

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
TUESDAY, JANUARY 29, 2002

The Board consisted of:

Mark A. Kablack, Chairman
Patrick J. Delaney III, Clerk
Thomas W.H. Phelps
Lauren S. O'Brien
Melinda M. Berman, Alternate

Notice was published in the Sudbury Town Crier on January 10 and 17, 2002, posted, mailed and read at this hearing.

Mr. Kablack, 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.

James Idelson was present to represent a petition for renewal of Special Permit 00-1 to maintain an 80-foot amateur radio tower at 96 Morse Road. The tower was erected in 1998 and this is the third renewal.

Mr. Idelson explained that the tower is located and maintained in accordance with the condition of the permit. Pictures of the installation and childproof shielding were shown.

Mr. Idelson referenced to recent change in the Bylaw which eliminated the bond requirement. He requested his bond in the amount of \$550.00 be refunded, adding that the value of these towers insures their removal.

With regard to the term of the permit, Mr. Idelson pointed out that the Wireless Communication Bylaw provides for a five-year renewal period.

Mr. Kablack explained that a five-year period is not applicable in this case as Mr. Idelson's tower is an amateur tower not located in the overlay district. For this tower, the Board's special permit guidelines are used which allow a maximum renewal period of three years after two concurrent two-year renewals without incident.

There was no further input. No abutters were present. The hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: "To grant James S. & Sue E. Idelson, owners of property, renewal of Special Permit 00-1, under the provisions of Section 2632 of the Zoning Bylaws, to maintain an 80-foot amateur radio tower, property located at 96 Morse Road, Residential Zone A, provided that:

1. Installation shall conform to all applicable building codes and wired in accordance with UL Standards.
2. Childproof shielding, no less than 10 feet in height, shall be maintained at the base of the tower.
3. This permit is non-transferable and will expire in two (2) years on January 29, 2004, 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 petitioner requires a special permit to operate an amateur ham radio hobby from his home. This tower has been operational since 1998. The Board finds this hobby to be in harmony with the general purpose and intent of the Zoning Bylaws. It further finds that the tower is in an appropriate location, not detrimental to the neighbors. It is not lighted or offensive as no smoke, noise or other nuisance is produced. Adequate and appropriate facilities have been provided for proper operation.

No abutters were present at this hearing. The petitioner has had no complaints since installation of the tower. The Board notes that the current, revised Bylaw continues the requirement for a special permit for amateur radio towers and the Board has established guidelines for renewal for monitoring purposes. Under those guidelines the Board finds a two-year renewal period appropriate. Additionally, in accordance with the revised Bylaw, the Board has eliminated the bond requirement and will begin the process to refund the bond amount currently being held for this special permit.

Mark A. Kablack, Chairman

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RICHARD ALBEE
5 Hunt Road
02-3

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Notice was published in the Sudbury Town Crier on January 10 and 17, 2002, posted, mailed and read at this hearing.

Mr. Kablack, Chairman, explained the requirements necessary to substantiate the granting of a variance. 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.

Richard Albee was present to represent a petition for a Variance to construct a 24X24 foot 2-story garage addition at 5 Hunt Road. The construction would create a street centerline setback deficiency of 5 feet \pm .

Mr. Albee described the proposed construction as shown on a plan submitted with the application. He pointed out that only a small portion of the garage will extend into the setback allowance.

The existing garage is undersized. Mr. Albee would like to use that area as a family room adding on to it the garage and second story. He said this will provide more room for his family and the ability to park both cars in the garage easily.

Location was discussed. Mr. Albee said the location requested is the only available option. The septic system area precludes construction of the addition on the opposite side of the house. A conservation setback to the brook behind the house will not allow for siting the garage further back to avoid the need for a variance. Mr. Albee said he spoke with the Conservation Coordinator who had no objection to the project provided the conservation setback is maintained.

Mark Hersum, 28 Hunt Road, resident, asked whether the usage would extend beyond normal residential use.

Mr. Albee said he simply needs more garage space in order to park his vehicles and that the use of the property will remain the same.

