GRIFFIN & MCMANUS
684 Boston Post Road
01-8

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
TUESDAY, APRIL 24, 2001

The Board consisted of:
Patrick J. Delaney III, Acting Chairman
Lauren S. O'Brien, Acting Clerk
Thomas W.H. Phelps
Gilbert P. Wright, Jr.
Jonathan G. Gossels, Alternate

Notice was published in the Sudbury Town Crier on April 5 and 12, 2001, posted, mailed and read at this hearing.

Mr. Delaney, Acting Chairman, explained the requirements necessary to substantiate the granting of a special permit. He also explained that if anyone is not satisfied with the Board's decision, they have the right to appeal to Superior Court or District Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Michael Griffin and Timothy McManus were present to represent a petition for renewal of Special Permit 00-3 to operate an automobile repair shop, including used-car sales, at 684 Boston Post Road. Also present was their Attorney, Robert Solomon.

Mr. Griffin was requesting that Condition 8 be deleted. He said the stockade fence has been installed with a temporary gate along the rear zone line. Mr. McManus requested the term of the permit be extended to two years.

Mr. Griffin said it is still his intention to pave the rear after which grease and oil traps will be installed. He said economic considerations have prevented him from doing so thus far. The area to be paved was pointed out on the plan submitted with the application.

Mr. Delaney asked if there had been any complaints. Mr. Griffin said the only issue was when the gate blew down.

Bruce Kankanpaa, 11 Stone Road, abutter, said he was not satisfied with the temporary gates.

Mr. Griffin responded that he was required to install 6-foot gates; however, he installed an 8-foot gate which shields Mr. Kankanpaa's house from the operation.

Mr. Wright pointed out that the condition for a 6-foot fence was for the previous owner. The Board has required an 8-foot fence for Mr. Griffin's operation.

Mr. Griffin said he is trying to shield Mr. Kankanpaa's house as much as possible.

Board members agreed that the property is much improved from previous years.

There were no further comments. The hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: "To grant Michael J. Griffin and Timothy M. McManus, applicants, renewal of Special Permit 00-3, granted under the provisions of Section III,B,2,f of the Zoning Bylaws, to operate an automobile repair shop, including limited used-car sales, property located at 684 Boston Post Road, Business District #6, provided that:

1. This Special Permit is to be for automotive mechanical repairs only. Automotive body repairs and painting are specifically prohibited.

2. The use is restricted to the business-zoned portion of the site.

3. Hours of operation shall be Monday through Friday 7:30AM-9PM, Saturday 9AM-7PM, Sunday 12-6PM.

4. All work is to be performed within the confines of the building except for incidental washing of vehicles with biodegradable soap.

5. There will be no outside storage of new or used parts, tires, assemblies, junk, trash or inoperable vehicles. Automobiles parked on the pavement to the west shall be limited to owners' cars, cars waiting to be serviced, and no more than two (2) cars for resale.

6. All exterior lights are to be wall mounted or mounted on exterior posts and are to be oriented to cast light downward only so as not to illuminate the residential areas abutting and across the street.

7. All residential areas not designated for planting areas are to be clear of debris and maintained.

8. The unpaved area to the west of the building is not to be used for employee and customer parking until such time that it is paved and sloped in such a way that storm water runoff is collected in a catch basin equipped with a gas and oil trap.

9. Disposal of all hazardous waste and materials is to be in conformance with all local, state and federal regulations.

10. Floor drains shall conform to all local, state and federal regulations.

11. Sanitary facilities shall conform to all local, state and federal regulations.

12. A dumpster is to be provided for trash and will be screened from view.

13. The sale of used cars shall be restricted to one (1) per month. These vehicles shall not exceed two (2) on display as set forth in Condition 5 above.

14. There will be no pricing sign displayed or written on the front windows of any vehicle offered for sale except as required by state and federal law.

15. The applicants shall adhere to the requirements of Section III,B,a of the Zoning Bylaw, Prohibited Uses.

16. This permit is non-transferable and will expire in one (1) year on April 24, 2002, and the Board will consider renewal upon receipt of proper application on or before that date."

VOTED: In favor: 5 (unanimous) Opposed: 0

REASONS: The Board finds that the proposed automobile repair shop is in harmony with the general purpose and intent of the Bylaw. The use is in an appropriate location, not detrimental to the neighborhood, and does not significantly alter the character of the zoning district. Adequate and appropriate facilities are provided for proper operation.

The condition requiring installation of the fence has been met and a temporary gate has been installed along the zone line to shield the operation from the abutter's view. An 8-foot permanent sliding gate will be installed at a later date.

The petitioner has indicated that it is still his intention to pave the area to the west as specified in Condition 8.

The Board continues to find a one-year renewal appropriate until such time as all conditions have been met.

Patrick J. Delaney III, Acting Chairman

Lauren S. O'Brien, Acting Clerk

Thomas W.H. Phelps

Gilbert P. Wright, Jr.

