous sections of the RPD-I District.
- **Objective 11.13.5:** Ensure that recreation/conservation areas are effectively managed and clearly establish the responsibility for such management.

This settlement agreement will solidify the location of conservation/recreation land and permanently conserve that property under Town ownership. By owning the land, the Town will have better control over how the land is managed for conservation and recreation purposes into the future.

**Residents have described the sand extraction area as the “core” or the “heart” of the RPD-I. Why would the Selectboard allow sand extraction to occur on 27.5 acres of that area?**

The alternative was to let a judge determine if sand extraction could occur on 54.3 acres in that area. The Selectboard recognizes that some residents strongly believe the judge would have upheld the Planning Commission decision and denied the sand extraction operation. The Selectboard, however, recognized and understood the risk of losing 54.3 acres of this area of the forest if left to the judge or the Vermont Supreme Court on appeal. By allowing sand extraction on 27.5 acres, the Selectboard was able to protect a significant portion of the RPD-I while simultaneously resolving the debate over public access within the 60 percent conservation/recreation land.

**Didn’t the public already have access to the 60 percent conservation/recreation land?**

Yes, although the extent of that access was subject to debate with the prior and current landowners. At a minimum, residents could use “fire roads” that were surveyed in the 1970s. The Town is of the opinion that residents can access the privately-owned lands beyond the fire roads, but the former landowner argued that access was limited to the fire roads. With the passage of time the exact location of the original fire roads has been difficult to determine. The Selectboard understood that absent an agreement with the landowner, full resolution of the access debate would require a separate legal challenge in Vermont Superior Court, Civil Division. By taking over ownership of approximately 245 acres, the Town and landowner will no longer have to debate the level of public access to privately-owned land. Furthermore, the Town now has opportunities to expand the existing trail network, identify areas better-suited for conservation, encourage forestry education for CTE students, and generate revenue through logging.

**How much tax revenue will the Town lose by taking ownership of the 245 acres?**

At the current assessed value of the land, Allen Brook pays \$30,746 annually in property taxes (\$7,491 municipal, \$23,255 education) on the 403 acres it owns. When the Town takes over approximately 245 acres, Allen Brook will pay \$25,536 annually (\$6,222 municipal, \$19,314 education) on the remaining 158 acres – a difference of \$5,111.

**How can I learn more about this settlement?**

The Selectboard will hold a public information session at its regular meeting on June 22, 2015. The meeting begins at 7:30 p.m. and will be held in the Essex Police Department, 145 Maple Street, Essex Junction.