

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
TUESDAY, FEBRUARY 7, 2006

The Board consisted of:

Stephen M. Richmond, Chairman
Jeffrey P. Klofft, Clerk
Jonathan G. Gossels
Constantine Athanas
Richard L. Burpee, Alternate

Notice was published in the Sudbury Town Crier on January 19 and 26, 2006, posted, mailed and read at this hearing.

Mr. Richmond, 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.

Virginia Perkins was present to represent a petition for renewal of Special Permit 04-48 to conduct yoga classes in her home. She explained that there have been some issues with regard to home businesses at Frost Farm which began as a result of one of the homeowners breeding birds which was against the condominium bylaws and town bylaws. She was told to stop by the trustees after which she threatened a suit claiming that there were other businesses operating at Frost Farm.

The trustees then informed all the residents at Frost Farm that all businesses must cease by February 1st. Ms. Perkins was then told that she could continue until February 7th, the hearing date for renewal by the ZBA.

While Ms. Perkins felt the trustees have the right to establish rules and regulations governing the use of the condominium and personal conduct of the unit owners, families and guests, it did not seem fair to make a policy that is contrary to the bylaws of the association. She read from Article 5, Section 23, paragraph 5 of the association bylaws which contains a sentence that no businesses, commercial offices, etc. are permitted. However, in the next sentence it states "All uses shall, however, be permitted, hereunder, and to the extent that they are in full compliance with all the applicable building, zoning and health ordinances."

Ms. Perkins said she has always operated her business in compliance with the conditions imposed by her special permit. She felt it unfair that her rights could be taken away because of one person who operated illegally.

Ms. Perkins explained that she has been operating in Sudbury since the early 70s, first in her home and now at Frost Farm. When she first applied for her permit at Frost Farm, she said

the trustees were present and no one was in opposition. She would request the ZBA grant her renewal so that she could convince the trustees to either change their no business policy or grandfather her in.

Mr. Richmond read a letter dated January 26, 2006, signed by ten residents of Frost Farm in support of renewal.

In response to questions by Mr. Richmond regarding the criteria for granting permits, Ms. Perkins responded that her business is conducted in the basement of her unit. This use doesn't produce any noise or other nuisance. There is no exterior storage of any equipment and there is no sign indicating the business. There are no employees associated with the use.

Mr. Gossels felt there to be two issues here – the issue with regard to the special permit and the ZBA, and the issue with the homeowners association.

Saul Bloom, 169 Powers Road, supported renewal. He felt it to be a traditional use as defined in the town bylaws.

Marilyn Riepe, 54 Newbridge Road, felt Ms. Perkins made a significant contribution to the community and supported renewal.

Jean Perkins, Ms. Perkins' daughter gave a history and chronology of the evolution of her mother's yoga classes from the perspective of the effect on the community and her mother's well being. She asked that this permit be renewed and that the trustees reconsider their ruling.

Jo-Anne Howe, 38 Birchwood Avenue said she was a member of the committee of the Housing Task Force that met for three years to bring Frost Farm to fruition. She said it never crossed anyone's minds that the residents would be deprived of benefits when they moved there that they had when they were owners of single family houses in Sudbury. She said Frost Farm was meant purely to be a benefit to the residents and those benefits should not be taken away from them.

Frank Chiodo, 150 North Road, Unit 55, trustee, said the trustees have had no problems with Ms. Perkins; however, as trustees they have a duty, as informed by their attorney, that there should not be any businesses there. He said even if the ZBA approves, the trustees cannot approve unless their legal questions are answered.

Mr. Klofft said the breeding and/or selling of birds would clearly have required a special permit from this Board. It would seem to him that the association should have told that owner to apply for a special permit.

Mr. Chiodo said his attorney told him that no businesses are allowed although he was not given a reason. He said his attorney was unavailable when he tried to contact him. Mr. Chiodo said he, personally, had no problem with Ms. Perkins' business but was concerned about a potential suit against the trustees by the resident who had owned the birds.

Mr. Richmond would suggest that Mr. Chiodo ask his attorney to give Ms. Perkins a specific reason why no businesses are allowed.

Adolph Bahlkow, 150 North Road, Unit 22, felt it comes down to the fact that there is a master deed and a set of bylaws which specifically states no businesses are allowed. Mr. Bahlkow said he was opposed to renewal of this permit on the grounds that no businesses are allowed.

Mr. Richmond said as a Board it cannot consider what is in the deed because the task of the ZBA is to interpret the Bylaw of the town and the town does not speak to Mr. Bahlkow's deed.

Mr. Bahlkow asked what recourse he had if the permit is approved. Mr. Richmond said Mr. Bahlkow can appeal that decision.