Jonathan G. Gossels, Alternate

VERRILL ET AL
NORTHWOOD AT SUDBURY
138 North Road
Case 01-9

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
TUESDAY, APRIL 24, 2001

The Board consisted of:
Patrick J. Delaney III, Acting Chairman
Lauren S. O'Brien, Acting Clerk
Thomas W.H. Phelps
Gilbert P. Wright, Jr.
Jonathan G. Gossels, Alternate

Notice was published in the Sudbury Town Crier on April 5 and 12, 2001, posted, mailed and read at this hearing.

Mr. Delaney, Acting Chairman, convened the hearing which is an appeal by Tyler et al of the decision of the Building Inspector to issue a building permit for Building #2 of the Northwood at Sudbury project located at 138 North Road.

Before proceeding, Mr. Delaney noted that the application the Board received included a request that two members of the Board recuse themselves from the hearing. One is Mark Kablack, the Board's Chairman, who has recused himself because apparently in his profession as

an attorney he represented or represents owners of the condominiums on the site in question. The second member is Lauren O'Brien who was asked to recuse herself because her husband serves the town as a Selectmen. Under the Board's Rules & Regulations each member makes their own determination as to whether or not they personally have a conflict of interest and in this case the Board decided there was no conflict of interest and she will be serving this evening.

There were also some late delivered materials. These materials were served by hand to four of the five members of the Board on Saturday. The Board has to consider whether or not these will be allowed. The Board's Rules & Regulations require that substantial materials must be submitted within six days prior to the hearing or continuance. We also strongly prefer that they be submitted in the normal way to the Town Clerk The Secretary of the Board of Appeals can then be sure they are all time stamped properly and she will then make distribution to Board members.

Mr. Delaney asked whether or not to allow these additional materials. If the Board wishes to accept them, he would suggest a formal vote to waive that condition in this instance.

A motion was made, seconded and unanimously voted to waive the condition in this instance.

Mr. Delaney said this is not the first time we have heard a case on this property. There was another case some years ago in 1998. During those hearings the public hearing went on for several sessions with it sometimes it being difficult to fully comprehend the points being made because the presentation was fragmented and because as the points were being presented by the applicants, the Board members were asking questions. He would ask the Board to write their questions and hold them in order get a cohesive presentation.

Mr. Delaney outlined the following procedure to be followed for this hearing. First, the presentation by the applicants and their representatives, if any. Following that will be questions and comments by the Board after which the owner of the property and his representatives will have an opportunity to speak.

Correspondence will then be read into the record. At that time the hearing will be open to input by the public. Board members will ask final questions after which the applicants will be offered the opportunity to summarize and perhaps rebut briefly with a similar opportunity being given to the owner.

At that point the public hearing will be closed and the Board may deliberate at that time. This process may take more than one evening.

Additionally, under the Board's Rules & Regulations there is a meeting limit to 10:30PM at which time the Board will decide whether the hearing can be completed or should be continued to another time.

Mr. Delaney asked whether there were any questions.

Mr. Phelps pointed out that a lot of the material submitted for this hearing was presented at the previous hearing which was also an appeal of the Building Inspector's decision to issue a building permit and is still in court. He was not sure of the legal procedure to revisit a lot of the material which has already been discussed, although not by this specific Board, when it is essentially being decided by the court.

Mr. Wright said he would suppose the Board would use its discretion as to whether what is being talked about is germane. He said there is a lot of material which may be relevant but could be background material. The Board would like to address relevant issues.

Mr. Delaney opened the hearing for the applicants' presentation.

Mr. Tyler asked if the Board would stipulate that there is sufficient information to consider Mr. Wagner and Mr. Verrill as aggrieved parties. He said this is an issue that people have raised.

Mr. Delaney said Mr. Wagner's and Mr. Verrill's positions are key to conducting the hearing. If they are not aggrieved parties there is no basis for an appeal under Chapter 40A. Mr. Wright said he would need to hear some evidence before stipulating.

Stephen Verrill, Wheeler Road, Concord, MA, abutter said he owns property directly across North Road from the development. It is farmland and receives drainage from the north side of North Road. He had two concerns. One is quantity of water and the other is quality, and the quality not being the result of whether is has been properly treated for septic or not but because the contaminated area residue from Unisys runs through his property. He understood that this Board does not have jurisdiction on water but felt that his harm is directly related to the number of units that are built. The more water that flows, both the quantity and quality of his water is affected. His concern is that the building not be in excess of what is allowed by zoning.

Mr. Verrill distributed copies of a map prepared by ERM, Boston, MA dated April 11, 2001. The map depicts the plume areas which have been identified. He pointed out a well that has just been found with contaminant in it and showed a blown-up Polaroid picture taken ten days ago that shows a that well flowing with water coming out of the ground. He said this is the result of the pressure from uphill groundwater.

Mr. Verrill added that part of the package the Board received earlier shows the groundwater maps that ERM and others developed which show that the water from the area from Unisys and Northwood does flow to his property.

With regard to the septic system for Norwood, Mr. Verrill said it was explained to him that it couldn't possibly harm him because it is filled with very good gravel with excellent drainage. He said the water moves very quickly down toward the septic system. The detail that was left out was that there is ledge within 10-12 feet from the surface of the septic system and the ledge funnels water down to where the plume goes.