There were no further comments. No abutters were present. The hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: “To grant Richard Albee, owner of property, a Variance from the provisions of Section 2600 of the Zoning Bylaws, to allow construction of a 24X24 foot 2-story garage addition, which will create a street centerline setback deficiency of 5 feet ±, property located at 5 Hunt Road, Residential Zone A.”

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

REASONS: The petitioner seeks a variance to construct a garage and second story addition which will create a street centerline deficiency. The Board finds that the proposed construction satisfies the criteria for the granting of a variance. Specifically, the location of the septic system prevents construction on the opposite side of the house. Additionally, the conservation setback along the back of the house precludes siting the garage further back to avoid the need for a variance.

The Board further finds that the applicant has demonstrated a hardship in that the existing garage is undersized, and a literal enforcement of the Bylaw would not allow for the necessary ease to park vehicles. It further notes that because of the orientation of the house on the lot, only a small portion of the front corner of the garage will encroach within the setback.

There will be no change in the use of the property or detriment to the neighborhood, and the granting of this variance will not nullify or substantially derogate from the intent or purpose of the Bylaw. The Board notes that no abutters were present to oppose this petition for variance.

Mark A. Kablack, Chairman

Patrick J. Delaney III, Clerk

Thomas W.H. Phelps

Lauren S. O'Brien

Melinda M. Berman, Alternate

LAURA McCARTHY
Parcel 01-100 – Map G09
02-4

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
TUESDAY, JANUARY 29, 2002

The Board consisted of:

Mark A. Kablack, Chairman
Patrick J. Delaney III, Clerk
Thomas W.H. Phelps
Lauren S. O'Brien
Melinda M. Berman, Alternate

Notice of the hearing was published in the Sudbury Town Crier on January 10 and 17, 2002, posted, mailed and read at this hearing.

Mr. Kablack, Chairman, explained the requirements necessary to substantiate the granting of a variance. 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.

Attorney Robert Abrams was present representing the applicant and one of the owners, Laura McCarthy, also present, as well as the owners JOC Realty Trust in a petition for a Variance to allow creation of a building lot on a parcel having no frontage. Attorney Abrams said the Trust owns a piece of property that consists of twelve acres of landlocked land in the center of town. It is bordered on the east by Old Town Cemetery and New Town Cemetery, on the north by land owned by trustees of a companion trust by the same family, on the west by the old railroad right-of-way, and on the south by property which fronts on Hudson Road. The property itself has no frontage anywhere. It has several different access ways. The Trust is zoned residential for one-acre zoning and is taxed as such.

Attorney Abrams said the Trust desires at this time to build one house on the property. This cannot be done as a matter of right but can be done by variance from the Board of Appeals.

The hardship is that it is cost prohibitive to build one house with a subdivision road which could be done. Attorney Abrams said there is, on the plan submitted with the application, a public way called Peter's Way. While the property at issue has no frontage on Peter's Way, there is a right-of-way to use Peter's Way and a subdivision road could be built extending from Peter's Way to this piece of land to generate frontage for the house lot. The estimated cost for the engineering is \$15,000. The estimated legal costs are \$5,000. The estimated cost for the road is \$200,000.

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Parcel 01-100 – Map G09
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Attorney Abrams said another reason for hardship would be the concept of reverse hardship. Attorney Abrams believed there would be a hardship to the town in terms of servicing the road for one house. As an example, he referred to a variance granted by the Board of Appeals to the Coach House Inn which allowed parking on residential land. Attorney Abrams

was saying that in addition to the financial hardship for the cost to build one house, it would be a benefit to the town to see only one house go on the 12 acres rather than see a subdivision road coming in.

With respect to soil conditions, Attorney Abrams said the land abuts the town cemetery. It was his understanding that the town cemetery is full. As part of a prior arrangement between the owner and the town, there is potential for the town to apply four of the twelve acres for town cemetery purposes. That, however, is not immediate.

A special condition which affects this land but does not affect others is that the owner is in a position and has made it known to the town that if they are able to get the variance they would be willing to convey two acres to the cemetery immediately.

Mr. Kablack pointed out that in order for the Board to be able to grant a variance all four criteria must be satisfied.

