

NOTICE OF THE PUBLIC HEARING
SUDBURY EARTH REMOVAL BOARD
TUESDAY, MARCH 4, 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

Notice was published in the Sudbury Town on February 13 and 20, 2003, posted, mailed and read at this hearing.

The hearing was convened by the Chairman, Melinda Berman under the provisions of Article V,A, Section 8 of the Town of Sudbury Bylaws, for the purpose of conducting an investigation of the facts pertaining to previous earth removal from the properties at 90, 96 and 102 Lincoln Lane. This petition was brought by residents Julia Euling, 55 Lincoln Road, Karen Pelto, 52 Lincoln Lane, David Terzian, 69 Lincoln Road and John Watkunas, 49 Lincoln Road.

Julia Euling provided a history of previous earth removal in past years from the ridge which resulted in the passage of the Earth Removal Bylaw. Ms. Euling said the issue now is with the other end of the ridge which is lower and has been made lower by the excavation which has taken place over the past year and a half.

Ms. Euling said it seems unfair to burden the people who purchased the properties with the responsibility of having taken out more earth than they should have without getting an earth removal permit because a lot of the earth was removed by either Eligius Homes or by Frank Maurer & Sons. From what was known of the hill previously, plus the large numbers of trucks, she would estimate approximately 10,000 cubic yards were removed in the process of building these three houses.

As a result of the excavation, Ms. Euling said topographical changes took place - the ridge on the hill became lower, there is a very steep slope behind one of the houses, the one that isn't sold, and the hill has been denuded of vegetation and is steeper than is healthful for the growth of shrubbery, trees, etc., which is necessary in order to preserve that hill as a aquifer.

With regard to the aquifer, Ms. Euling noted that all the homes in this area have wells. She said there are many large houses already built on the hill, on the side of the hill – and all have wells and septic systems. She said there is only a certain amount of water in this aquifer and when you add very high-water demand houses, it taps into the water that serves the rest of the houses.

Ms. Euling said in order to remain an aquifer there has to be a cap, and it has to be sealed off. If there is sand tightly covered with materials, shrubbery, vegetation, etc., the whole thing is tied together nice and tight, and it remains an aquifer with the most water being available for the area.

Ms. Euling believed this has been lost. She said the area is completely open - there are wood chips along one slope which does not make a tight seal. It is eroding. Water is streaming down, melting snow is streaming down both of the driveways and it goes across the paved part and goes right into the Sudbury River marshland. This affects the Sudbury, Assabet and Concord Wild & Scenic River Stewardship Council (SUASCO) which is very concerned because (1) this excavation can be seen from the river and is unsightly and (2) there is concern about the affect it's going to have on the Sudbury River, because this is going to erode.

Ms. Euling said this is the situation and the residents all feel extremely worried about their wells, and some wells have problems already. The residents feel that the hill needs to be restored as close to what it was before, which would mean bringing back some earth and restructuring and replanting it to blend in with the rest of the woods. Ms. Euling said she and the neighbors feel this part of the Bylaw has been violated and needs enforcement to set it right.

Karen Pelto wanted to indicate that the purpose for bringing the question of the violation of the bylaw has to do with Section 4 of the Bylaw, in two parts: the first part being that no earth removal was sought for site preparation to develop the three homes that are there despite the explicit provisions of Section 4 that the exemption for single family homes does not cover removal of earth from the premises involving topographical changes. The petitioners maintain that the topography has changed and the ridge elevation has diminished; therefore, that section of the Bylaw is in violation. The petitioners also feel the section of the Bylaw that pertains to quantities of material removed in excess of that displaced by the portion of lot, building, driveway or similar appurtenance during the construction of these homes is also at issue, and the concern is really the quantity of material that had been removed to construct these homes in the first place. Ms. Pelto submitted three maps – a comparison of a 1995 aerial photo which shows the contours of the ridge in feet, and an April 2001 aerial photo which shows the extent of excavation at that point of the first home which was completed. The other two had not yet been started. She said the Earth Removal Bylaw does provide for an investigation of the facts and one of the big questions that the petitioners would seek an answer to is a full documentation of this change in topography looking at these original US Geological Survey maps, looking at the original plans for the three homes and the elevations shown on those plans in comparison to current as-built conditions to determine how much material has been removed as part of the development of these homes, and whether or not that was in violation of the Bylaw.