It was Mr. Verrill's position that the density of the development of Norwood would impact his property through the septic system and storm drainage

Mr. Phelps said the Board is trying to determine whether there is legal standing. He referenced Building Inspector Hepting's letter dated April 4, 2001 which indicates that neither of the co-signers have demonstrated standing. The letter states that "standing is predicated upon financial injury and devaluation of property directly resulting from an action of others." It seemed to Mr. Phelps that there is enough evidence to say that one of the applicants is directly affected.

Mr. Wright did not believe the Board had to go as far as Mr. Hepting's literal interpretation and insist on dollar and cents evidence.

Mr. Verrill said the previous Northwood owners filed summary judgment against them saying we didn't have standing, but the court found there was standing.

Attorney Richard McCarthy representing the present owners wanted to correct the last statement which was made regarding summary judgment. He said there are two cases in the land court. One involves another piece of property – Bay Avary. In that case, which didn't involve the Northwood property, the court did decide that the petitioners had standing. In the case which we're involved in that issue has not been decided and we are seriously contesting this. He would point out as to the two petitioners, Mr. Wagner & Mr. Verrill, they stand on different footing. Mr. Wagner is not an abutter; he's an abutter of an abutter. He's more than 300 feet away and under the statute he's not a party in interest under Chapter 40A, Section 11. So we would challenge his standing to be here as we have challenged it in the land court.

Mr. Delaney said the Board has an application in three names. His position would be that if any of those three names could be established as aggrieved parties, the Board could proceed with this case.

Following discussion the Board agreed that there was standing by at least one of the parties and the hearing could begin.

Mr. Phelps asked whether Mr. Tyler could indicate those points which are new and unique to just this building.

Mr. Tyler replied that because a building permit was not pulled for the entire project, it was his understanding that this is a whole new hearing. He said every two years one can come back for some kind of relief and more than two years have elapsed. But more particularly, he said this is a new building. It has some of the same issues and has some new issues as well. Also there are two Board members who are new to the issue and there is new information.

Mr. Delaney said there will be items which will be familiar from the previous case which will be familiar to most of the Board members. He believed the two members for whom those items will not be familiar will not be shy about asking questions during the question and answer period. He suggested that when Mr. Tyler got to a topic that he knew had been previously explored with three of the members, that he touch on it lightly and emphasize the items that are more significant to this building.

Mr. Tyler felt the easiest way was to just take the packet, with the exhibits, and go over it, which he did as follows:

Exhibit 1 is the Selectmen's site plan for the layout and services to be provided.

Exhibit 2 is the Water Resource Protection District (WRPD) special permit. This was included because of page 8 which is marked as to the date of the plan to which this permit applies.

Exhibit 3 is that plan. The septic system in Exhibit 3 is the one that has the WRPD special permit. Exhibit 3A is the septic system that was approved by the Selectmen and was approved by the Board of Health which issued the septic permit. This is an entirely different system from the system shown in Exhibit 3.

The septic system has been moved significantly and was done without a public hearing and without an opportunity for engineers hired by Mr. Verrill to comment on it. Basically the developer changed his plan and does not have a WRPD permit for it. There is nothing in the record that says that the Board did a formal modification as is required to allow for this change in the siting. There is no valid permit for the septic system that was built.

Exhibit 4 was skipped over.

Exhibit 5 consists of groundwater maps from which Mr. Tyler demonstrated where the groundwater flows. Figure 16, the first map, shows all the properties that are listed, well #5, Mr.

Wagner's property, and Mr. Verrill's property. There is an arrow that goes through an S which is actually a model of the ground water flow done ERM, hired by Unisys, and has nothing to do with Mr. Verrill against the Northwood project. This was done independently and ERM says that from this site, the site where Northwood is going to be putting their septic system, the groundwater is flowing right down into Mr. Verrill's property in areas of known contamination.

The last figure of this exhibit, figure 18, shows the model well capture zone for the public water supply well. It shows the gradient of groundwater flow going from the Northwood project directly across the Melone property, then directly across Wagner's property and reaching into well #5.

Exhibit 6 demonstrates that when the engineers looked at this property, the topography and the way the water flows off this ledge, the hydro geologist did the study and figured that the water table could increase by 3 ½ feet in Mr. Verrill's fields. Further, parts of the times of the year it will be up to within a foot of the surface. Mr. Verrill's concern is with when he can plant fields that are already difficult to plant. A late planting in the year may lose the entire growing season. Equally as important is the whole issue that there have been established groundwater flows since 1959 as being problems with that site where contaminants have been released from the Sperry site into the ground and which flowed in a certain way. When those patterns are changed, it severely complicates the cleanup activity and effort because it gets dispersed and much harder to clean up which will be a problem. It'll also be a harm to Mr. Verrill and Mr. Wagner because they will be unable to use parts of their property.

Exhibits 7 & 8 were skipped because they are environmental reports and self-explanatory.

Exhibit 9 – Mr. Tyler said Mr. Hepting in his first letter dated April 4, 2001 rejected the applicants' request that he find zoning violations on the existing site – that is that it is not being operated as a residential care facility. In the second letter dated April 4, 2001, Mr. Hepting refused to rescind the building permit. In the first letter he (Hepting) is of the opinion that the listing of items, in this case in the condominium master deed, establishes this as a residential care facility. The third letter dated April 4, 2001 states that the "project construction was undertaken within one year from the decision date and use thereof for the purpose intended commenced upon substantial completion thereof." Mr. Tyler said in the brief that was found in bankruptcy court, Mr. Kablack takes issue with both of those statements.

