

VERRILL ET AL
Northwood Properties
142 North Road
03-12

MINUTES OF THE PUBLIC HEARING CONTINUATION
SUDBURY BOARD OF APPEALS
TUESDAY, FEBRUARY 25, 2003

The Board consisted of:

Patrick J. Delaney III, Chairman
Stephen M. Richmond, Acting Clerk
Thomas W.H. Phelps
Richard L. Burpee, Alternate
Elizabeth A. Taylor, Alternate

Mr. Delaney reconvened the hearing for Case 03-12 which is an appeal of a decision of the Building Inspector not to revoke the Occupancy Permit for the revised Northwood Activities Center located at 142 North Road. This hearing was continued from February 18, 2003 as a result of a verbal communication from Town Counsel through the ZBA Secretary during which Town Counsel requested the hearing be continued to allow for receipt of a stipulation from Northwood that the part of the appeal dealing with the activities center is already before the court as a result of a previous appeal. As to the issue dealing with the Water Resource Protection (WRPD) Special Permit, it was Town Counsel's opinion that the ZBA did not have jurisdiction.

Mr. Delaney reported that during a phone conversation with Town Counsel this afternoon, Town Counsel reiterated his opinion that the ZBA does not have jurisdiction with regard to the WRPD Special Permit. As to the remaining portion of the appeal, it was Mr. Delaney's understanding from that conversation that having a variety of decisions puts the town in a difficult situation with regard to the cases already under appeal since conflicting lawsuits could result. Town Counsel said he contacted Northwood's attorney requesting that he stipulate that one or more of the items in this appeal are already a part of the case in court.

Further, Mr. Delaney said Town Counsel's advice to the Board was that it didn't need to necessarily agree that these are new issues; if it believes they are not new issues, the written materials that Mr. Tyler has provided can simply be accepted with the Board rendering a decision based on that material.

Attorney McCarthy, representing Northwood, referred to his materials which include a letter dated December 11, 2003 from Messrs. Tyler, Wagner and Verrill and said his position is that this same issue was before the ZBA in October and November 2002 and decided by them on November 18, 2002. He said that decision said the Board did not have jurisdiction over the issue and was not appealed. Attorney McCarthy felt this appeal now before the Board was only another way of getting the issue before the Board again to appeal it to Superior Court.

Before proceeding, Mr. Delaney wanted to provide Mr. Tyler with some time to introduce the points he was making in this appeal, but not necessarily to go into all the details.

Mr. Tyler provided a history of the Northwood project as it was proposed by the original developer, Peter Conant. The project was to be built as a residential care facility under the provisions of the Bylaw that was created by the Planning Board in 1994. As a residential care facility, services had to be provided and Mr. Conant made representations to the town that while the services weren't going to be an integral part of a package to the residents, they would all be optional. That is, people could get meals in the community dining room and if all of them wanted to have their meals there, it would be available. Mr. Tyler felt those representations have all gone by the wayside since there has been a bankruptcy and there is now a new developer.

The first appeal dealt with whether or not the project was a residential care facility and was based on representations of things that were going to happen in the future. There was no building, no tenants – nothing. Mr. Tyler said some of Mr. Conant's early brochures for marketing the facility indicated that there was going to be meal service and restaurants from which to order meals.

Mr. Tyler said three of the five ZBA members denied the appeal and gave Mr. Conant the benefit of the doubt that the services would be provided.

Mr. Tyler said the material in front of the Board contains no representation that any of those services are available to residents. In all of the current marketing materials, the term “residential care facility” is never used in any ad. Nor has that term been used in any of the full-length articles in the Sudbury Town Crier. He believed Northwood is not a residential care facility and is not what was intended by Town Meeting or represented by the original developer.

He believed what is now happening is a procedural issue based on certain representations from the original developer who is no longer here, and a new developer who redesigns and downsizes an activities center so that it can't possibly provide the services the first developer represented for the project.

Mr. Tyler said Attorney McCarthy's earlier statement that the November 18 Decision was not appealed is incorrect. He said it was appealed to the Land Court as a procedural appeal which says the ZBA didn't have the right after issuing a decision to then withdraw it. However, rather than pursuing that procedural appeal which is in Land Court, Mr. Tyler said he decided to get the ZBA back to look at it as the Board's responsibility, which is a determination of whether Northwood is a residential care facility.

Mr. Delaney said Town Counsel has told the Board everything it needs to know about what's on the table tonight. One is the WRPD Special Permit, and the second is the legitimacy

of the project as a residential care facility with this new question of the significance of the community building.

Mr. Tyler said the WRPD issue is different because what is before the court is impervious surface, and what he was raising is the Zone 2 line based on the Planning Board's interpretation of that line.

Mr. Delaney said the Planning Board has already made their decision and the ZBA made its decision of the facts as they existed at that time, which goes back to the 1996 case. He said if the Planning Board makes subsequent decisions for other properties, or even on the same property, it doesn't change the fact that the matter has already been before the court.

Returning to the two items, Mr. Delaney said Town Counsel has told the ZBA that the WRPD issue is outside of its jurisdiction. Although Mr. Delaney was not sure he agreed, he said Town Counsel made some compelling arguments. Nevertheless, that issue has already been before the ZBA.