Attorney Abrams said there would be no derogation from the intent and purpose of the Bylaw as the town has been taxing this property as residential land for a number of years. He said it would be inconsistent with that tax to prevent the owner from being able to build a residence on land that is being taxed residential.

With regard to soil conditions, Attorney Abrams said the plan shows a lot divided by a zone line which is a 5-acre parcel that was also given to the town for cemetery purposes. Unfortunately the town was not able to use that land for cemetery purposes because of the soil and topography.

Mr. Kablack asked where the proposed practical access was located. Looking at the plan, he asked whether it would be off Hudson Road.

Attorney Abrams said Hudson Road would not be a suitable access at this time for a number of reasons.

Before continuing, Mr. Phelps said that looking at the plan he could not see a starting point. He said he needed to know where the house would be going and where the access road would be located, noting that this information is not shown or addressed. He believed the Board should have that information before proceeding.

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Parcel 01-100 – Map G09
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Attorney Abrams said the Hudson Road access is not suitable because it would limit the ability to put a modular home on the lot. The access is steep and narrow. He said the acceptable access would be over Peter's Way and the existing 40-foot right-of-way next to it.

Mr. Kablack said one of the confusing aspects of the plan which was submitted with the application is that the Board does not know where the frontage will be. He said if the applicant is proposing the frontage to Peter's Way, which is not obvious on the application, is there control over Parcel 3.

Attorney Abrams said there is control over Parcel 3. The alternative to the owners of both Parcels 1,2 and 3, if they are not able to build a house, is a subdivision. He displayed what a typical subdivision plan would look like for this area.

Mr. Kablack said there was nothing in the application regarding Parcel 3 or the control over it to provide access to Peter's Way. He said this is a continuing issue, and one raised by Mr. Phelps, that the application does not address all of the issues that are relevant with respect to this variance application. He got a sense from the Board that the materials that were submitted were not adequate for the Board to be able to determine what the applicant wanted and why.

Attorney Abrams believed his application clearly stated that the applicant owns Parcel 2 that Parcel 2 has access from a public way but has no frontage, and that the application is for a variance from the frontage requirement in order to construct one residence.

Mr. Kablack said the application does not address the four statutory criteria for why the variance should be issued. It does not address where frontage practically will be given to the lot for one residence, which does raise the issue of public safety. It does not address where it will be entitled to access through a subdivision process which the applicant argues would be an alternative.

Mr. Kablack said he had major issues with this application and sensed similar issues among the other Board members. He was reluctant to proceed along these lines with the deficiencies in the application and would suggest the applicant withdraw and resubmit.

Attorney Abrams said to withdraw and resubmit was not an alternative that was acceptable to the owner. He said he would be happy to answer whatever questions he could.

Mr. Kablack said it was not incumbent to establish a need for a variance through a process of question and answer. It is incumbent upon the applicant to submit a full application that supports the application. He said he was just raising issues which were problematic on which the application is deficient.

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Attorney Abrams said if the Board has any interest in working with the applicant to see if we can achieve what we are trying to achieve, that would be helpful. He said to withdraw and resubmit is unacceptable.

Mr. Phelps said while the goals of the applicant might seem to be commendable, in the absence of sufficient information he would suggest the applicant withdraw without prejudice and resubmit thus allowing the applicant to address the issues which have been raised.

Attorney Abrams said he was not inclined to withdraw. He said he will be happy to answer questions. He did not want to wait the length of time required to resubmit. He referred to the comprehensive permit application which was continued saying he would prefer to continue and come back within a week before the Board.

Mr. Kablack said the comprehensive permit application met the standard for submission for the application, and then the Board asked for additional information as opposed to this application which is materially deficient as an application for a variance to the point where the application would almost seem to fail on its face. Mr. Kablack said the Board was giving the applicant the opportunity to withdraw without prejudice or risk a denial with prejudice because the standard requirements for an application were not met.