Mr. Wright asked if Mr. Tyler was speaking about Building #1.

Mr. Tyler replied in the affirmative, adding that he was talking about a project which also has to be a residential care facility. If the site is not being operated as a residential care facility then Building #2 is not part of a residential care development.

Mr. Phelps asked if Mr. Tyler was talking about Building #1 construction which the Building Inspector said took place within one year and therefore was started on time. He asked if Mr. Tyler's premise was that the use did not kick in.

Mr. Tyler said the real premise is that the Selectmen's site plan had a specific provision that says not only must construction start within the year but a substantial use must also start within the year or the permit shall lapse. The use that commenced was not a residential care facility. In the affidavit filed on behalf of the current owners it is not clear that it was even being operated providing the basic services that one would expect in a normal condominium. That affidavit also demonstrated that it was not a use until 13 months following the site plan endorsements and 17 ½ months following the actual decision, that affidavit from the time that people moved in they were not getting the services.

Mr. Tyler submitted a series of pictures which he took yesterday which he said show the current site condition. They show the roads not being completed, trash along the side of the road, Building #1, trash on the property, and Building #2 under construction. He said basic services are not in place.

Mr. Tyler said the permit has lapsed. Revisiting the issuing of the permit would allow the Selectmen to hold a public hearing to see if they wanted to extend it. Mr. Tyler would be hoping for ways to insure that the services would be provided as required.

Exhibit 10 – In terms of the height restriction of Building #2 the legislative history is important. This goes back 60-some years to 1936 when this "height exception" clause was first established in the Bylaw. That clause was very clearly intended for small protrusions that would go above the roof. It stated the limitation of height does not apply to chimneys, ventilators, skylights, and other accessory features usually appearing above the roofs. That language was changed in 1959 and the words "usually appearing above the roofs" was eliminated because the Planning Board at the time said they were not making a change only a clarification that makes the language clearer. The intention was not to enable crafty developers to dream up some creative new way to get around the height regulation for buildings as Northwood is try to do in their approach to the design. Exhibit 10 is the historical background for the height exception that applies.

Exhibit 11 – Mr. Tyler said Mr. Verrill hired a registered architect, Paul Miner, from Concord, MA who looked at all the plans and made measurements of those plans to determine the heights of the various roofs on the building. He determined that all three of the roofs were above the 45-foot limitation, even the flat portion. In his affidavit which is included with the exhibit, he points out that the plans that were developed by the architect were misleading as they show a flat topography. They did not actually incorporate the details of the site plan; that was done by the engineers. When Mr. Hepting looked at the plan, it mentioned the height of the building as being

43 feet. This was based on the architect not having followed the directions of the Zoning Bylaw on how the height of buildings is calculated. The Zoning Bylaw is very specific. You measure the finish elevation of the ground on each side of the building and calculate the mean.

Mr. Wright pointed out that this was brought up in the first case and the Board approved the plans the way the were.

Mr. Tyler replied that some members disagreed.

Mr. Delaney said the Board did not vote any individual item.

Mr. Tyler said he was talking about Building #2 which has not been brought to the Board's attention. Both buildings are being built off the same plan. Looking at the elevation it shows a ground elevation that's about 3/4s of a foot below the top of the first floor. That is not the ground elevation that is shown on the site plan. The affidavit addresses both buildings and this application puts this in a different context than that which we were visiting before.

Mr. Tyler said Mr. Verrill's architect comments on where these mistakes were made and shows how the calculations should be made in accordance with the Bylaw. He establishes that for Building #2, the distance is measured by the Zoning Bylaw to the roof that goes all the way around and that to the peak or ridge of that roof the distance is 53 feet 2 inches or over 8 feet above the maximum allowed. There is an interior flat section behind this roof section that

functions as a roof which is above the 45-foot limit. The entire building exceeds the height limitation of the Zoning Bylaw. Pictures were presented in support of this interpretation.

Exhibit 12 includes part of the Zoning Bylaw which establishes a single dwelling for a lot. While residential care facilities do talk about having one or more buildings in the Bylaw, Mr. Tyler said some have argued that to be a contradictory statement and more weight should be given to one than the other. He said there is nothing that says in the Research District provision that those other buildings have to be for dwelling purposes.

He said this particular section, single dwellings per lot, was last amended in 1998. So, quite a few years after the residential care facility was put into the Bylaw this was revisited by the Planning Board who did not see any need to provide the exception for residential care facilities. They specifically identified senior residential community and the incentive senior developments as two kinds of developments that would allow more than one dwelling unit.

In response to a question from Mr. Wright regarding single dwellings per lot, Mr. Tyler responded that the Bylaw provision applies to the entire town, not just on residentially zoned land. This is one of the first provisions of zoning. With regard to exceptions, Mr. Tyler said he

included with Exhibit 12 the two front pages of the two exceptions in order to show that when an exception was warranted, it was added.

