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July 11, 2007

HAND DELIVERED

Barry Watson, Chair and Members
Zoning Board of Appeals
c/o Kinderly Hodgdon,
Code Enforcement Officer
Town of Gray
6 Shaker Road
Gray, Maine 04039

RE: Twin Brooks Camping Area – Haines/Morant Appeal

Dear Chair Watson and Members of the Board:

Thank you for your time and hard work in reviewing Twin Brooks' expansion activities and code violations. In this summary, I will distill the key evidence presented at the May 23, 2007 and June 27, 2007 hearings, against the backdrop of the legal standards imposed by the Town of Gray Code of Ordinances (the "Gray Code"), and by the Maine Supreme Court.

Jurisdiction. The Town Attorney, appearing for Code Enforcement Officer ("CEO") Hodgdon, takes an overly narrow view of the Board's jurisdiction. The Gray Code clearly empowers the Board "[t]o hear and decide where it is alleged there is an error in any order, require[ment], decision, or determination by the Code Enforcement Officer **in the enforcement of this Ordinance**. The actions of the Code Enforcement Officer may be modified or reversed by the Board of Appeals" Gray Code, Ch. 402, Art. VI, § 402.32(B)(1) (emphasis added). Clearly, the Board has full authority to add the violations CEO Hodgdon omitted, and to order that the violations be corrected.¹

Burden of Proof. The Maine Supreme Court places the burden of proof squarely on Twin Brooks to prove its claim that each and every campsite located within the shoreline,

¹ We presented a detailed rebuttal of Attorneys Lowry and Hill's arguments regarding the Board's jurisdiction in our letters dated May 23, 2007 (addressed to Attorney Hill), and June 27, 2007 (addressed to the Board).

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wetland, or property line setbacks is “grandfathered.”² The Maine Supreme Court also requires – to advance the long-standing public policy of discouraging nonconforming uses – that the Board “strictly construe” any provision in the Gray Code that tends to authorize expansions, and “liberally construe” provisions in the Code that limit the nonconforming use.³

Elements of Proof . To meet its burden of proof, Twin Brooks must show three things:

1. The sites existed prior to the enactment of the zoning provisions that prohibit them⁴ (shoreline setback of 100 ft. – 1968; property line setback of 100 ft. – 1968; and wetland setback of 75 ft. – 1977);
2. The use was continuous – i.e., not discontinued at any time for a period exceeding one year (with no exception from this requirement for seasonal uses);⁵ and
3. The current use must “reflect the nature and purpose of the use prevailing when the zoning legislation took effect and not be different in quality or character, as well as in degree, from the original use, or different in kind in its effect on the neighborhood.”⁶

Thus to rule against the Haines appeal, the ZBA must conclude that Twin Brooks has proved that *each and every campsite* claimed to be grandfathered was in continuous use *each and every year* since 1968, and *without any change* in quality, character, degree, or effect.

Chronology of Violations, and Complaints. As Mr. Haines has demonstrated in his sworn Affidavit (Ex. 16) and his testimony on May 23, 2007, before his family purchased their camp, they carefully studied the scope of Twin Brooks’ operations, the location of campsites in the vicinity of their camp, the extensive wooded buffer that separated them, and Gray’s zoning regulations preventing Twin Brooks from further developing along the lakefront and near neighboring properties. None of the sites at issue in this appeal existed at the time, and Gerry, Francisca, and their children enjoyed their new lakeside retreat, undisturbed, for nearly a year before Twin Brooks broke the law, clear cut and removed the mandatory buffer along the property line, brought in truckloads of new fill, added new utility drops, and parked numerous RVs in what had previously been untouched woodland.

² *Town of Orono v. LaPointe*, 1997 ME 185, ¶ 13, 698 A.2d 1059, 1062.

³ *Id.*

⁴ *Id.*

⁵ Town of Gray Code of Ordinances, Ch. 403, § 12(D)(2).

⁶ *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, ¶ 13, 753 A.2d 489, 492.