Attorney Abrams said he tried to make it clear that it is the owner's position that the application will not be withdrawn. He said if the application is denied with prejudice, the owner will go the subdivision route. He said that route is costly and not in the best interest of the town. He said the owner will not listen to a withdrawal to begin again and asked if the Board has an alternative to suggest with regard to the deficiencies.

With regard to the application, Attorney Abrams said he answered every question. He said the Board may not be "thrilled" with the application it requires applicants to fill out, but each question was answered with technically correct information. He said there is no question on the application which asks where the access is, and if the Board wants to know where the access is, it should ask the applicant and not tell them to withdraw.

Mr. Kablack wanted to canvas the other members as to how to proceed. He said he felt the applicant failed to adequately state grounds for a variance, the application is deficient, and he saw no further need to proceed based on the information submitted.

Mr. Phelps said he would ask Attorney Abrams to consult with the owner before making a decision.

Mr. Delaney asked how long Parcel 2 has been in ownership by JOC Realty Trust. Attorney Abrams said it has been owned by the trust since the 1980s. Mr. Delaney asked whether it was landlocked when acquired. Attorney Abrams replied, "by JOC Trust, yes."

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Ms. Berman and Ms. O'Brien both agreed that there was not enough information provided to continue. Nor did they feel the Board should try to flush out the information to warrant a variance in this forum.

Discussion followed on the issue of the landlocked parcel, its history and access. Mr. Kablack said while Attorney Abrams had made some good points, they probably were deserving of a description in written form as part of the application and included in the plan. He again went over the criteria required to be submitted for a variance as it appears deficient in this application.

Attorney Abrams said the questions on those issues were not on the application as required to be answered. He said he could answer those questions if the hearing were continued and the applicant was told exactly what the Board wanted. He said his resistance is in not wanting to go through another two months to get back before the Board.

In response to Mr. Phelps suggestion to consult with the owner, Attorney Abrams said he just spoke with Ms. McCarthy and her response is that she will be happy to answer questions and continue within two weeks if the Board indicates exactly what it wants. He said her answer to reapplying and coming back in two months is “no”.

Mr. Kablack wanted to remind Attorney Abrams and Ms. McCarthy that there is a period of two years after a vote is adversely taken which precludes the Board from hearing a subsequent application unless there is a substantial and material change which must first be voted on by the Planning Board. Again, he asked Attorney Abrams to take the Board’s suggestion to withdraw without prejudice and deal with perhaps a two-month delay as opposed to the likelihood of denial with prejudice where he might be dealing with a two-year period.

Ms. McCarthy said it took two months to get before the Board. She asked whether it would take two months to come before the Board again.

Mr. Kablack said he couldn’t answer that because it will take the applicant as much time as it needs to get the application right. In addition, the opportunity to get it before the Board is driven by a statutory time period which means the public hearing must be opened within 65 days from submission of the application.

Attorney Abrams said he has made it unequivocally clear that he will not withdraw and start again. He said if the Board denies with prejudice, he will file a subdivision plan. He said there may be people in the audience who have something to say about this.

Mr. Kablack said the decision being made will be on the procedural issue of whether the application warrants discussion in a public hearing, and not on the substance of the case or whether it merits a variance.

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Attorney Abrams asked whether Mr. Kablack was saying for the record that if there are abutters in this room who want to tell the Board that they would rather see a variance granted and not have a subdivision plan filed on this property, that he (Kablack) did not want them to say this on the record.

Mr. Kablack replied that he was saying that the application is deficient on its face and that there is no need to get into the merits of whether a variance should be issued on this property or not because Attorney Abrams has failed to apply on the face of the application for what is needed to apply. He said the applicant has failed to state, within the four corners of the application, what needs to be stated.

Paul Trefry, 42 Codman Drive, resident voiced concern that there could be a large subdivision instead of one house on a lot of acres. He would hope that all parties could somehow figure something out.

Mr. Kablack said it was heard from the Board that the spirit of what the applicant was trying to accomplish may be all well and good. It is just that the Board has no basis to begin its review of the application.

Mr. Trefry said he got the impression that a game of “chicken” was being played.