Exhibit 13 – Water Resource Protection Districts by their very nature are overlay districts. Their intention is to be more restrictive so that if there is a conflict, particularly if there is something that is specifically prohibited, the WRPD trumps anything else in the Bylaw. In this case it is very specific about the septic that can be discharged in Zone 3. And for residential uses it's very specific; it is for one and two family residences.

Exhibit 14 describes the kind of uses Title 5 considers to be residential, institutional and business. Mr. Tyler said we know that Northwood is not for example a hospital, correctional facility, church, gymnasium, or public park. Those are the kinds of institutional uses that might be covered under the terms of this bylaw.

Exhibit 15 – The whole purpose of this exhibit is to demonstrate that as far as the Board of Health is concerned they can issue the septic permit. There is no determination of zoning requirements because that is not their job. They are looking at Title 5 and WRPD has different rules than Title 5.

Exhibit 16 divides the relevant parts of the Zoning Bylaw and what speaks to the lot. In the Definition Section of the Bylaw a lot is defined as being under one ownership. When you have an easement on the property you don't own it. Lot area within a lot means the area that you own.

Exhibit 17 – Mr. Tyler said Mr. Conant took an entirely different position and the Board of Health didn't rule on it. They did not make a zoning determination. Mr. Conant used easements to satisfy the discharge requirements and as can be seen in Exhibit 16, that is not allowed in the Bylaw. In fact, they are using 56,000 square feet of an easement of Cummings land.

Mr. Tyler said Mr. Conant also used 21,000 square feet of the land under the subdivision way, and again, going back to Exhibit 16 it's very clear that you cannot use the land that is in the street layout for lot area - even if it's a paper street. You cannot build a house using that land and you cannot use it for septic. He said these exhibits establish that for the almost 10,000 gallons of septic discharge, there is not enough lot area in a more intensive use as allowed by zoning.

As to Mr. Verrill & Mr. Wagner's being harmed by this project, Mr. Tyler said they are entitled to enforcement of the Zoning Bylaw until the project is no more intrusive than allowed by the Zoning Bylaw.

Exhibits 18 & 19 were skipped with a comment by Mr. Tyler that Northwood must own all the property to give them the allowable frontage.

Exhibit 20 is the marketing brochure for Northwood. In that brochure there is virtually no discussion of care components for this project. This brochure is indistinguishable from any other luxury-type condominiums. It could almost be a cookie cutter for Springhouse Pond.

Mr. Wright as for the date of the brochure.

Mr. Tyler replied that it is a brochure for the Northwood project. Some of the ads for marketing Phase 2, for example the ad for February 6, 2000, with Phase 2 construction beginning, is relevant to Building #2. He said the second page described the dining situation and meal service as being no different from takeout at a restaurant which anyone in town could utilize.

Exhibit 21 is an affidavit of Ursula Lyons regarding the history of rezoning of the residential care facility. In previous discussions between Northwood and this Board a few years ago there were representations made by the Planning Board that this zoning bylaw change was made in consort with Mr. Conant, in discussions with Mr. Conant and his developer. Mrs. Lyons after having checked the records and revisited the Town Planner, found no evidence that Mr. Conant or Northwood was involved. All of that testimony to this Board was incorrect. Mr. Tyler read into the record Mrs. Lyons testimony from pages 10 & 11 of that affidavit.

Exhibit 22 is the budget which emphasizes that for Building #2, which is all part of the project, there are very limited amounts of money being spent on services to the residents. Mr. Tyler said this was the only budget he could find.

Exhibit 23 speaks to the common driveway limitations. Mr. Tyler said in the recodification of the Zoning Bylaw, certain things were taken out which were prohibited. Town Planner Kablack's explanation for that at Town Meeting was that if it is not included as allowed, then it's prohibited. Mr. Tyler would argue that there is nothing in the language here that allows one to mix the common driveway with a residential and a research or business use. In the provisions under research district it specifically addresses when common driveways are allowed, and it does not include mixing a business or research use with a residential use.

Mr. Tyler asked about Frost Farm.

Mr. Tyler said Frost Farm, being the town's development, is doing a lot of things normal people wouldn't be able to do. He said the Cummings property was subdivided without their

permission and roads are being run through conservation land. Frost Farm may have the same issue, but Frost Farm is not for this hearing.

Exhibit 24 shows two exhibits one of which is the definitive subdivision plan. The definitive subdivision plan requires the road to be built. There is a statutory provision if one wants to change the subdivision plan. This is part of the plan endorsed by the Planning Board and recorded at the Registry of Deeds. Mr. Tyler said Mr. Conant, on his own volition, decided he wanted to change it without going through the procedures. He applied for a driveway permit and built the second road which is a far different profile. This was done without public review, and in particular, this design has moved drainage basins down so that they are affecting more of Mr. Verrill's property. The drainage was moved to the southeast across the road which will eventually cross over into Mr. Verrill's property.

In summary, Mr. Tyler believed the applicants have given a large number of reasons, some of which may be more substantial than others, all of which are meaningful, as to why they believe that the building permit should not have been issued. He asked the Board to carefully consider this.