Mr. Athanas said if the Board renews the decision, it gives Ms. Perkins the right to operate under the town bylaws. If she is barred from operating due to the association, that's a different issue which probably has its own enforcement mechanism.

Mr. Gossels suggested extending the term of the permit to two years. The Board was in agreement with that change.

Mr. Richmond reviewed the terms of the conditions. Ms. Perkins was requesting no changes.

There was no further input. The hearing was closed.

The following motion was placed and seconded:

MOTION: "To grant Virginia Perkins, owner of property, renewal of Special Permit 04-48, granted under the provisions of Section 2340 of the Zoning Bylaws, to conduct a Home Business, specifically yoga classes, property located at 150 North Road, Unit 33 (Frost Farm), Research District #1, provided that:

1. There will be no more than three classes per week, no more than six students for daytime classes and no more than nine students for evening classes.
2. No on-street parking along the streets at Frost Farm or on the driveway to the Cummings property is allowed. Parking is available on the conservation area property.

3. The applicant shall be the only employee for this Home Business.
4. No signs, flags or banners will be allowed.
5. This permit is non-transferable and will expire in two (2) years on February 7, 2008, 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 conduct yoga classes in her home. This business has been in operation at this location for two years. The Board finds this operation to be in harmony with the general intent and purpose of the Bylaw. Adequate and appropriate

facilities are available for the proper operation of the use. The nature of the operation is passive and generates no noise or other detriment to the neighborhood. The petitioner has complied with the conditions of the previous permits and there have been no complaints associated with this business. As a result, the Boards finds a two-year renewal deemed to be appropriate.

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Robert Crowley was present to represent a petition for renewal of Special Permit 03-2 to maintain a 51-foot amateur tower antenna structure at 64 Puritan Lane. Mr. Crowley said he has been operating for ten years. He referred to the initial permit 95-5 which granted approval with conditions and read from the section of M.G.L., Chapter 40A dealing with the Board's authority to grant approvals for such structures. That section states that the Board may reasonably regulate the location and height of such antenna structures for the purpose of health, safety and aesthetics provided that it reasonably allows the height to sufficiently accommodate radio communications by a federally licensed operator.

Mr. Richmond asked what the criteria is to be a federally licensed amateur operator.

Mr. Crowley replied that this is a person who has passed a test which is administered by the F.C.C. He said he is federally licensed and would be willing to provide that information to the Board.

Mr. Crowley was asking that his permit be in compliance with M.G.L., Chapter 40A.

Mr. Gossels felt the permit has been in compliance with 40A since the issues of health safety and aesthetics still apply.

Mr. Richmond asked whether Mr. Crowley was asking for anything beyond a renewal.

Mr. Crowley said he would request the permit be made final with no expiration period. He was also requesting the word “tower” be replaced with “antenna structure.”

In terms of non expiration, Mr. Klofft asked Mr. Crowley whether there were any circumstances under which his license could be revoked. Mr. Crowley answered in the affirmative.

Mr. Klofft said because of that and because of the public safety issues with regard to these structures and their general maintenance, the likelihood of this Board issuing a non-expiring permit at least for him was a non-starter. He said the purpose of renewal is to insure that these structures are in good working order and with no safety or aesthetic issues. He said the Board could discuss a longer term, but having a permit that doesn't expire is not in the best interest of the town.

Mr. Gossels asked about the condition of the tower and whether climbing guards are in place.

He said he has never been asked about the mechanical integrity of the structure but stated that it is in excellent condition.

Mr. Crowley also took issue with the public hearing notice where he noticed cars driving by and checking out his structure.

Mr. Richmond said some of those cars were most likely those of the Board members who visit the sites for each application.

Mr. Crowley submitted a copy of his notes for the record.

No abutters were present. The hearing was closed.

The following motion was placed and seconded:

MOTION: “To grant Robert J. & Patricia L. Crowley, owners of property, renewal of Special Permit 03-2, granted under the provisions of Section 2632 of the Zoning Bylaws, to maintain a 51-foot amateur antenna structure, property located at 64 Puritan Lane, Residential Zone C-1, provided that:

1. The structure shall continue to be located between the house and garage, as shown as the alternate location on sketch dated November 28, 1994, submitted with the original petition, Case 95-5.
2. Panels, no less than eight (8) feet in height, shall be maintained around the perimeter of the tower to prevent climbing of the structure.
3. No illumination at the top of the structure is allowed.
4. The applicant will provide evidence to the Board that he is a federally licensed amateur radio operator
5. This permit is non transferable and will expire in five (5) years on February 7, 2011 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 the operation of a home-based radio hobby to be in harmony with the general purpose and intent of the Bylaw. The antenna is in an appropriate location, not detrimental to the neighborhood and is shielded by trees which continue to act as a buffer. The structure is not illuminated, nor is it offensive or detrimental to the adjoining zoning districts as no smoke, noise or other visual nuisances are produced. Adequate safety precautions continue to be in place to prevent access by children. The Board notes that there have been no problems associated with the structure and that no abutters were present to oppose renewal. Town Bylaws and Mass. General Laws allow regulation of these structures for purposes of health, safety and aesthetics; therefore, the Board finds a five year renewal period appropriate in this case for monitoring purposes.

