



Brian Cavanaugh <brian@cavanaughpartners.com>

Cavanaugh Cherry Hill Road Opening Permit Letter

Brian Cavanaugh <brian@cavanaughpartners.com>

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To: Susan Semrau <ssemrau@dorseysemrau.com>

Cc: Fred Semrau <fsemrau@dorseysemrau.com>, Joyce Bushman <jbushman@mendhamnj.org>, Lauren McBride <lmcbride@mendhamnj.org>, Paul Ferriero <paul.ferriero@ferrieroengineering.com>, Susan Sharpe <ssharpe@dorseysemrau.com>

I am quite surprised by your most recent communication on behalf of the Borough. I had expected that, now that the Chief of Police, finally armed with accurate information, had clarified his perspective, that the Borough Council would now be provided the opportunity to review, and likely reverse, its objection to my application to replace my fence. Instead, I am getting unexpected comments from who I can only assume is Joyce Bushman, the Borough Administrator, since that was the author of the original letter you sent me. So, with that in mind, Ms Bushman, I'll now address you directly.

I am disappointed that the Borough is now spending our taxpayer dollars on what appears to be (from this email's cc list) two people from an outside law firm to spend time on what I would have hoped would be a very simply-resolved matter. I've been trying for nearly 6 months now to work WITH the Borough on this, from the time I first filed the initial fence permit 2 WEEKS BEFORE I began the installation of the replacement wall, which the Borough Engineer eventually required me to desist from with his formal Stop Work Order (with which I complied). After realizing nearly two weeks after filing the fence permit that that my fence permit would not be processed until after I obtained the survey (which had already been ordered, but it was scheduled weeks away still at that point) I did commence the fence replacement in the interest of time. I had every reason to believe that I would be granted the permit from the Borough fence permit fellow and it became clear that the Borough had a long history of not enforcing whatever fence permitting process it had, as evidenced by the Borough's repeated inability to produce even one approved stone fence permit for any of the 9 such stone fences within the ROW just on Talmage Road. So, in the interest of time (an issue I have already shared with you), I decided to proceed with the fence and related permit in tandem, since it was so certain that the permit would be granted. I was not even aware of the existence of -- or need to file an application for -- a "road opening permit" prior to my beginning installation of the replacement fence. The fence permit administrator to whom I timely submitted the fence permit never mentioned any "road opening permit." In fact, even the mayor had not heard of a "road opening permit" -- she said that she couldn't recall any road opening permit coming before the Borough Council in the 4+ years of her service when I spoke to her after learning about this requirement from the Borough Engineer, which was only AFTER I had begun installation of my replacement fence. Once again, going to the "selective enforcement" issue, I will remind you all that there are 9 other solid stone fences, just along Talmage Road, that are closer to the road than my proposed replacement fence (two of which were installed on the property of Borough officials -- Bryan Seavey and Dennis Santos -- at the time they were installed), and no Borough administrator -- I've asked the fence permit fellow, the Borough Engineer, even the Mayor -- has yet to be able to confirm for me that ANY of those 9 other solid stone fences -- let alone *all* of them -- ever even bothered even filing for a fence permit and "road opening permit," as I did, let alone receive approval from the Borough to install such stone fence. So, please do not try to imply that I did not try to work with the Borough administrators PRIOR to beginning my installation. In fact, I took the "high road" (unlike most, apparently) and I have paid the price ever since for doing so in the form of what I can only describe as administrative obstruction.

Your previous letter, forwarded by the Borough's outside attorneys, clearly stated that the reason (presumably, the ONLY reason, for I'm sure that your letter would have otherwise enumerated any other reasons, had they existed, that the Borough Council considered) that the Borough Council rejected my proposal was because of a "traffic sight line" issue the Chief of Police had with what had been described to him (apparently, it now appears) in a misleading manner, as the proposed replacement fence. So, whomever misled the Chief of Police regarding the nature of this proposed stone fence also likely misled the Borough Council. The Chief of Police told my friend (who met him "on site" to show him and explain the temporary model of the proposed fence I had constructed for the Chief to review) that he had previously been under the impression (a mistaken impression at the time he shared his assessment with the Borough Council) that the solid stone fence would be constructed to be at roughly *eye height, when standing*, which is clearly not the case from the plans (clearly showing it to be "conforming" and well below the eye height of a motorist, at only 30" in height) I submitted, at the Borough Engineer's insistence, as part of my "road opening permit" application. I could understand why the Chief of Police might have had such concerns had the proposed solid fence, regardless of building material selected, been proposed to be so high. But, that is NOT what I proposed, as the Borough Engineer knows full well. So, let me ask directly if the plans for the wall, complete with detailed measurements, submitted at the insistence of the Borough Engineer, were shared with the Chief of Police *and* the Borough Council prior to the Chief's review and advice to the Borough Council, and prior to the Borough Council's decision? If not, why not? The only reason I ask is that it seems that the only possible way that the Chief might be under such a significant mis-impression is if those plans were not shared with him.