Ms. Berman read the following letters:

- from Town Engineer dated January 31, 2001 which calculates the amounts of materials removed from each of the three lots as well as the amounts proposed to be removed from 90 and 96 Lincoln Lane. The information was taken from sewage disposal plans prepared by Thomas Land Surveyors dated April 10, 1998 and January 12, 1998 and a grading plan, also prepared by Thomas Land Surveyors for Brian Jadul dated December 2, 2002.

The calculated amounts are:

102 Lincoln Lane – existing earth removed 3,248 cubic yards

96 Lincoln Lane – existing earth removed 4,033 cubic yards, proposed 2,956 cubic yards,
total 6,989 cubic yards

90 Lincoln Lane – existing earth removed 1,068 cubic yards, proposed 2,359 cubic yards,
total 3,427 cubic yards

- from Town Engineer dated February 13, 2003 with comments as follows on the petitioners' statement that the topographical changes as a result of the earth removal are detrimental based on four reasons:

1. Petitioners maintain erosion of both exposed and vegetated slopes following rain events threaten stability of the upper elevations of the ridge.

Town Engineer notes that the only erosion seen on Lincoln Lane was from exposed front yards before they were loamed and seeded. No erosion was seen from the excavated areas to the rear of the houses.

2. Petitioners maintain there are potential impacts on the quality and quantity of the sand and gravel aquifer that recharges all private drinking water wells in the neighborhood due to loss of recharge and transformation.

Town Engineer notes there should be no impact upon the aquifer as a result of the proposed development from forested to residential use. Roof and driveway runoff will be collected by a leaching catch basin located at 90 Lincoln Lane. To prevent further surcharging of this basin, Town Engineer would suggest the Board require dry wells for roof runoff and retention basins to the rear of the lots.

3. Petitioners maintain increased runoff of storm water has required the Town to install a new storm drain at 90 Lincoln Lane.

Town Engineer notes the Town installed a leach pit at 90 Lincoln Lane after several unsuccessful attempts to request Peter Karassik, Eligius Homes install a drainage system to control runoff from 90, 96 and 102 Lincoln Lane.

4. Petitioners maintain the changes in topography in a reach of the Sudbury River designated as a "National Wild and Scenic River" does not protect the health, welfare, convenience and safety of the public, nor does it promote the best interests of the neighborhood and the town.

Town Engineer notes that earth removal has taken place within .25 miles of the main stem of the river; however, the proposed activity does not have the potential to alter flows within the river. A suggestion was made that the petitioners meet with the National Park Service to determine if the project is appropriate for a Programmatic General Permit.

- from the Sudbury, Assabet and Concord Wild & Scenic River Stewardship Council (SUASCO) dated February 19, 2003 which notes that although it has no jurisdiction to express an opinion about whether the activities conform to the Bylaws, there are concerns that the vast amount of soil and vegetation that has been removed from Lincoln Lane has reduced the elevation of the ridge of the Sudbury hill that is visible from the river. This topographic change has had deleterious impacts on the river's scenic qualities. SUASCO has additional concerns that the disruption of the topsoil and natural vegetation along the ridge may be impacting the river's ecological resources by adversely affecting both the quality and the quantity of the water in the sand and gravel aquifer underlying this area that discharges into the river and suggests that the Earth Removal Board investigate this further before finalizing any decision in this matter.

SUASCO urged the Earth Removal Board to not only impose a permanent cease and desist order precluding further excavation of the ridge area, but also to order the landowners to restore the natural topography and the vegetation that have been disrupted by the earth removal activities.