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Any member of the Board, or audience, would have acted decisively in those circumstances to protect the lake, their property, and their family's quiet enjoyment of it. The following outlines key events, the reasonable steps taken by Gerry and Francisca, and the Town's markedly varying responses to Twin Brooks' on-going violations:

- May 7, 1993: Maine's Dept. of Human Services (now Health & Human Services, or "DHHS") approves an increase from the original 25 sites to 43 sites, with new sites shown in the Shoreland and Campground setbacks. No Town approvals are ever sought or received. (Ex. 7 and May 23, 2007 PowerPoint, Slide 11).
- 1993 – 2005: Twin Brooks illegally expands from 25 to 55 sites – exceeding Town approvals by 30 and its DHHS permit by 12.
- May 11, 2006: Unknown to Town of Gray officials, DHHS cites Twin Brooks for illegally operating 55 sites – 12 more than ever licensed by DHHS based on the limits of Twin Brooks' septic system (Ex. 4). Twin Brooks does not appeal, and the finding is deemed admitted.
- May 25, 2006: Gerry files a written complaint that Twin Brooks has cleared and filled new areas, in violation of Gray's Shoreland Zoning.
- CEO White inspects the Twin Brooks site, finding tree cutting and filling in violation of the Shoreland Zoning. Twin Brooks agrees to stop work (Ex. 3). No appeal is filed.
- May 25, 2006: Al Frick signs a new site plan for Twin Brooks' expansion, labeling as "Future Sites" the new sites CEO White found to be in violation of Gray's Shoreland Zoning (May 23, 2007 PowerPoint, Slide 12).
- May 26, 2006: Gerry files a second complaint with the Town, regarding violations of the Campground Ordinance by Twin Brooks.
- May 26, 2006: Twin Brooks applies for a DHHS license to open for the season the **next day**, attesting that the new sites that are the subject of this appeal (which CEO White had found to be in violation of the Shoreland and Campground ordinances) are "Future Sites" (June 27, 2007 PowerPoint, Slides 20-22). No license for the 2006

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season is issued until June 6, 2007 (limited to 43 sites); Twin Brooks admits to operating 55 sites throughout 2005 and 2006.

June 19, 2006: Gerry complains to CEO White that Twin Brooks has added utility drops and parked numerous RVs on the new, unlawful sites.

CEO White inspects Twin Brooks again, finding that it failed to stop work, and unlawfully placed RVs in the Shoreland Zone and other setback areas. Twin Brooks is ordered to Stop Work and submit a letter of commitment to removing the unlawful RVs and campsites within two days. Twin Brooks never complies. (Ex. 3).

July 17, 2006: CEO White issues a Notice of Violation reciting his findings that Twin Brooks and the sites in question are in violation of Gray's Campground and Shoreland Zoning Ordinances, and imposing a \$100/day fine (Ex. 3). Twin Brooks does not appeal the Notice of Violation, thereby losing the right to contest these violations.⁷ Twin Brooks has never paid any fine.

Sept. 12, 2006: Twin Brooks applies to the Planning Board for after-the-fact site plan approval. A site plan dated September 11, 2006 again represents that the sites at issue in this appeal (and found to be in violation by CEO White) are "Future Sites" (Ex. 6).

March 19, 2007: Asked by the Planning Board for a complete recitation of Twin Brooks' zoning violations, CEO Hodgdon issues an incomplete Notice of Violation, ignoring CEO White's findings and orders as well as Twin Brooks' violations of other provisions of the Gray Code, including the lack of (i) Planning Board approval for expansions, (ii) requisite state licenses, and (iii) permits for new plumbing and electrical hookups for the new sites constructed in 2006 (Ex. 1).

April 13, 2007: Gerry Haines and Francisca Morant appeal CEO Hodgdon's failure to list all of Twin Brooks' code violations and to take the enforcement actions mandated by the Gray Code: ordering Twin Brooks' abatement and remediation of all violations.

⁷ See, e.g., *Town of Boothbay v. Jenness*, 2003 ME 50, 822 A.2d 1169 (discussing the well-established principle of administrative "res judicata," or "things adjudicated").