I am also quite bothered by how you appear, in your most recent communication, to prioritize the safety of passing motorists over that of my family. Just to put a fine point on how incredible that apparent position is, we are residents and taxpayers, and have been for over 30 years, paying over 3/4 of a million dollars to support this community (and your salaries, I might add). The motorists that have driven into my yard over the years have included both non-residents of Mendham and drunk drivers. Thank God one of our dedicated school bus drivers witnessed one of these drunk drivers, who fled the scene after running into our hedges, and promptly notified the police. He was caught in Chester two hours later, still drunk, with two children in his car. Every motorist (there have been six of them over the past 30 years, including 3 in just the past 2 years) that has run off the road into our property and caused damage has been at least a "distracted driver," likely on their phone while driving, given the distance off the road they traveled onto my property and the speed/force with which they did it. None of them appeared to have observed the Stop sign at the end of Hardscrabble Road. Had they done so, they would never have had anything close to the momentum required to mow down a section of my hedge, stone fence or wooden fence with the force with which they have done so over the years. So, I must ask, "Whose "safety" does the Borough prioritize?" That of the law-abiding property owner or that of the law-breaking (it is against the law for a motorist to careen off the road and into someone else's private property, isn't it?) motorist? If the roads are insufficiently safe as to enable a reasonable (not running a Stop sign or speeding, which they also do frequently on Cherry Lane) driver to stay on the road, then might I suggest that the Borough improve the condition of its roads. This is a particularly sensitive issue for us, as we have just entered the "grandchildren stage" (our first was just born last week) of our life, and we'd like to understand how safe these children should expect to be playing in our yard. So, I really must insist on having our elected representatives -- the Mayor and Borough Council -- clarify for us -- and, for that matter, our entire community -- whose rights to safety they prioritize -- those of their law-abiding, taxpaying constituents, or those of "transient motorists" who *break* the law (driving off the road into other people's private property, causing damage, sometimes while drunk)? Based upon my very short interactions with the Police Chief, I'm pretty sure that he would prioritize the residents/property owners, thank God, but I think it's time to hear from our elected officials on this, given your recent communications to me, which, presumably, represent the priorities of the elected officials of the Borough. I think our community deserves to have this point clarified by THEM, not their representative.

In fact, one of the reasons that I am proposing to replace my wooden fence with a stone fence (with large, immovable base stones set in the ground) is PRECISELY to keep these transient law breakers from injuring/killing any of our family members while enjoying our private property. I have already explained this to the Borough Engineer and Mayor in the past. While the Borough Engineer didn't seem to care too much about that risk to my family, he did not go so far as to tell me that he prioritizes the right to safety of the motorists over those of my family. If this is now the case, I would like to know that. The Mayor, for her part, seemed to agree with me that no family, including mine, should have to accept such frequent dangerous motor vehicle incursions into their private property. So I am quite surprised by *your* comments. I would see your point, of course, were I to be proposing to place my wall IN the existing roadway (which I am not, of course), as that is a place where the transiting public *should* reasonably expect to be protected. There is, however, nothing to suggest to those motorists that they have a right to be protected -- at our expense -- on OUR private property. The right of way easement exists for 25' from the road's centerline -- I understand that -- but it's just an easement, not ownership, to be clear. Moreover, the Borough has only used 10' of that easement, EVER! The Borough has never used - and has never maintained -- the rest of that easement, the 15' of my property closest to the road -- I own, use and maintain that property. Because the Borough does not use it in ANY manner, motorists rightly have *no reason to believe* that they are *entitled* to drive onto my private property, even if it exists as an unused easement. I simply don't understand the logic -- or wisdom -- of using this type of argument in what appears to be this latest attempt to frustrate my legitimate interests in protecting my family and property, and in being allowed the enjoyment of my private property, a right to which all private property holders are entitled, so long as that "enjoyment" complies (as does the fence replacement I have proposed) with the local codes.