- from the Building Inspector and Assistant Building Inspector dated February 20, 2003, which provides the following opinion regarding earth removal on all residential lots:

"All excavation, earth removal, grading, bank stabilization etc., customarily associated with the construction of a new single family dwelling and its accessory structures, does not require review or approval by the Earth Removal Board. However, any subsequent earth removal after the original home construction, i.e., creating a larger rear yard, does require an Earth Removal Permit. Also, review and approval are required for "mining" operations or attempts to remove earth as a commercial venture on any lot in town. Generally, any earth removal in addition to, or totally separate from, that customarily associated with the construction of a new single family residence requires Board approval."

The letter also provides a timeline of events beginning October 15, 2002 through February 19, 2003 of the events surrounding earth removal on Lincoln Lane, including the cease and desist, site visits, various meetings with Town Engineer and Town Counsel, as well as correspondence to the petitioners' attorney. It was the opinion of both Inspectors that no permit was required by Eligius Homes for construction of new single family dwellings, that the Building Department

responded immediately and decisively, and took any and all action required by the circumstances.

Ms. Berman said it has been made clear by the Building Inspectors that Eligius Homes did not have an obligation to get a permit to remove whatever earth they removed in order just to build the homes. Subsequent to passing papers on the homes, earth was removed. The question is how much.

Mr. Phelps said it seems to be a significant amount, which is what the Board should know. The next step is the proposed removal of more earth by the homeowners which the Board had already addressed in one application. (Cases 02-1 &2)

Ms. Berman asked whether the homeowners had any documentation as to how much they removed prior to the cease and desist. Mr. Given estimated four truckloads.

David Terzian said what triggered the analysis was when the property changed hands, there was still construction going on. Normally when the property changes hands it's the responsibility of the property owners. He said he and the neighbors had assumed prior to that that the town was actually enforcing the earth removal bylaws which they didn't realize were so strict on what was allowed. Therefore, they are more concerned with the thousands of yards that were removed prior to when the homeowners moved in, and the incremental truckloads after that.

Mr. Terzian said Section 4 of the Bylaws allow earth removal incidental to construction. – we're talking about almost 10,000 yards here.

Mr. Phelps said the petitioners' issue seems to be with what Eligius Homes removed. He said the Board was told by the Building Inspector that it was okay.

Mr. Terzian believed that according to the Bylaw it's not okay – which is the whole point of the appeal.

Mr. Phelps asked whether Mr. Terzian was basically saying that the Building Inspector was wrong.

Mr. Terzian said "exactly". He said Section 4 says earth incidental to the construction of a house can be removed. That includes some grading around the house. But the amount of earth removed from the site is close to 10,000 cubic yards. The Bylaw says when the topography is changed – and the crest of the hill is lower, that requires a permit.

Ms. Berman asked Building Inspector Kelly whether it was ever investigated as to whether Eligius Homes needed a permit to remove any earth.

Mr. Kelly replied that it was not looked into. He said the Bylaw says that one can remove enough to build a house, that is the driveway, walkway, grading – that's what it appears that Eligius did. He added that they are large houses.

Suzanne Whittlesey, 85 Lincoln Road said one of her concerns is with the industrial grade wall that had to be constructed to hold up the hill because of the erosion. She said the wall was built after the house.

Mr. Phelps said retaining walls can be part of the building plans. He said Ms. Whittlesey was arguing scale probably because of the size.

Ms. Euling said the issue is that there is a big disagreement between the Building Department and the petitioners who maintain that 10,000 cubic yards in that area is too much to take out to be incidental to the building of these houses.

As to why no one spoke up sooner, Ms. Euling said they thought the town was enforcing the Bylaw and that something would be done. She said nothing happened and it dragged on and got to be an incredible amount that was removed.

Ms. Euling said the petitioners disagree with the Building Inspector on this matter and believe Eligius Homes did violate the bylaw and should be held accountable.

Mr. Burpee asked if there was agreement that it was the developer that took out the bulk of the materials and the current homeowners have taken out a relatively small amount.

Ms. Euling replied in the affirmative.

Ms. Berman said she felt that is where this Board is feeling a little bit taken aback because it seemed that there was a real issue with the homeowners and that they had removed a tremendous amount.