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Summary of the Evidence. Throughout this process, CEO White, state officials, the Haines family, and concerned Gray residents and taxpayers have consistently attested to Twin Brooks' unlawful expansion beginning in early 2006. Clearly, Twin Brooks planned to expand, and began without the mandatory Planning Board, DHHS, and DEP approvals – consistent with its expansion from 25 to 43 sites in the 1990s. Only after they were caught and specifically found – with respect to the sites at issue in this appeal – to have violated Gray's Campground and Shoreland Zoning Ordinances, did Twin Brooks stop its illegal expansion activities. While the Haines family has been the most direct victim of Twin Brooks' recent conduct, the entire community, and fragile Little Sebago Lake, have all paid the price for Twin Brooks' many years of illegal expansion.

The Haines family has carefully documented Twin Brooks' violations, submitting (i) sworn affidavits attesting to Twin Brooks' clear cutting and construction of new sites; (ii) aerial and ground photographs depicting these changes; and (iii) un rebutted testimony that, starting in the Spring of 2006, Twin Brooks radically altered the previously undeveloped Shoreland and property line setback areas. Many more members of the public have supported and supplemented this evidence. Indeed, Gray's own former CEO, Paul White, found these activities – and new camp sites – to be in violation of Gray's zoning ordinances.

Against this overwhelming and consistent body of evidence, only one story has ever changed – that of Twin Brooks. What Twin Books mapped out in May and September of 2006 as "Future Sites," and then constructed without approval, are now claimed to have existed since before 1968! Indeed, no two plans submitted by Twin Brooks are alike, reflecting a shell game of renaming and re-configuring "existing" and proposed "new" sites and access roads, attempting to deceive and confuse the public and Town officials alike. Witnesses presented by Twin Brooks fondly recall camping near the "rock," but place the rock in the vicinity of Twin Brooks' oldest sites – on the "Circle" and near the office – not near the property line. Only with the help of Attorney Lowry's leading questions did a few of these witnesses change their testimony and try to place the sites closer to the Haines family property on Attorney Lowry's unidentified site plan.

Even the testimony of Cal Austin, the 40-plus year owner and operator of Twin Brooks, significantly undermines the campground's position. Mr. Austin claims to have filled rain puddles at campers' requests in the setback areas at unspecified times in the past. However, he also explicitly stated that the numbering of the original 25 sites remained unchanged through the years so that campers who used them historically could still refer to them by the original site numbers. His statement that sites labeled 7A, 7B, and so on were added later, and numbered differently to avoid confusion with the original sites, confirms that his 1991 map (submitted to DHHS) (May 23, 2007 PowerPoint, Slide 11) shows the original sites as Sites 1-25, with everything else added later. Comparing Mr. Austin's own 1991 map, and Al Frick's

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September 11, 2006 maps, it is clear that Sites 6-9 and 12-15 weren't even among those added in the 1990s. This is also consistent with all of the sworn witness testimony that these sites were not constructed until 2006. In sum, any sites other than those sequentially numbered 1-25 on the 1991 map, to the extent they are located within the Shoreland, wetland, or property line setbacks, are illegal, and NOT grandfathered sites.

Moreover, Mr. Austin's testimony regarding the numbering of old and new sites is entirely consistent with the evidence presented by Mr. Haines:

Aerial Photographs: Photographs taken in June 1975 (Ex. 10), April 1986 (Ex. 11), April 1995 (Ex. 12), April 2001 (Ex. 13), and May 2004 (Ex. 14) – in most cases before the leaves were out, and thus revealing the ground below – clearly show that the area within the 100 foot setback of the Twin Brooks/Haines property line was undeveloped, fully wooded, and contained no campsites. Contrast these photos with the February 2007 aerial (Ex. 15), and you will see the area next to the property line newly cleared of vegetation, graded and filled, and serving as a parking lot for large RVs unlawfully stored there in the winter of 2006-2007;

Affidavits: Sworn testimony in fifteen affidavits (13 from non-parties) consistently describes the area adjacent to the Twin Brooks/Haines property line as undeveloped, densely wooded, and empty of RVs or even campsites as recently as the winter of 2005-2006, before Al Frick plotted "Future Sites" in this area, and before Twin Brooks constructed the m;