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Attorney Joshua Fox was present, representing the applicant, D.J. Bosse, also present, in a request to increase the hours of operation as contained in the original Special Permit 02-32 filed February 5, 2001 for the Bosse Sports & Health Club located at 141 Boston Post Road.

Mr. Fox said the current hours of operation are 5:30AM-10:30PM, Monday-Friday, and 6AM-7PM on Saturday, Sundays and holidays. The request is to allow the club to operate until 11PM seven days a week.

The reason for the request is that several members of the club have requested extended hours and also to accommodate some planned special events in the near future.

Mr. Gossels pointed out that Condition 13 of the original permit required consolidation of entrances with Buddy Dog, the installation of granite curbing along the south side of Boston Post Road, and pursuit through the Mass. Highway Department and the Sudbury DPW of an expanded shoulder along the south side of Boston Post Road to alleviate current and projected traffic congestion in that area. Mr. Gossels said this has not been done.

Mr. Fox said with regard to Buddy Dog, the joint passageway is present. Bosse Sports fulfilled their obligation; it is Buddy Dog's responsibility to close off their access to Route 20 and to use that way. He said that is outside of Mr. Bosse's control.

Mr. Fox said the granite curbing is in place. With regard to the expanded shoulder, he said the applicant had agreed to make reasonable efforts to go to Mass. Highway to see if that was feasible. Mass. Highway was opposed to it, so a contribution was made in the amount it would have cost to do that work.

Brendan Kiernan, 45 Willow Road, asked to whom the money was contributed and the amount.

Mr. Fox said the contribution was made to the town in the amount of \$53,000 which was set by the Town Engineer.

There was no further input. The hearing was closed.

The following motion was placed and seconded:

MOTION: "To amend Special Permit 00-32 by deleting the wording contained in Condition 2 and substituting the following therefore:

2. Hours of operation shall be as follows:
 - a. Monday-Friday 5:30AM to 11:00PM
 - b. Saturday, Sunday and Holidays 6:00AM to 11:00PM

All other terms and conditions shall remain in full force and effect."

VOTED: In favor: 4 (unanimous) Opposed: 0

REASONS: The petitioner is requesting a change in the hours of operation of his sports club. The Board finds the request to be reasonable and one which will not have any impact on the surrounding area.

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Mr. Richmond, 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 Joshua Fox was present representing the petitioners in a Variance request for 10 Phillips Road. Mark-Anthony Cautela, one of the petitioners, was also present.

Mr. Fox displayed a plan of the property in question. He explained that Mark and his brother own the property shown as Lot 7 which is 10 Phillips Road. It is a "pork chop" shaped lot. The applicants were raised on this property and inherited it from their parents. They have now decided to sell the property which is comprised of approximately 40,000 s.f. When they went ahead with marketing the property they ran into a problem related to the lot perimeter and a potential boundary dispute from the neighbor, a close friend, who is the owner of Lot 8, 20 Phillips Road, the Wolfmans.

Section 2641a of the Zoning Bylaws dealing with lot perimeter requires no more than one foot of perimeter for 40 feet of square footage of the lot – and this exceeds that by a couple hundred square feet right now.

Mr. Fox explained that normally with a nonconforming grandfathered single family home a special permit would be required to encroach further into a setback. In this case, the Bylaw reads that although this is grandfathered, it's not nonconforming – it's considered lawfully conforming. Therefore, under the current Bylaw, if you wish to modify or increase the lot perimeter, you're required to obtain a variance. He said originally they were going to request an Approval Not Required (ANR) plan which he thought would be standard until this issue was discovered.

The reason for this variance request to allow a land swap, is because the Wolfman family has occupied Lot 8, a triangular shaped lot, for 34 years and has maintained the area shown as Parcel B of approximately 3,347 s.f. with shrubs and landscaping, and they even have a small piece of their driveway in there.

Mr. Fox said the Wolfmans set forth a potential plan for adverse possession but really don't feel that that's necessary under the circumstances. These are neighborly people who have known each other a long time and just don't want to go that route.

The proposal is for the Cautela family to acquire 3,352 s.f. shown as Parcel A, and in exchange for that they would grant Parcel B to the Wolfman family. It's almost a square foot for square foot swap.