Mr. Delaney said at the last hearing Mr. Tyler went on at great length about the wording of the Bylaw. He believed what has been discovered, also after looking at Ursula Lyons' deposition, is that the Bylaw may not be worded the way some people felt it was being portrayed at Town Meeting. However, he said it does include the term "or independent living" or "assisted or independent living". He said the Board wrestled with that quite a bit the last time and he was one of those who felt that that did not mean this type of development. However, he said he changed his mind after thinking about it over time which was why in his mind that is one of the

issues that has already been resolved. Additionally, Mr. Delaney did not think it has a lot of meaning for Building #2.

Mr. Tyler said in the previous presentation he came away with the sense that the Board was divided in the past and might be in the future and he felt that to be an issue. He believed there is some new evidence here in terms of what was presented before and that Mr. Conant's involvement might have influenced the Board, but his (Tyler's) point that it is not now being operated as a senior residential care facility is a different point and is around the fact that the services that were to be provided have not been provided. Mr. Tyler felt the photographs demonstrate that since the new owners took over, somewhere right before the first of the year when they purchased the property, that as of April 23rd the garbage that was discussed in October is still there.

Mr. Delaney said he was struck by some of the dimensional variations which seemed very small; i.e., 9 inches above the limit.

Mr. Tyler replied that that is the part of the roof that cannot be seen. It is the interior flat portion.

Mr. Verrill said if 8 or 9 inches meant one less story, it would be 25% less storm water on his property.

Mr. Delaney said 8 or 9 inches might mean there is enough variation in the measurement, but it was difficult to know what effect might apply.

Mr. Wright believed these were issues raised and gone over before. He said this Board does not have jurisdiction over some of them. To his mind there might be something here that might be less than revocation.

Ross Hamlin introduced himself as the new owner of this property. He said Mr. Tyler has spent a great deal of time talking about Building #1. He said the height of Building #1 uses Building #1's plans. They are not Building #2's plans. The information that he and his representatives will present deals specifically with Building #2. He said his goal is to simply answer the questions that relate to Building #2, not questions that relate to Building #1 which was something that was decided by this Board a couple of years ago. That matter is in some stage of litigation right now and he was going to push that litigation forward to get it out of the way and put it behind him.

Attorney Richard McCarthy was present representing the new owner. By way of background he said he also appeared in the land court case in which Mr. Verrill and Mr. Wagner appealed the Board's decision of March 1999. He appeared originally for the prior owner and

will substitute in appearance for the new owner in that litigation. He said he is thoroughly familiar with the issues that were raised in the decision and the facts that went into that decision in 1999. He focused on that in supporting the decision in the land court case. For his presentation he felt it would be more helpful to go through the order in which Mr. Tyler raised those issues referring, if necessary, to the decision and where the issues were addressed or any new information that may be relevant.

Attorney McCarthy pointed out that all the talk about issues involving possible contamination of other people's properties running from the Unisys property is not the responsibility of Northwood. He said Unisys had some contamination problem back in the 50s. It has given the town an indemnification agreement which he believed the abutters are beneficiaries of. If anybody feels harmed by the contamination seeping from the Unisys property, under the indemnification agreement they can proceed against Unisys. There is nothing, engineering wise or otherwise, that Northwood's construction has done to change or affect that problem. If Mr. Verrill has contamination of a chemical nature on his property, it's

Unisys cause, not Northwood. Attorney McCarthy said he heard Mr. Verrill mention Unisys a number of times when talking about the contamination.

Beginning with the exhibits and the matters raised, the first issue is the site plan decision of November 1997 issued by the Selectmen. Attorney McCarthy would suggest that Northwood has complied with all the terms of that site plan. The final one says that "construction and substantial use thereof must commence within one year". It doesn't say construction must be completed within one year or that occupancy must be in place within one year. He would suggest that "substantial use thereof" relates back to the site plan permit in that you have to start using the permit and start construction within one year. That was done with the first building.

The septic system was approved by the Planning Board in November 1997. There was no change to the system. There was a change in the location of the system which previously this Board in its decision said was a minor change. It came about because the original demarcation between zone 2 and zone 3 was pointed out by either Mr. Wagner or Mr. Verrill to be in error. The line was closer to the building than was thought to be. The prior owner moved the septic system another 150 feet away from the line so if anything, the movement of the septic system contributed to protection. The change resulted in far more protection than had been before. However, once again, this Board dealt with that two years ago.

Exhibit 5 talks about the groundwater flow. Once again that's a Unisys contribution, not Northwood. Northwood should not be contributing to the groundwater flows with an approved septic system which is away from the North Road/Route 117 area and Mr. Verrill's property. It leaches in the other direction. Attorney McCarthy said if he understood Mr. Tyler correctly, the problems go back to 1959, clearly 30-40 years ago and before this project was even conceived of.

In talking about the use of the property and whether in fact the services required to be given to the residents are being given or were being given, it is common knowledge that the prior owner went through a financial difficulty. The entity that had ownership with this filed for protection under Chapter 11 and eventually sold the property to the present owner. It is fair to understand that perhaps with the financial problems some services were not provided. It does not excuse anyone because the master deed to this property gives the town the right to recourse that all of those services that were represented to the Selectmen in the site plan would be provided. The question here is Building #2, and the present owner stands perfectly ready, willing and is, in fact, presently providing all of the services as required by the master deed. If that was not the case, the residents here would be complaining, and they are not. The affidavit referred to by Mr. Tyler which was given in the bankruptcy proceedings by the residents telling the court that they were not getting what were supposed to be getting dealt with the debtor. That is not the question here. There is a new owner who is providing the services at Building #1 and stands ready, willing and will provide the services to Building #2. If he doesn't, either the

residents or the Selectmen through the covenants in deed which runs in favor of the town will force him to do so.