Ms. Euling said the homeowners want to remove even more. It has to stop at some point.

Ms. Berman said the question has been asked and answered in terms of the issue of erosion in Town Engineer's letter as part of the four issues raised and his response to them indicating that in certain cases certain things have been done, i.e., leach pit, etc.

Ms. Whittlesey said that pit has failed.

In response to a question from Ms. Berman as to whether the town has any plans to revisit the leach pit, Mr. Place said his department is open to what the Board decides and referred to his letter which recommends dry wells for roof runoff and retention basins to the

rear of the lots. He said right now the water sheets down onto Lincoln Lane and the catch basin cannot handle all of it. He said he will be back in the spring and the end result with his recommendations should control 80% of the runoff.

Stacie Williams, 25 Lincoln Road, said all of the homes have wells as the town water stops at the high school. She said over the past year and a half there has been a significant change in her water. She is looking at an expensive water softening/filtration system which will cost several thousands of dollars. Her main concern was with what happens if she runs out of water. Ms. Williams believed the earth removal would affect the water table. She also did not believe that any expert with expertise in that specific field has testified this evening.

Ms. Pelto had a question and concern relative to the determination of the quantity of material necessary vs. that in excess to have constructed the three homes. She said her home is an older vintage home but it was built into the hill, and her back yard is the hill. Construction of her house did not require an extensive amount of excavation. She wanted to know what would be the working definition of the quantity of material displaced by building of a house, etc. vs. the quantity of material in excess of that. It was Ms. Pelto's belief that more material was excavated than was needed for those homes.

Ms. Berman asked whether there were any guidelines. Mr. Kelly said there is nothing in the Bylaw with regard to quantity or percentages. He commented that coming in to this hearing he thought the issue was with the new owners and not specifically with the builder and what he did. He felt the issues should be determined - either what the builder did - did he need a permit or not - and then after that it will be an earth removal permit application, specifically for the homeowner to remove a certain amount of earth.

Ms. Berman said she also did not understand that the big issue was with what Eligius removed.

Mr. Phelps said the Building Inspector said that what Eligius built was okay without a permit. However, what they built was above and beyond what the plan called for. What is needed is a comparison of the original plan and the as-built.

Roberta Kanarek, 58 Lincoln Lane believed the issue is the development of this piece of property and that the builder or developer of the property is responsible since he was the one who came in with machines, took down the hill and sited the homes. It was clear to her that the amount of earth that was taken out doesn't bear a whole lot of relationship to the structures that were built.

Attorney Harold Jacobi was present, representing David Terzian. He said the issue is framed in the neighbors' letter of appeal to the Board. That letter was in reference to Eligius Homes excavating not four truckloads but 500 truckloads - more than 10,000 cubic yards of

earth. Under Sudbury's Bylaw, Section 4 very clearly spells out the exceptions. It does not cover the earth removal resulting in topographical changes, or for soil or loam stripping activities, which is exactly what Eligius Homes has done. Attorney Jacobi faulted Eligius Homes for not sharing that information with the Building Inspector, and the town who should have been out to the site to make sure the excavation was for the building itself.

Attorney Jacobi said one could back door that and get the engineers to go back and say exactly how much earth is required to take that hill out and make a footprint for each house. However, the petitioners are asking that the earth be reinstated, if at all possible. He said Eligius did not follow procedure. Further, he said the four truckloads, if it is indeed four truckloads that the present owners have taken out, should have been under the auspices of the Earth Removal Board as well. He questioned why they didn't they come to the Board; that it is not enough that they didn't know they had to come to the Board.

Mr. Phelps said Town Engineer's memo gives amount for the existing earth removal as 4, 033 cubic yards at 96 Lincoln Lane. He asked if that is what it would take to build the house and driveway as it is built or whether that amount was excessive.

Town Engineer Place said the plan the calculations were based on was taken from the plan submitted for the septic system showing existing and proposed topography for three houses and the retaining wall. That was the plan which was submitted and approved. Referring to his overlay plan, Mr. Place described the area of the actual amounts removed for everything which shows a difference between the design plan that was submitted and the as-built that was submitted.