Addressing the variance requirements which must be satisfied, Mr. Fox said this is a situation where the lot has a unique "pork chop" shape. He said there are several cases on record

which state that this is a unique shape unless there are neighboring properties similar to that. In this case he said there are no other “pork chop” shaped lots in the area.

The unique shaped lot leads to a hardship. Mr. Fox said there is no ability to do a simple straight forward ANR plan or affect the lot perimeter in any way shape or form anywhere on the lot. This leads to circumstances which are affecting the marketability of the property. He said the Cautela’s actually had a buyer for the property who had the property surveyed for the P&S. When they saw this issue they walked away from the deal.

Mr. Fox said he could not conceive of any detriment to the neighborhood as a result of this land swap or of any derogation from the intent of the Bylaw. It’s a square foot for square foot land swap. This is not a developer trying to carve off an additional lot to make some additional money. It’s merely a homeowner trying to get through a difficult situation.

Mr. Richmond said the standard to obtain a variance is very difficult. He asked whether a grant of an easement would solve this problem.

Mr. Fox replied that neither the Wolfman family nor the Cautela family wish to pursue that route, nor did the potential buyer who had this under agreement. He said the property has been on the market for approximately nine months. The reason the buyer walked away was the potential claim on the land.

Mr. Richmond asked if the problem could be solved by granting an exclusive easement so that the fee ownership remained the same but the right to use the land is vested in the neighbor.

Mr. Fox said this was contemplated by the parties; however, again there was a buyer who wasn’t interested, and the Wolfmans who could have a claim for adverse possession are not interested. He said his is trying to solve this amicably.

Although empathizing with the applicant, Mr. Richmond did not feel that the facts established either substantial hardship or unique conditions.

Mr. Gossels said this is a pork chop lot with narrow frontage. He was inclined see if there was a way to grant this because there’s absolutely no harm created. Mr. Burpee agreed.

Mr. Richmond said his concern is that the way the standard is written you have to be able to connect the shape of the parcel to the substantial hardship. He did not think the shape in the back could in any way be associated with the suggested hardship.

Mr. Richmond referenced a recent Use Variance case appealing this Board’s grant of a variance where there was a request for a preliminary injunction by the appellant and the court denied that request because it found there was a substantial likelihood of striking down the variance.

Mr. Fox said with respect to use variances, a strict constructionist would be hard pressed to find any situation under which the use would be granted - and the Bylaw authorizes use variances. He felt this case falls into a similar category when speaking about dimensional variances only because of the unique lot perimeter provision. He said the shape of the lot is creating the lot perimeter problem from which relief is needed. He saw a direct nexus between the shape of the lot and the perimeter and the hardship in question. He felt there is a hardship here and the facts show that the marketability of the property has been adversely affected.

Considerable discussion followed on the shape of the lot from the perspective of the uniqueness of the shape in that there are some pork chop lots in town. Mr. Klofft felt if the district was drawn broadly enough, nothing would be unique.

Mr. Richmond said the intent of the Bylaw is not to have these irregular lots. He felt this application exacerbated the problem.

Mr. Klofft could not see how it could be any worse since the lot is already nonconforming.

Mr. Richmond's concern was more of precedent. He felt the way to resolve this was by an easement.

Mr. Athanas voiced concern that there could be a problem with reconstruction on the lot if the house is torn down.

Mr. Fox felt that with regard to precedent, every variance request is different and the facts are looked at and determined on an ad hoc basis. With regard to the easement, because it was a proposal which was discussed amongst the parties, it just wouldn't work. Again, he said these people get along, they have a long standing relationship but they weren't getting to "yes" on an easement.

Mr. Klofft asked for the reason.

Mr. Fox said his understanding is that the Cautela's feel that it affects the value of the property and it affected the actual buyer who they had under agreement and wasn't agreeable to accepting an easement or an easement swap. And the Wolfmans have not been agreeable to the easement to date as well.

Mr. Athanas asked if Mr. Fox knew why the Wolfmans were not agreeable.

Mr. Fox said he does not specifically represent Mr. Cautela in this matter and in fact represents Mr. Wolfman in certain capacities, including those related to this matter. He said this is a very delicate situation - we don't want to argue the merits of an adverse possession case before the Board.

Mr. Richmond asked if any there was anyone in the audience who wanted to speak to this application. No residents or abutters were present.

Mr. Richmond asked whether Mr. Fox would like a sense of the Board. Mr. Fox said he would. It appeared at this time that the application might not have the four votes required to pass.

Mr. Fox requested a continuance.

It was voted to continue this hearing to March 7, 2006.

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after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Mr. Vander Els was present to represent a petition for special permit to construct an addition of approximately 670 s.f. and a deck on a nonconforming lot which will result in side yard setback deficiencies at 96 Mossman Road.