Mr. Kablack said there is no game being played here. He said the Board takes its job very seriously and all members sit on the Board voluntarily. This is an extremely serious matter and the Board is asking the applicant to take it as seriously as the Board is adding that the Board has asked in several different ways for the applicant to be creative to improve the application in a manner with which the Board would be more than willing to entertain.

Mr. Trefry asked if there could somehow be cooperation to accommodate the applicant so that he could provide more information in order to submit what is needed.

Mr. Phelps said there is a provision for what Mr. Trefry was suggesting and it is called withdrawal without prejudice. He said the Board has used this provision many times with applicants. It allows the applicant a certain amount of time to correct anything that is wrong with an application and to come back. He said that process is actually shorter than the process of continuing the hearing. A withdrawal without prejudice is to the owner’s benefit; however, this Board has not been able to convince this particular applicant.

Mr. Trefry asked whether the Board had the right to accept the application and request additional information.

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Mr. Kablack said the Board does not have alternatives in that regard. It does not have the alternative to accept waivers of the requirements or to treat it any differently than other variance applications.

Ruth Howey, 18 Hudson Road, abutter, said this land has a long history. Although she would not want to see a large subdivision, she said the issue at hand is the application which appears to be incomplete.

Kenneth Daly, 29 Codman Drive, resident and abutter of Parcel 3 asked for a definition of the four criteria which is deficient. Mr. Kablack provided an overview.

Further discussion centered on the application from a deficiency standpoint and the process by which the applicant can address those issues. Mr. Kablack said this applicant is not being treated any differently than any other applicant who submits applications that are deficient.

Before closing the hearing Mr. Phelps wanted to ask the applicant one more time to consider requesting a withdrawal without prejudice in order to return with a complete application.

Ms. McCarthy said she believed the questions on the application were answered and that the application did not specifically ask for the details the Board was asking for. She would prefer the hearing be continued to answer questions and amend the application. She said she will not resubmit the application.

A motion was made, seconded and voted to close the hearing.

After deliberation the following motion was placed and seconded:

MOTION: "To grant Laura B. McCarthy, applicant, Laura B. McCarthy, Martha J. Keighley & Dorothy M. Bartlett, Trustees of JOC Realty Trust, owners of property, a Variance from the provisions of Section 2600 of the Zoning Bylaws, to allow creation of a building lot on a parcel having no frontage, property shown on Town Map G09 as Parcel 01-100, Residential Zone A."

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

REASONS: Upon opening the hearing, the Board entertained the applicant's initial oral presentation and further reviewed the written application materials, which included a plan entitled: "Plan of Land in Sudbury, Massachusetts," dated November 19, 2001, prepared by Sullivan, Connors and Associates. The Board then determined that the application failed to meet the minimum statutory criteria for the requested variance relief. In particular, the Board found as follows:

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1. The application failed to identify special conditions relating to the soil conditions, shape, or topography of the land or structures and especially affecting the land or structures, but not affecting generally the zoning district in which the land is located.

2. The application failed to identify the substantial hardship, financial or otherwise, if the provisions of the Bylaw were to be literally enforced.
3. The application failed to identify how substantial detriment to the public good would be avoided if the variance is granted.
4. The application failed to identify how the variance, if issued, would not nullify or substantially derogate from the intent or purpose of the Bylaw.

The application further failed to identify how the applicant's parcel became landlocked, where and how the parcel would be able to create frontage to a so-called paper street, where and how the parcel would be able to have practical access to Concord Road, and what relationship the applicant's parcel has or had, if any, with other parcels shown on the plan, which parcels appear to lie between the applicant's parcel and nearby public ways.

Finding that the application was deficient in regard to the minimum criteria for a variance, the Board offered to the applicant the opportunity to withdraw the application without prejudice to the future filing of a more complete and documented application. The applicant refused this offer of the Board. The applicant stated that it was only prepared to address specific questions of the Board regarding the current application before it.

The Board then unanimously voted to close the hearing and subsequently denied the application for a Variance by a vote of 0-5.

Mark A. Kablack, Chairman

Patrick J. Delaney III, Clerk

Thomas W.H. Phelps

Lauren S. O'Brien

Melinda M. Berman, Alternate