Mr. Phelps asked whether Town Engineer was saying that the amount removed was excessive to the plan.

Mr. Place said it has nothing to do with the house, driveway, or septic. It's beyond the design plan.

Mr. Phelps said facts are that Eligius submitted a plan that was approved by professionals and the as-built shows removal of amount in excess of that original plan.

Mr. Delaney said the Bylaw is clear that removal can be only what is necessary in order to construct the house, driveway and septic system.

Brian Jadul, 96 Lincoln Lane said Maurer told him a lot of the earth removed from the back was put on the front of the lot and was not taken off the property.

Mr. Kelly said he was told by Eligius Homes that that was the case for 102 Lincoln Lane.

In response to a question from Mr. Delaney, Mr. Place said from the plans submitted it was not possible to establish whether the earth was moved around.

Discussion followed on how to proceed. Ms. Berman said this Board has the jurisdiction to request Eligius Homes provide an estimate of the earth removed and to be present at the hearing to answer questions. She also felt the Board needs to have more in-depth discussion with experts as to what could be done if we did want to go in the direction of replacing earth.

Mr. Phelps said from what he heard this evening an excessive amount of earth may have been removed by the developer. Assuming that, the question is whether there has been harm to the neighborhood. Mr. Phelps said he respected Town Engineer's opinion as a professional who has said there is no harm to the neighborhood.

Ms. Berman said there is also the aquifer issue. She asked the petitioners whether they had any other information, other than anecdotal, from a professional person as to the impacts, or potential impacts on the aquifer.

In response to a question from Ms. Whittlesey as to whose responsibility this was, Ms. Berman said it is the petitioners' responsibility to demonstrate that there has been a problem. She would suggest a professional person who is involved with wells, etc. – a hydrologist.

Michael Melnick, 97 Lincoln Road felt it is clear that the Bylaw was violated and it was within the Board's jurisdiction to require the developer to put it back.

Attorney Jacobi said approximately 500 truckloads were taken out and a developer doesn't bring this size truck in to move it to the front yard from the back. He said 10,000 cubic yards were taken out and dumped somewhere else. He said that land should be returned to its natural state.

Mr. Delaney said the Board has heard a variety of testimony on that subject from the Town Engineer, and to a lesser extent, the Building Inspector that they cannot determine what was removed. The Board has also heard testimony from the neighbors that they know it was removed because they saw the trucks, as well as testimony from the homeowner that it might have or might not have been removed. He said the Board does not have facts that say for sure that a violation occurred.

Mr. Place said his calculations were based on the plans as previously reported; there is no topography as to what was removed.

Ms. Berman was not sure of the direction the Board could take at this point. She said the Board needs to evaluate the information that has been received and to request additional documentation to quantify was removed. This is needed in order to make any kind of recommendation or use whatever authority is available under the Bylaw to ask for some remediation of the situation.

Mr. Burpee said if there was a violation by the developer, that developer no longer controls two of the lots. He questioned what remedies the Board could impose since Eligius Homes no longer controls the property.

Mr. Jadul asked whether it was possible that perhaps 8,000 cubic yards could all be dumped back into their yards.

Ms. Berman replied that these are the issues the Board must deal with. Following further discussion it was agreed to send a letter to Peter Karassik, Eligius Homes, requesting documentation be provided with regard to the amounts of earth removed from 90, 96 and 102 Lincoln Lane and also requesting his presence at the hearing continuation. A letter will also be sent to Town Counsel for his opinion on what remedies or penalties could be imposed on the developer given the fact that he no longer owns the lots.

With regard to the aquifer, Mr. Phelps said the Board has been told by Town Engineer that there is no problem. Ms. Berman added that if the petitioners feel this is a problem, it might be beneficial for them to provide the Board with a professional opinion.

The hearing was continued to April 8, 2003.

Melinda M. Berman, Chairman

Richard L. Burpee, Clerk

Stephen A. Gararin

Thomas W.H. Phelps, Alternate

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