One corner of the addition would be deficient by approximately one foot. Mr. Vander Els would also like to add to the deck which would result in a 7 foot deficiency on the same side. The deck would be at grade level.

Mr. Vander Els said he has spoken to his immediate neighbors all of whom were supportive of the project including the neighbor who would be most affected.

Mr. Vander Els said the road has a significant bow so that the front of the houses are splayed and do not really look at each other. There is also a mature stand of arborvitae which provides screening. He was told by one contractor that those trees might not be able to be preserved. If that were the case, Mr. Vander Els would replace them with 6-foot trees.

Mr. Richmond said this application proposes two setback deficiencies – one for the actual structure, the other for the deck. Looking at the drawing, he had no issue with the structure; however, he did have issue with the deck. He felt it was quite close to the side yard. He asked why the deck was needed at the proposed location.

Mr. Vander Els said the addition was pulled forward to lessen the amount of setback deficiency. He said he might be able to move the deck over and asked whether the Board would be comfortable with a one-foot deficiency for the deck.

The general consensus of the Board was that this would work.

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

The following motion was placed and seconded:

MOTION: “To grant Theodore Vander Els, owner of property, a Special Permit under the provisions of Section 2420 of the Zoning Bylaws, to alter and enlarge a nonconforming structure by constructing a 2-story addition which will result in a side yard setback deficiency of one foot \pm , and a deck which will not be allowed to extend more than one foot \pm into the 20-foot side yard setback, property located at 96 Mossman Road, Residential Zone A-1.”

This Special Permit shall lapse if construction has not begun, except for good cause, within 12 months following the filing of the Special Permit approval, plus such time required to pursue or await the determination of an appeal under M.G.L., Chapter 40A, Section 17.

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

REASONS: The petitioner requires a special permit due to the nonconforming nature of the property. The Board finds that the proposed construction, which will result in side yard setback deficiencies, will not be substantially more detrimental to the neighborhood than the existing nonconforming structure. The sideline of the lot angles inward towards the back and the addition was positioned so that only a small portion encroaches into the setback. Further, the petitioner has agreed to relocate the deck, originally proposed to encroach considerably more, so that it will not extend more than one foot into that setback. The Board finds the resulting deficiency would be minimal and approves this application.

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Attorney Robert Dionisi was present representing the applicants, John and Rebecca Cutting, also present, in a petition for a variance to legalize an outbuilding having a front yard setback deficiency on Cutting Lane.

Mr. Dionisi said the structure in question is an office consisting of approximately 600 s.f. It has been used for decades by the Cutting family business which was Sudbury Nurseries. The purpose of the variance is that the development of a 10-lot subdivision abutting the Cutting property caused this office building to be closer to the frontage on Cutting Lane which is a private way in that subdivision. The structure is deficient by approximately 12 feet. Mr. Dionisi said the creation of Cutting Lane caused the office building to be nonconforming.

There was some question by the Building Inspector as to whether this is pre-existing nonconforming; however, during the deliberations of the Planning Board and the creation of the Arboretum Subdivision, it was reflected in the minutes that the Cutting family would come before the ZBA at a subsequent time to request a variance from the front yard setback.

Mr. Dionisi said the reason why the structure exists as a nonconforming dimensional setback is because Cutting Lane, when it was laid out, could not be moved further west because of a wetland resource area. As a result the Cutting property was cut out in such a fashion so as to make this building too close to Cutting Lane.

He said there are other features affecting this particular site in addition to the setback deficiency and the resource area. The slope of the Cutting property as it exists on Maynard Road slopes dramatically to the rear. Therefore, relocation of this building would cause a substantial hardship inasmuch as there is a basement.

The soil conditions as affected by the Arboretum Subdivision is the existence of a wetland resource area.

Understanding that the intent of the Bylaw is to maintain distances between structures, Mr. Dionisi said the Cuttings live on approximately 2.23 acres which contain other outbuildings which have been in existence for generations. He did not believe that the granting of a variance would present a derogation of the intent of the Bylaw with respect to distances between structures given the size of this building.

Further, Mr. Dionisi felt there would be no substantial detriment to the public good by leaving this one particular structure 12 feet short from Cutting Lane. He said Cutting Lane will be maintained privately by two or three homeowners.

In summary, Mr. Dionisi felt this application to be right for a variance. He said he would hope the Planning Board would recommend in favor since he said it was their idea to do this.

Mr. Garanin asked whether there will be any houses directly across the street from this building.

Mr. Dionisi believed there could be one house lot.

Mr. Cutting described the subdivision road layout noting that the subdivision was designed to stay far away from the wetlands so there would be no environmental impact whatsoever.

Mr. Klofft asked whether Cutting Lane could have come out another 12 feet and then jog back.

