

MINUTES OF THE PUBLIC HEARING CONTINUATION
SUDBURY EARTH REMOVAL BOARD
THURSDAY, APRIL 10, 2003

The Board consisted of:

Melinda M. Berman, Chairman
Richard L. Burpee, Clerk
Stephen A. Garanin
Thomas W.H. Phelps, Alternate
Patrick J. Delaney III, Alternate

The public hearing for Case 03-1, Investigation, was reconvened by the Chairman, Ms. Berman who reported that as a result of the previous hearing on March 4, 2003, letters were sent to Peter Karassik, Eligius Homes, requesting documentation with regard to earth removal at 90, 96 & 102 Lincoln Lane as well as his attendance at this hearing, and to Town Counsel requesting his opinion on what remedies or penalties could be imposed on the developer given the fact that he no longer owns the lots.

A letter dated March 24, 2003 was received from Eligius Homes and was read by Ms. Berman. That letter states that the three homes were constructed in accordance with the standard building rules and regulations of the State and local inspection boards, permits were received from the necessary town departments, and inspections made at necessary intervals. Records are not kept for fill removed from any of Eligius' construction sites.

The letter notes that the homes were built with a minimum backyard with one necessitating a retaining wall. In each case a level building pad was created by removing fill from the rear and filling in the front of the house. On-site fill was also used for the in-ground septic systems, which are all in front of each home.

A previously committed engagement prevented Mr. Karassik from attending this evening.

A letter from Town Counsel dated April 8, 2003 was received and read by Ms. Berman. The letter delves into the language of Sudbury's Earth Removal Bylaw and its interpretation in the past. With regard to the investigation, Town Counsel notes that according to Section 8 of the Bylaw, the Board, if they find a violation to exist, may send a notice ordering cessation of the improper activities. Since no work is being performed at the present time, it would appear that a cessation order is not necessary. The question of whether or not any further work requires an Earth Removal Permit would depend upon whether or not the removal was consistent with the exemption contained in Section 4.

If the Board determines the exemption in Section 4 was exceeded, they may order cessation or take action under Article VI involving enforcement of the Bylaws. In that event a \$50 non-criminal fine may be imposed.

If the developer is responsible for a violation, the fine may be imposed. There does not appear to be a provision for requiring that the property be returned to its original topographical condition.

In summation, the letter notes that it appears that enforcement by virtue of remedies or penalties are limited by the terms of the Bylaw itself. The strongest remedy appears to be a cessation order by the Earth Removal Board when the matter comes to their attention. Under the circumstances, violations, if they exist, have already occurred before enforcement is requested.

Michael Melnick, 97 Lincoln Road, presented a 1971 topographic plan which shows the properties before development. Also presented was an aerial photographic of the site as it exists today and has existed since October 2002. He felt the comparisons clearly demonstrate that this was a mining operation.

Julia Euling, 55 Lincoln Lane said several representatives from the neighborhood have done some research looking into water quality, hydrology and other concerns and have put together a presentation. Copies of the presentation were submitted for the record.

Ms. Euling's presentation consisted of a statement noting the opinion of the neighborhood representatives that a violation of the Earth Removal Bylaw has occurred and that this violation is detrimental to the neighborhood. Ms. Euling's presentation dealt with topographical changes with regard to the earth removal which the neighbors believe ultimately threatens the stability of the upper part of the hill.

John Waitkunas, 49 Lincoln Road, spoke to the impact on scenic qualities of the area, its visibility from the Sudbury River which is a wild scenic river under the stewardship of SUASCO. Bringing back earth and restoring the hill to as close to what it was before will help maintain the scenic value of Lincoln Road and Lincoln Lane in addition to helping residents maintain the value of their homes.

Skip Williams, 25 Lincoln Road, spoke to the adverse effect on water quality as a result of the earth removal as this area is dense with wells. In addition, the groundwater flows over Lincoln Lane and this drainage problem needs to be addressed.

David Terzian, 69 Lincoln Road, said he had his well water tested and the results show lead was present in unsafe amounts. Previous tests done in 1998 showed no indication of lead. Mr. Terzian believed the earth removed by the developer caused this result and that the developer should pay for the filtration system which he needs to remove the lead.