It's also disappointing to understand that the Borough, which benefits so much from its Colonial-era history, would hold in such disregard my reasonable property improvement proposal -- completely in keeping with the Colonial era -- of the owner of the second oldest home in the town which, unfortunately, is situated only 30' from the road. To, instead suggest that this historic property sacrifice *fully half* of that property's front yard, by requiring it to install its property border fence 15' in from the road, is tone-deaf, at best, in a community that so values its rich history, such as ours. I could, perhaps, understand why the Borough *might* take such a position were the home situated very far back from the road, but that's clearly not the case here. Does the Borough now have such little regard for both private property rights *and* the community's historical jewels (dating back to 1740, our home is apparently loved by many in the community, who would, no doubt, prefer to see it protected and enhanced by the proposed stone fence) that it would knowingly communicate as cavalierly as you have in this matter? Is anyone over there actually *thinking* before *communicating* these evolving, surprising (some might say, crazy) perspectives? Who's "in charge" over there? Are you taking personal responsibility for all of this? Does the mayor approve these communications before you send them to me? The Borough Council?

I'm copying the mayor and several Borough Council members (with whom I have been acquainted with over the past 20 years), to make sure they fully understand the perspectives being articulated on their behalf and to alert them to the facts of what I see as an bureaucratic -- and, perhaps, nefarious -- travesty of process. It may not change anything, but I want to make sure that everyone has the same information, so we don't run into the inevitable, "Oh, had we known that, we

would have behaved differently, of course" type of excuse for the existence of what appears to be a bureaucratically deficient system.

By the way, I want to correct what I view as your ill-advised and poorly researched *legal guidance* (?) regarding land ownership and insurance coverage issues in your last communication -- apparently, you feel that this unused right of way area adjoining the roadway is *not*, my property *and* that my insurance carrier would *not* cover any damage (including to the motorist) caused by a motorist leaving the roadway and trespassing onto my property. I'm no lawyer, but I believe that both of those pieces of guidance are inaccurate.

First, regarding the question of *who* owns the property, I provided the Borough with an independent survey *clearly indicating* that *my* property extends to the *middle of the road*. At the time of receiving this survey, I asked the surveyor if his survey indicated that the property I owned extended to the middle of the Borough's road. He confirmed that it did. This is the very survey the Borough required that I obtain and provide them, because its administrators could not independently confirm the Borough's own ROW on these roads. So, to be clear, the Borough is currently utilizing, at its election and as is its right, 10' (from the centerline of the road) of property that I OWN under the Borough's 25' (from the centerline of the road) ROW -- which is an easement, *not* a transfer of ownership -- in order to provide a road for the public. All of this is clearly marked on the survey. To be clear, the Borough does NOT "own" even that 10' of property over which it currently exercises its ROW easement, let alone the other 15" further (onto my property) feet of its unused (and, never used to date) ROW easement. I just want to remind you of the information already clearly included in the survey I provided to the Borough as part of this process.

Separately, contrary to your "guidance," not only do I believe that my insurance company *would* cover me in the event a passing motorist was injuring after leaving the roadway, driving onto my property and impacting any structure on my property, including a stone fence 4' away from the road's edge, but other insurance companies (including USAA) already have proactively accepted the liability, on behalf of *their* insureds, for doing just that when their insureds have collided with my "structures" only 2-3' from the road's edge -- and have paid me "settlements" for the damage to my property as a result. But, since you bring it up, I'll confirm with my insurance company that they do, in fact, cover whatever damage (including to the motorist themselves) occurs as a result of a motorist driving onto any portion of my property *not* currently being used under an easement (such as the existing road). If they don't, perchance, I can assure you that they will no longer be *my* insurance company. I'm sure that the other 9 properties along Talmage Road (or in the many other areas of the Borough) where stone fences are already installed within the Borough's right of way *all* have insurance companies that will cover them, as well. But, if you really believe that all of these unpermitted stone fences within the right of way present their homeowners with the risk of being liable and uninsured for the injuries sustained by those motorists that drive off of the road and impact those stone fences, then I fail to understand why you have not *already* warned *all* of the residents of the Borough of this risk, perhaps by posting a public service warning on the Borough website. Also, while we're on the topic, motorists that careen at high speed into the trunks of large trees or into other items that might be located, even temporarily, within the ROW of private property abutting a road, can injure themselves just as severely as they would driving into a stone fence. Does the Borough have a consistent policy of enforcing the type of "public safety concern" you have now articulated across ALL such potential hazards? Does, for example, the Borough prevent any trees of species that can grow to be large from being planted with the right of way of its roads? The answer to that is clearly "no", because the Borough doesn't exercise a consistent enforcement of even *just* the many unpermitted stone fences within its ROW, let alone all of the many hazards an out-of-control motorist might encounter when driving into the private property of the residents of Mendham Borough.

Please provide answers to all of my many direct questions, as you did for much of my last email.

Thank you, Ms Bushman.

-- Brian

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