Mr. Cutting replied not without getting into a conservation restriction. He said they worked with the Planning Board on the design of the road.

Mr. Garanin asked what the current use of this building is.

Mr. Cutting said a portion is used in conjunction with the town athletic field. Space is also used by his son for his nursery business in addition to his own personal use. He said the use is non-residential.

Mr. Athanas asked why a variance was needed.

Mr. Dionisi said because the Town Planner has determined that the structure must have the minimum front yard setback on the new Cutting Lane. It was decided at the Planning Board hearings that we would come and make this building in conformance with the front yard setback of the new private way.

Mr. Klofft asked whether, theoretically, the structure would have to be taken down should the variance be denied.

Mr. Dionisi said it would but would prefer not to pursue this with the town. He said the reason he is here is to follow through on the intentions and promises made during the Planning Board subdivision hearings.

Mr. Burpee asked if the subdivision plan has been approved. Mr. Dionisi said it has.

Discussion followed on the wording of the Planning Board's decision. The ZBA had not received a report from the Planning Board nor did they have a copy of the decision. No Planning Board members were present this evening.

Mr. Klofft said he would feel more comfortable seeing the decision before voting. He suggested a continuance in order to obtain copies of the Subdivision Decision and plans. The other members were in agreement.

It was voted to continue this hearing to March 7, 2006.

Jeffrey P. Klofft, Acting Chairman

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MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
TUESDAY, FEBRUARY 7, 2006

The Board consisted of:

Stephen M. Richmond, Chairman
Jeffrey P. Klofft, Clerk
Jonathan G. Gossels
Constantine Athanas
Richard L. Burpee, Alternate

Notice was published in the Sudbury Town Crier on January 19 and 26, 2006, posted, mailed and read at this hearing.

Mr. Richmond, 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.

William Curley was present to represent a petition for special permit to allow demolition of an existing residence and construction of a new residence on a nonconforming lot. The new residence will exceed the area of the original nonconforming structure and will conform to current zoning setback requirements.

Mr. Curley explained that the existing residence is in disrepair and the septic system has failed. The lot is 30,000 s.f. with 150 feet of frontage. He has met with many of the neighbors to discuss his proposal.

It is proposed to construct a 2-story colonial as shown on the plan submitted with the application. Some dead trees will have to be removed but it is Mr. Curley's intent to limit the amount of tree cutting leaving as many trees as possible on the site. For the record he submitted a plan which depicts the buffer to be placed around the property and described the species proposed which are 6-8 feet in height.

Mr. Gossels said the applicant has followed the Board's demolition and reconstruction guidelines noting the house has been set further back (60 feet) on the lot and the scale is appropriate.

Mary Wentworth, 14 Tanbark Road, abutter to the rear said she purchased her property two years ago and while the houses were close together there were trees between them which acted as a buffer. She voiced concern that the proposed house will overpower the other houses in the area which are split level homes. She did not think it would fit with the character of the neighborhood, however she has observed that this style has been the trend in other neighborhoods. Her other concern was with the trees. She said currently there is a visual barrier between this property and her property. Although she had not seen Mr. Curley's buffer plan, she would hope that whatever he proposed, if acceptable to the Board, would be made a requirement of his permit. She would not want anyone purchasing the house to come in and remove all the trees.

Yal Kupiec-Dar, 77 Hemlock Road abutter diagonally across the street, echoed Ms. Wentworth concerns with regard to the size of the house and tree cutting as it relates to the character of the neighborhood.

Brendan Kiernan, 45 Willow Road, asked for an explanation as to why Mr. Curley needed to apply for a special permit and this was explained to him by Mr. Richmond and further elaborated on by Mr. Curley. The special permit is triggered by the fact that the lot to begin with is nonconforming and the new house to be constructed is larger than the existing one.

Mr. Kiernan reiterated the previous speakers' concerns with regard to the character of the neighborhood and also expressed his belief that the location of the driveway could cause safety issues with regard to visibility when exiting from the property.

Mary Drake, 78 Hemlock Road, had no issues with improving the property but would like to see a way for the trees to be preserved.

Paulo Matos, 14 Tanbark Road, abutter to the rear, referred to Mr. Curley's plan which proposes a 30-foot buffer. He said the lot dips in the back and if many trees are removed there would be quite a gap.

Mr. Richmond said the buffer proposes a 30-foot "no touch" zone in the back and 10 feet "no touch" on the sides. Mr. Curley said he would commit to adding 6 trees on the north and south side plus 4-5 trees in the back.

With regard to the size of the house, the members of the Board pointed out that this house is relatively modest for a reconstruction compared to others which have come before them. With a 60-foot setback and the size proposed the members felt there would not be an issue of looming.

There was no further input. The hearing was closed.