Karen Pelto, 52 Lincoln Lane, read into the record an email received from Robin Cooper, formerly of 8 Lincoln Lane. The email notes Ms. Robin observations of the earth removal which speaks to the fact that the earth removal was a part of the development of the site.

Ms. Pelto's presentation dealt with policy implications and possible remedies. The presentation offers opinions of the neighborhood representatives with regard to enforcement capabilities under Section 6 and Section 8 of the Bylaw as well as remedies. These remedies include (1) issuance of a formal letter of reprimand to Eligius Homes, (2) require a comprehensive landscape plan by a professional landscape architect, (3) require review and approval of the comprehensive plan by the Board with opportunity for public comment, (4) require reimbursement to the Town for activities taken to remedy flooding of Lincoln Lane following site development, (5) require implementation of the approved plan, with provision for inspection of the premises by the Board or its representative.

Mr. Phelps asked why Mr. Terzian believed the increase in lead is a result of the earth removal.

Mr. Terzian replied that the report doesn't explain why. He said he did the testing because a lot of people were complaining about the quality of their water. So much earth was removed that it is possible that the groundwater paths may have changed.

Mr. Garanin asked how many have had wells redone. Two raised their hands

Ms. Pelto said in 2002 she had to drill 400 ft. down for a new well. Her previous well was not nearly as deep.

Mr. Williams said he spoke with the Board of Health with regard to how much development can occur before you can't develop any more. The response was, as long as you can drill a well that can supply the water volume specified EPA guidelines. Mr. Williams said the problem is now you have to go deeper and deeper to achieve that. He was concerned that with more development, long-time residents who ultimately develop problems will incur greater replacement costs to replace their wells; that those increased costs are a direct result of the development of these new homes.

Brian Jadul, 96 Lincoln Lane, said most people aren't happy with the houses that have gone up. He said the purpose of this hearing is to find out whether Eligius violated the Earth Removal Bylaw, and if they did, what penalties can be imposed.

Mr. Terzian said the Earth Removal Bylaws were written to prevent this sort of thing. If this is not a violation, it's very similar to what happened at the other end. If the laws are not going to be enforced, what's the point in having them.

Anton Vernooy pointed out where he lives with relationship to the earth removal in the past which resulted in the Earth Removal Bylaw. He said that area still is an eyesore and now there is this added risk from the other side with more earth removal.

Mr. Phelps believed this was a case that should have been brought to the Earth Removal Board's attention, but it wasn't. He felt the town did its best to monitor the progress against the plans supplied by Eligius. However, the plans submitted by Eligius were not followed and they (Eligius) should have come to the Earth Removal Board for a permit. He also believed the town officials, including Building Inspector Kelly, felt that Eligius had basically built according to the plan close enough in order to grant permits and perform inspections, etc. Therefore, Eligius did receive a Certificate of Occupancy. Given that, it was Mr. Phelps' opinion that the town did its best, at a professional level, to see that the development took place as it was submitted, and it was built within an acceptable fashion. He couldn't see, after the fact, going back to the builder and trying to take some remedial action.

Mr. Burpee didn't see any remedies here even if there was a violation by the developer since he has sold the property.

Mr. Garanin said one house hasn't been sold; perhaps the Board can act on that property.

Mr. Burpee said although Eligius owns one lot, the real subject of controversy is on the other two lots. Although the plan shows the contours going into that lot, there is relatively little disruption, other than the retaining wall.

Mr. Kelly said there was no violation in the building of the houses; what was brought to the attention of the neighbors was when the trees were cut down and Maurer was brought in. That was when the Building Department was alerted and went down there and asked them to stop, and when they came to the Board for a permit. The developer was building single family homes; an earth removal permit wasn't required.

Mr. Phelps said he was in disagreement with the Building Inspector and Town Engineer that a permit wasn't required. However, he said that judgment was made and he respects that since the Building Inspector has seen more houses being constructed than he has. Mr. Phelps was sure there are other cases of developers, building, digging out and removing trees in other areas of town. Unfortunately it does change the neighborhood.