Ground Photographs: Photographs taken by Gerry Haines (Exhibits 16A-16L) show the previously wooded, undeveloped area adjacent to the property line now denuded of trees and other vegetation; covered with truckloads of fill; graded flat; sprouting new electrical and water hookups; and littered with RVs, decks, platforms, storage units, demolition debris, and junk – all added in 2006 in violation of Gray's Shoreland, Campground, and other ordinances; and

Testimony of Eliot Woodbury, Paul Libby, Cal Cutter, John Redlon, Susan Honeywell-Nielson, Gerry Haines, Carol-Ann Doucette, and Frank Vorlicek: These witnesses – most long-term, year-round residents – testified in person that since the winter of 2005-2006, Twin Brooks engaged in a campaign of expansion within the protected setbacks that has included "clear cutting," new sites where none existed before, overuse of the campground's limited septic system – resulting in an offensive stench in the summer of 2006 – and dramatic, even "alarming," changes in the scope and manner of the operation of the Twin Brooks Camping Area.

The only evidence proffered by Twin Brooks was statements (unsworn) from five or six former campers at Twin Brooks. Most of these individuals admitted being related to the campground's owners, and their statements were carefully elicited, with leading questions, by

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Attorney Lowry. As campers or relatives of the owners, all clearly have a stake in the outcome of this matter. These individuals described camping near the water and Circle, on sites for tents, and later small pop-up campers, enjoying the natural beauty and quiet of the campground. One or two of these witnesses agreed, at Mr. Lowry's prompting, that sites they saw being used may have included sites between the Circle and the Twin Brooks/Haines property line.

Not a single witness for Twin Brooks claimed to have any knowledge of where the property boundary was. None of them claimed to have recently visited the site, or to have compared their recollections to its current condition, or even checked to see if the sites Mr. Lowry pointed out on the map were those they recalled using 40 years ago. Moreover, Mr. Lowry never even identified the date of the map he asked witnesses to use, and failed to submit a copy for inclusion in the record. Importantly, given the many changes to the campground described by Mr. Austin as starting in 1993, there is no evidence of any correlation between the sites described as existing in the 1960s, and those now filled with RVs next to the Haines family's property line.

Finally, the photographs submitted and described solely by Mr. Lowry add nothing to the relevant evidentiary record. Not a single witness described the photographs – not even Cal Austin. Mr. Lowry claimed that one photograph is relevant to the status of the campsites in dispute, but did not claim to have taken the photograph, or even to have any personal knowledge of Twin Brooks prior to his representation commencing in May 2007.

Conclusion. In sum, amid the turmoil and threats that tainted the June 27, 2007, hearing and intimidated members of the public opposing Twin Brooks' illegal expansion, it could be easy to lose sight of the fact that the most probative evidence offered by Twin Brooks – the testimony of Cal Austin – supports rather than contradicts the sworn affidavits, maps, and aerial and other photographs presented by the Haines family, or the public comment of long-term residents clearly demonstrating that Campsites 6-9 and 12-15 are located in the protected setbacks, were added in 2006, and are not grandfathered.

It is clear that Twin Brooks has not – and indeed could not – meet its very difficult burden of proving that the campsites in question satisfy the strict requirements for grandfathering. This is particularly true in light of all the tangible evidence in the record to the contrary – fifteen sworn statements, Cal Austin's 1991 map, Twin Brooks' certified site plans calling the campsites "Future Sites," and, of course, the voluminous photographic evidence. On this record, the decision to find the asserted violations and to require compliance is an easy one. Indeed, simple compliance is exactly what is expected of each and every landowner and business operator in the entire Town of Gray. To allow one party to side-step the law in the face of glaring evidence of violations would not only be an injustice to those who obey the law – it would invite others to run, not walk, down the "act first, get away with what you can, and beg

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forgiveness for the rest” path – ultimately benefit ing no one.

Very truly yours,

BRANN & ISAACSON

Kevin J. Beal
*Counsel for Gerald Haines
and Francisca Morant*

cc: Leslie Lowry, Esq., via U.S. Mail
Michael Hill, Esq., via U.S. Mail

Attachment s:

Proposed Findings and Motion
Copy of May 23, 2007, PowerPoint
Copy of June 27, 2007, PowerPoint