Mr. Delaney said the question of whether or not this is a legitimate residential care facility as a basic question has been before the Board and has been gone over in tremendous detail. He said the only wrinkle that he could see was the question of whether or not the changes that were made in the actual construction of the community building are significantly different than what was proposed to the Board when it was represented and decided that it was in fact a residential care facility.

Mr. Phelps, who was the only Board member, other than Mr. Delaney, present for the original hearings, asked Attorney McCarthy if he could explain the matter of these cases presumably not going to court because of the initial cases.

Attorney McCarthy said he has consolidated a file on all of the cases and has a trial date of June 9, 2003. He said in his view, many of the cases have similar issues.

Mr. Phelps asked whether, if this is the case, the court ever has before it the actual as-built of the buildings on the site as of the date of the court case, or does it go back to something previously existing.

Attorney McCarthy replied that it depends on what evidence all parties put in. In this case he was sure Mr. Tyler would present plans.

Mr. Tyler said it was his understanding that when Town Counsel tried to get Northwood to stipulate in writing prior to this meeting, that Attorney McCarthy was willing to stipulate; however, Mr. Hamlin, the owner of Northwood, refused.

A brief confrontation ensued between Mr. Tyler and Attorney McCarthy. Mr. Tyler said he was making a representation as to what Town Counsel told him on the phone this afternoon. Further, he said he has not seen anything in writing from Northwood that they will not argue that they're not properly before the courts.

Mr. Delaney said Town Counsel told him that Northwood would not stipulate in writing.

Mr. Phelps said that would be the whole case that's in front of the Board. His feeling was that there are significant changes in the activities building which make him think that it does not provide for residential care for the occupants of the building. He would support the fact that this development is not going the way it was planned. He said the Board had to act in 1996 and the appeal was based on existing plans. Now, he said we're seeing the actual structures and if in fact it is in front of the court, that would be evidence for or against and he would feel comfortable with that.

Mr. Delaney reiterated that Town Counsel has asked the attorney for Northwood if they would agree that these things were all part of the case, and they would not.

Attorney McCarthy said it was his understanding that this same issue was decided by the ZBA in November. He didn't know what appeal was made – that if an appeal was taken he would put that appeal in court as part of Northwood's case, whatever it says.

Mr. Delaney said that was not Town Counsel's advice; that Town Counsel did not say that the ZBA did not have jurisdiction.

Mr. Tyler asked if this hearing could be adjourned until the stipulation is received in writing.

Mr. Richmond asked if that stipulation was on whether this is a residential care facility.

Attorney McCarthy replied that it will be part of the underlying, overall issue, which is the first issue from the very first case, and he would stipulate that this is part of the first case.

Mr. Delaney said the ZBA in 1996 already decided that it was a residential care facility. The only new point he saw this evening was whether or not the differences in the way the community center was constructed and the space allocated are part of the appeal already in court. He asked whether Attorney McCarthy would be willing to provide a letter to that effect.

Attorney McCarthy replied in the affirmative.

Responding to a question from Mr. Phelps, Mr. Delaney said the ZBA has already taken a position based on previous facts. He said when the letter of stipulation is received, the whole matter, including the activities center, is in court and therefore outside of the ZBA's jurisdiction.

Mr. Tyler disagreed. He believed the Board can still take jurisdiction.

Discussion followed on the second question which is the WRPD Special Permit. Mr. Delaney said Town Counsel told him that unequivocally the ZBA does not have jurisdiction in that matter. Mr. Delaney reminded Mr. Tyler that just a few months ago the ZBA reached a decision and unfortunately received Town Counsel's opinion after the fact that it did not have jurisdiction, and the Board's response was to reverse itself. He said if that is the way this Board feels about an opinion from Town Counsel on jurisdiction, there is no need to discuss this further.

Mr. Richmond asked why Mr. Tyler believed the Board had jurisdiction.

Mr. Tyler said he believed that there was confusion in what is perceived to be the special permit granting authority and for whom appeals for zoning enforcement are directed to.

In response to a further question from Mr. Richmond, Mr. Tyler said he was not testing whether or not Northwood should have a permit, but that there is a violation that the ZBA is empowered to correct. That issue is with the location of the Zone 2 line. Mr. Tyler believed the delineation in the 1996 Decision was correct and that he has a right to a decision on where the line was. If the ZBA says it's not within their jurisdiction, it will come out as a decision and he will appeal it.

Mr. Delaney wanted to remind the Board that this case is not unusual in at least one way. He said there have been several appeals and the Board has been very consistent and careful to support the fact that decisions were made in 1996 and are now in court, and to take a hands off on any appeal unless something truly new was brought up. He said in the case of the WRPD Special Permit, this is unquestionably something that was discussed in the very first case. It was part of the decision, and to his understanding is part of the appeal beyond this Board. Mr. Delaney said he completely sides with Town Counsel's opinion that the ZBA has no jurisdiction. He said the ZBA's policy of deciding to not rule in favor of appeals that are already before the court is a very wise one.

Mr. Delaney suggested the hearing be continued pending receipt of a letter of stipulation from Attorney McCarthy.

Attorney McCarthy said he will have to go over all the papers previously filed for the wording of the stipulation.

Mr. Delaney said they are all on file at the Town Clerk's office.

A motion was made, seconded and unanimously voted to continue this hearing to a date uncertain pending receipt of a letter from Attorney McCarthy which stipulates that the issues raised in this appeal with regard to the activities center are a part of the Superior Court case.

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