Mr. Delaney said the Board has to decide whether or not the decision that an earth removal permit was not required was the right one. There are two sections of the Earth Removal Bylaw, (1) topographical changes, and (2) the requirement that the earth removal has to be related to construction of the house. It does not include cutting into the hill. The issue is, was an earth removal permit required and was there a violation.

It was Mr. Phelps' feeling that it was required. However, it's been done. He didn't think there was any action the Board could take to change that.

Mr. Delaney said the Board could try to improve what it is left with. It seemed to him that there are a lot of problems, some of which can be related to this earth removal and some which may not be. He said there are two established facts (1) these lots were developed and graded other than to plan – what happened to that earth (2) the road floods which brings a third issue which is one of safety. He felt the Board should concentrate on the two that it might be able to improve on which is the flooding of the street and the safety issue.

Mr. Phelps asked Mr. Kelly whether there are performance standards that Eligius Homes should have been held to. He said what Eligius left is a hill. He asked whether that complied with any existing standards that he would set.

Mr. Kelly said when Eligius sold the houses, the hill was fine. There were trees on the hill. Mr. Jadul began excavating and created a situation where they had to put the fence up. He wanted them to stop work, they stopped, and this is what's left. Mr. Kelly said he would not have considered what Eligius left as being dangerous, which is where this permit is at. Messrs. Jadul and Given need to come for an earth removal permit to do what they've already started. In that permit, as referenced by Town Engineer, the plan should show some type of plantings and ground cover for the slope as well as improvements for drainage. That should be part of that permit.

Mr. Garanin still believed Eligius violated the bylaw. Quoting from Section 3431 of the Zoning Bylaws which deals with site development, it was Mr. Garanin's opinion that Eligius complied with none of those standards.

Mr. Burpee agreed that there was probably a need for Eligius to obtain an earth removal permit and it appears to have adversely affect the two lots sold, but not very much the lot they still own. He didn't see a remedy in these proceedings because the lots are no longer owned by the developer. To the extent that the Board can search for ways to improve the existing situation, he felt that opportunity was with the new applications which are pending.

Ms. Berman agreed. She said it looks like the response can come at a different hearing when the Board hears the other applications for earth removal.

Mr. Delaney also agreed that there was not a lot the Board could do for this hearing. He felt everyone was in agreement that Eligius needed an earth removal permit and that Eligius needs to be informed of that. He said this Board also needs to have a discussion of that section of the ERB Bylaw and share that interpretation with the Building Inspector so that when he has to make similar decisions in the future there isn't any question of the ERB's interpretation of that section of the bylaw. So, if a marginal case comes up where it is possible that changes to the

topography are necessary in order to construct a building but there is a question as to whether or not that includes the creation of a back yard, this Board's position is that this is something that is at odds with the bylaw and this needs to be communicated to the Building Inspector.

Mr. Garanin asked whether the Board could request remedies to the road flooding and drainage issues which it appears was caused by the developer.

Mr. Kelly said Eligius should provide a solution to those problems, adding that Town Engineer mentioned those issues in his letter to the Earth Removal Board. He felt the Board could address them with Town Engineer and in a letter to Eligius Homes.

Mr. Delaney wanted to see the Board go on record with regard to the interpretation of Section 4 and reach a consensus at some future meeting.

The Board agreed to send two letters to Eligius Homes – one expressing the Board's opinion that a permit should have been pulled for the entire development and discuss cooperation with regard to reconstruction of the drainage issues on the road, and meet with the Earth Removal Board. The second letter, specific to 102, would ask Eligius to again come and apply for a permit and discuss the issues raised by Bill Place in his letter.

Further discussion followed on the wording of the letters and whether the Board could hold up a closing of 102 Lincoln Lane. It was agreed to discuss this with Town Counsel.

As to the process regarding this investigation a motion was made, seconded and unanimously voted that two letters will be sent to Eligius Homes, as discussed above, and those letters will serve as the result of this investigation.

Before closing this hearing, the Board agreed to continue it to April 22, 2003 in order that Town Counsel's opinion with regard whether the closing can be held up can be received and included as part of the record.

The hearing was continued to April 22, 2003, 7:00PM.

Melinda M. Berman, Chairman

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