With regard to the height exception, Attorney McCarthy said that is dealt with in the previous decision. He quoted from that decision, "The Appellant argued that the subject structure exceeds the maximum building height of 45 feet, as measured to the 'ridge or highest point of the roof.' Provision IV,A,4 limits the height to exclude 'other accessory and structural parts of such buildings, if they are not used for living purposes.'" All of those structural accessory facades that were shown are not used for living purposes. The living purposes area ends at 43 feet above the ground. This because the steel beam which forms the vertical structure is 43 feet long. Everything above it is decorative which is what Mr. Hepting ruled in his letter two years ago, and again in his more recent letter. Nothing has changed.

The Bylaw concerning single dwelling purposes was dealt with by this Board in March 1999. But the more recent bylaw is the one that provides for the creation of the residential care facility in one or more buildings which is what this Board found to "trump" or be read more clearly over the previous bylaw provision which limits single family houses on lots.

Exhibit 13 concerns the WRPD permit. Attorney McCarthy said this was dealt with in the Board's prior decision. These are not single family residences, this is an institutional use, specifically accepted. The Planning Board found it to be an institutional use and this Board found it to be so in the prior decision.

The question was also raised in determining the amount of square footage available for the septic system, as to whether it was permissible to use square footage obtained by easement over a neighbor's property. Attorney McCarthy would agree that if Northwood was building a building and the building was limited to a 20,000 square foot lot and there wasn't 20,000 square

feet, we couldn't take an easement and satisfy the building requirements. That is not the case. He said we're dealing a bylaw that specifically permits the use of land obtained by easement to determine the square footage for the septic requirements, and that was addressed previously by this Board. Reading from that decision "The Board finds no restriction on such use. As long as the easement over which the easement is granted is effectively taken out of use for the type of utilization granted away (i.e., septic capacity) the Board finds that the use of the easement to meet septic capacity is permitted." The land that was granted by easement from Cummings was taken out of their measurement for their septic system.

The suggestion was made that Hillandale Lane, over which one of the easements was obtained, is a street and therefore cannot be used for an easement. That was also dealt with in the prior decision. It doesn't meet the definition of a street because it doesn't provide access to anyplace. It has never been built and will not be built.

Attorney McCarthy said Mr. Tyler presented a brochure which was prepared by the prior owner for Building #1. This new owner disavows any authorship of that. He has not prepared any brochures. The brochures for Building #1 should not be considered and are irrelevant to this Board's decision.

Attorney McCarthy said Exhibit 22 contains a budget that was prepared by someone other than Mr. Hamlin. For this matter we are dealing with Building #2 and any budgets that were prepared for some other building are irrelevant.

The issue of common driveways was also addressed in the prior decision. It was found that the one-way property driveway as a subdivision road was not a street and that the Planning Board in fact waived certain requirements of road construction implying that the intent was to deem the driveway not a road.

Attorney McCarthy said 92% of what was said tonight has been addressed by the Board before in a written decision which is now on appeal in the land court. This is a unique situation where the Board is being asked to in a sense reverse the decision made years ago which he and Town Counsel Kenny are defending in the land court. He said it was an issue that has been decided and everyone has had a chance for a hearing to say what they want to say, put in all the evidence and a decision is made. The law says you don't get a second bite at the apple. We don't adjudicate that which has been adjudicated. Attorney McCarthy would suggest that's exactly what we're dealing with here.

Attorney McCarthy requested, and was granted, permission to submit documents which are essentially the brief that he prepared for the land court on behalf of the owners upholding the decision of two years ago. In addition, he submitted affidavits from Mr. Hepting, Mr. Conant

and the Board's Secretary, Mary Corley which bring together in one packet all of the submissions that were before the Board two years ago and are part of the land court action.

Josephine Whittington, Unit 301, Northwood resident, said she sold her home in Houston and moved here to what she thought was exactly what she needed. She said it is true that we had some problems out there but none of them were problems of the new ownership. The problems were inherited. She said Mr. Hamlin has called the residents and we have discussed our problems. We have gone over the things that were promised and the things that weren't delivered and we're reconciling those that can be afforded now, and we are happy. She said Mr. Tyler is wrong when he says we would be here complaining. Ms. Whittington felt that everything has been done that sensibly can be done to give us the services we need. There are only four occupants. It is unrealistic to expect anyone to have a driver and a van for us at all times. So, arrangements have been made for us to use a service and that is not included in our fees at this time. If later when there is build out, and we can afford it, it will be included. But at

the present time she said we are very happy with the service that we're getting. When this place is built out to 56 units, Sudbury is going to have a pretty good tax base up there. She said we're not a group or people that don't pay our taxes, and we don't clutter up the school system. Four of us can't live out there by ourselves if you don't let them finish up the project. And we all can't afford to lose our investments and start over.