The following motion was placed and seconded:

MOTION: "To grant Green Meadow Realty Trust, owner of property, a Special Permit under the provisions of Section 2460 of the Zoning Bylaws, to allow demolition of an existing

residence and construction of a new residence not to exceed 3,200 s.f., conforming to all zoning setback requirements, and as shown on the Site Development Plan dated January 5, 2006, which is incorporated into this permit, property located at 82 Hemlock Road, Residential Zone A-1, subject to the following:

1. The applicant shall plant at least five new trees to the rear of the property.
2. The buffer zone as shown on the plan will be specified a “no touch” zone for vegetation and will include the plantings as shown on the plan. The applicant will not disturb existing vegetation in the buffer zone.
3. This Special Permit shall lapse if construction has not begun, except for good cause, within 12 months following the filing of the Special Permit approval, plus such time required to pursue or await the determination of an appeal under M.G.L., Chapter 40A, Section 17.
4. Construction must be completed no later than one year after commencement.”

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

REASONS: The petitioner requires a special permit due to the nonconforming nature of the property. The Board finds that the proposed reconstruction will not be substantially more detrimental to the neighborhood than the existing nonconforming structure. The new structure will conform to current zoning setback requirements and will be set further back on the lot so it create a looming effect on the streetscape. The size is appropriate in terms of scale for the size of the lot. Further, the developer has agreed to create a sizeable buffer along the back and sides of the property and to plant additional trees to add to the screening of the surrounding houses.

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Mr. Richmond, Chairman, explained this case involves an appeal under M.G.L., Chapter 40A, Section 15 in which the petitioners are appealing a decision of the Building Inspector that the property shown on Town Map H-09 as Lot 026, Goodmans Hill Road is not a legal nonconforming lot. A vote of four of the five member Board is required to reverse the Building Inspector's decision. Mr. Richmond asked anyone present at the hearing who requested written notice of the Board's Decision to provide their names and addresses on the sheet provided.

Attorney Lisa Mead was present representing the petitioners in this appeal. She said the property is located in the Residential Zone A district and contains 25, 167 s.f. and 177 feet of frontage on Goodmans Hill Road.

On August 30, 2005, a request for determination of the property's zoning status was made to Assistant Building Inspector John Hepting. On December 8, 2005, Mr. Hepting issued his determination that the property is not a grandfathered nonconforming lot and that a variance from the Board of Appeals would be required to reinstate the lot to a buildable status.

As a result, pursuant to M.G.L. Chapter 40A, Section 15, Ms. Mead is appealing that determination.

Ms. Mead said M.G.L. Chapter 40A, Section 6, para. 4, applies to the lot. She contended that the lot was held in separate ownership at the time the Town Bylaw increased the area requirements for buildable lots. It had at least 5,000 s.f. and contained at least 50 feet of frontage. Section 2410 of the Zoning Bylaw states that the Zoning Bylaw shall not apply to structures or uses lawfully in existence or lawfully begun before the first publication of notice of public hearing on the proposed change.

Ms. Mead provided a history of the lot which is owned by Martine, Alexander and Dominique Cherau who inherited it from their parents in 2000. Their parents purchased the lot in 1958. Prior to conveyance to the Cheraus parents, the lot was held in separate ownership by the Forbes as of 1947. At the time of the conveyance, in 1947, the lot contained approximately 28,290 s.f. and approximately 198 feet of frontage. She said at this point, both she and Mr. Hepting are in agreement.

In August 1955 the Town Bylaw changed and required a minimum lot area of 30,000 s.f. Prior to the 1955 change, the lot area requirement was 22,500 s.f. The frontage required was changed in 1955, from 150 feet to 180 feet. She said she and Mr. Hepting are in agreement with this as well.

In early 1969, the parents of the Cherau's inquired of the town as to whether they would jeopardize the status of that lot if they transferred a small portion of approximately 3,000 s.f. to their neighbor. The Planning Board Chairman at the time responded that the lot was nonconforming and if a portion of it were deeded away, it would make the lot a little more nonconforming. Ms. Mead said that letter dated May 15, 1960 was included with the appeal documentation submitted to the Board.

Ms. Mead said Mr. Hepting recently had a conversation with Mr. Davison concerning the interpretation of that letter and that Mr. Davison basically agreed that what he was telling Mr. Cherau at the time was that it would still be conforming under the grandfathered provision and therefore would still be a legal preexisting nonconforming lot. Ms. Mead submitted for the record a copy of Mr. Hepting's letter dated January 30, 2006 referencing that conversation.

Mr. Gossels said Mr. Davison's letter of May 15, 1960 did not say that. He said it says "The lot is not now a legal building lot, and if you deeded off the forty-five foot strip it still would not be a legal lot."

Ms. Mead disagreed. She felt Mr. Davison's letter could be clearer. She felt it says that is that it would simply be making an already nonconforming lot somewhat more nonconforming.

Mr. Richmond said putting the May 15, 1969 letter aside, there is a lot which is legally in existence but nonconforming. The owner of the lot sells more than 10% of the lot off. Essentially, they take a nonconforming lot in terms of size and make it smaller. He asked Ms. Mead to explain her argument.

Ms. Mead said her argument is that it remained a legal nonconforming lot because it didn't get smaller than what it had been grandfathered under. It still exceeded the pre 1955 zoning requirements. So, the lot was left with what it is today in terms of size.

Mr. Klofft asked if it exists now as a separate lot.

Ms. Mead said it became a part of the abutter's property.

Mr. Richmond noted the Bylaw says there can be a continuation of a preexisting nonconforming use as long as it isn't made worse. However, the Bylaw does not allow the preexisting condition to be modified once it is established as preexisting and nonconforming.

Ms. Mead agreed; however, she said it didn't exist at the time. She said her argument is that it didn't become worse under the old zoning under which it was grandfathered. The lot was

made smaller in reliance upon Mr. Davison's letter, but not so small as to have it become smaller than what it was grandfathered.

Mr. Athanas asked whether Ms. Mead had looked at this as to whether this situation has come up before in Massachusetts.

Ms. Mead said both she, Mr. Hepting and Town Counsel tried to find case law and could not find a case on point.

Mr. Richmond said he was confused with regard to Mr. Hepting's January 30, 2006 letter. He said the application package contained Mr. Hepting's decision of December 8, 2006 says that this is not a buildable lot. However, his January 30, 2006 letter says that "It certainly would appear unfair to deny non-conforming lot status"

Ms. Mead said that letter goes to the variance application which has also been submitted for this property. She said she submitted the letter (a) because it exists and (b) because Mr. Hepting had a conversation with Mr. Davison. She said Mr. Hepting still believes he's right.

Mr. Athanas felt it would be helpful to know the zoning at the time the lots were sold off.

Ms. Mead read from 40A, Section 6, para. 4, which states "any increase in area, frontage, width, yard, or depth requirements of a zoning continuance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land."

Mr. Gossels did not feel he had enough facts to make a judgment and would prefer to continue this hearing.

Mr. Richmond said it seems the facts are that the lot was at one point conforming – then preexisting nonconforming because the Bylaw changed.

Mr. Klofft asked whether any of the facts are in dispute up to that point.

Ms. Mead said they were not. She said the facts are separate and Mr. Hepting agrees with those facts. She said we just disagree with the outcome. The land was held in separate ownership - she provided that information – there was an existing Bylaw at the time - the Bylaw changed – the land becomes grandfathered – the Cherau's asked about transferring some land to the neighbor – there is Mr. Davison's letter – and the appeal.

Mr. Gossels asked whether grandfathering was lost when the property was made more nonconforming.

Mr. Richmond felt that was the question that needed to be answered. He said the current Bylaw says prior lawfully existing nonconforming uses and structures may continue provided that no modification of the use or structure is accomplished, unless authorized hereunder. The

question is - what did the bylaw say at the time the lot was altered. He felt the Board needed that information.

Mr. Richmond asked if there were any questions from the audience.

Kerrie Doty, 309 Goodmans Hill Road agreed with Mr. Hepting's findings. She said she spoke with him when the perc tests were being done and was basically assured that once the property was nonconforming, they gave up their grandfathering status by making it even more nonconforming by selling off the land. Ms. Doty did not want to see a large house constructed on what she felt was too small a lot.

John Standish, 295 Goodmans Hill Road voiced concern that since the property consists of a side hill lot with a steeply rolling hill, several trees would have to be removed just for a septic system which would be higher than the surrounding slopes. He also felt the lot was too small for a house.

Edward Rodrigues, 252 Concord Road, felt the challenge for this Board was the legal basis on which it must make a decision. He pointed out that the Mr. Davison's letter presumes a question was asked, but never asks the question.

Mr. Klofft felt the question is to determine the rules at the time the piece of property was sold off and whether it was allowable to do that and maintain its status.

Ms. Mead said this is a step-by-step process. She said if the Board overturns Mr. Hepting's decision, they would have to comply with zoning at the time. If a variance was granted, they would have to comply with current zoning. She said what is needed is the base.

Mr. Richmond suggested the hearing be continued in order to receive that information.

Ms. Mead would also request a continuance on the variance as well.

It was on motion voted to continue this hearing to March 7, 2006.

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Inasmuch as this Variance is dependent upon the outcome of Case 06-15 (Appeal), which has been continued to March 7, 2006, the Board voted to grant a continuance of this case to March 7, 2006 as well.

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