David VanVliet, Unit 302, said he has been a resident for resident almost two years and during the time he's been here to say that there have been no services is an exaggeration. To take a picture of the garbage today and say that there are no services is an exaggeration. He said the residents have a garbage retrieval company, and a management company. The garbage may have been out waiting to be picked up when Mr. Tyler took his pictures. He said it was clear to him that there is a sense of trying to stop this whole project from top to bottom.

Mr. VanVliet said he sold his house and moved to Northwood because he believed in the idea and that this was a good project. Unfortunately Mr. Conant ran into some difficulties and while he was not able to offer us the services, his wife came in and helped out. They kept a man here on the job almost until Mr. Hamlin came over. That man was available to help us. So we were not suffering from the standpoint of Mr. Tyler. Mr. VanVliet believed there is a lot of good in this project and hoped to see it completed.

Mr. Phelps suggested that since the Board has a great deal of data, the hearing should be continued this order to read it. He felt the members would then have questions as a result of reading the data. The other Board members were in agreement.

For the record, Mr. Delaney read a letter dated April 24, 2001 from Mark Kablack which gave the reason for his recusal from this hearing and provided background information on the situation at the development as pertains to his involvement in this matter.

Ms. O'Brien asked for an explanation on the trash situation.

Mr. Hamlin said the trash wasn't there today. He said there are contractors on the site and in his opinion (from the photos) it looks like someone's lunch was left there. He said trash is being picked up on a regular basis.

There was further discussion on where the trash was located.

Attorney McCarthy said as the residents pointed out it is a construction site. Could be considered debris and not part of the landscape.

Mr. Wagner said water is a carrier for contamination. If more water is added there will be more contamination.

Mr. Verrill said the town does have an indemnification agreement with Unisys which he believed could be voided if the town takes any action that allows something to change. The agreement is between the town and Unisys and not between Unisys and anybody in the town. He said in Attorney McCarthy's argument there was no reference to the quantity of water that would be flowing. He (Verrill) reiterated his earlier statement that there is ledge underneath that flows in one direction only which will impact him as a result of this project.

Attorney Norman Greenberg was present representing the owner of the property. He wanted to point out that it has never been proven that the contamination from Unisys has flowed off that site to other sites, such as Mr. Verrill's & Mr. Wagner's. There is an indemnification agreement for that purpose. No one has been making the allegations that the contamination comes from the Northwood site. He noted that Mr. Wagner for years has had abandoned automobiles stored on his property which could be a source of contamination. The source of the contamination has never been proven that has found its way onto their properties. The indemnification agreement was a settlement of a matter many years ago for which after a relatively small amount of money was set aside for possible claims of contamination. Also, at the same time as a result of the settlement agreement, Unisys agreed to start a very comprehensive cleanup which has been continuing now for about 15 years and continues to this day.

He said there is nothing in any of the data that indicates that there is a flow of contaminate from the Unisys site, across the Northwood property to the Verrill or Wagner properties. There are wells all over the place that have been dug to indicate the flow of groundwater and none of them indicate that there is a flow of contamination from the Unisys site, across the Northwood property to Mr. Verrill and Mr. Wagner.

Attorney Greenberg added that even if that were the case, it is an environmental problem that has been dealt with by the EPA, the DEP, by the city, by various agreements. He said the EPA has already made a decision recently that this site is under control and are releasing their jurisdiction from the matter leaving it in the hands of the DEP and the city based upon the fact that there has been a comprehensive cleanup continuing for 15 years. The environmental information has nothing to do with why we are here. It is not a zoning issue and has nothing to do with the issues that are relevant to this project.

Mr. Tyler took issue with Attorney McCarthy's statement that the steel structure was the same size as the one for Building #1, hence it is the same height. He said that is not how building height is calculated. It is not from the first floor elevation. He believed that statement has no relevance.

With regard to revisiting the issue, Mr. Tyler said if Northwood had originally come for a building permit for the entire project he would not have had an opportunity to be here today. He said in every case that comes before the Board, an applicant has the right under statute to come back within two years to revisit an issue. He said people understand that situations change, Boards change, viewpoints of Boards change, inspectors change, perspectives change, just as permits the Board issues sometimes are not re-issued after consideration after a couple of years. It was Mr. Tyler's understanding that the Board is not bound by previous decisions. It was his understanding that the Board must take a fresh look at it and make a determination based on their judgment and the facts.

Mr. Tyler added that he agreed with the residents that they are not throwing their garbage out; it could perhaps be debris from construction blowing on the site.

Mr. Hamlin held up the plans for Building #2 which he said are on file with the town. He pointed out that the height is from finished grade and is 43 feet.

Mr. Delaney said the Board will forward that issue to Building Inspector Hepting.

The public hearing was continued to May 10, 2001 at 7PM. All materials for that continuance should be submitted to the Town Clerk's office no later than May 3, 2001.

Patrick J. Delaney III, Acting Chairman

Lauren S. O'Brien, Acting Clerk

Thomas W.H. Phelps

Gilbert P. Wright, Jr.

Jonathan G. Gossels, Alternate