VORDERER
26 Ames Road
Case 02-37A

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
OCTOBER 6, 2008

The Board consisted of:

Jeffrey P. Klofft, Chairman
Nancy G. Rubenstein, Acting Clerk
Jonathan G. Gossels
Stephen A. Garanin
Jonas D.L. McCray, Associate

Notice was published in the Sudbury Town Crier on September 18 and 25, 2008, posted, mailed and read at this hearing.

Christopher and Jeffrey Vorderer were present to request a modification of Special Permit 02-37, which was granted to allow an Accessory Dwelling Unit on the property at 26 Ames Road.

Christopher Vorderer explained that he would like to increase the size of the bedroom and add a family room onto the existing unit. The square footage of the addition is 242 s.f.

The Board was in receipt of a letter dated September 17, 2008 from the Building Inspector supporting the amendment and noting that the addition is within the amount allowed under the Bylaw for an accessory dwelling unit.

Mr. Gossels said his only concern was that this addition not be construed as creating a 2-family dwelling and should be specifically defined as being a part of the accessory dwelling unit.

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

The following motion was placed and seconded:

MOTION: "To grant Christopher P. Vorderer and Jeffrey D. Vorderer, owners of property, a modification of Special Permit 02-37, to allow an increase in the size of the Accessory Dwelling Unit, property located at 26 Ames Road, as follows:

1. The addition will be as shown on the floor plan and in the location shown on the plot plan submitted with the application, which are marked Exhibits 1 and 2 respectively.

2. This approval is for an addition specifically for the Accessory Dwelling Unit and is not to be construed as the creation of a 2-family dwelling.

3. All other terms and conditions of the original permit remain in full force and effect."

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

REASONS: The petitioners seek a modification to increase the size of an accessory dwelling unit. The increase falls within the total allowable amount required under the Bylaw. No changes are proposed to the front of the house and the addition will comply with all other provisions of the Bylaw. Because of the Board's concern that this not be construed as a 2-family dwelling, a condition has been imposed identifying the addition specifically as part of the accessory dwelling unit.

_____
Jeffrey P. Klofft, Chairman

_____
Nancy G. Rubenstein, Acting Clerk

_____
Jonathan G. Gossels

_____
Stephen A. Garanin

_____
Jonas D.L. McCray, Associate

SUSAN FEIST
15 Brimstone Lane
08-25

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
OCTOBER 6, 2008

The Board consisted of:
Jeffrey P. Klofft, Chairman
Nancy G. Rubenstein, Acting Clerk
Jonathan G. Gossels
Stephen A. Garanin
Jonas D.L. McCray, Associate

Notice was published in the Sudbury Town Crier on September 18 and 25, 2008, posted, mailed and read at this hearing.

Mr. Klofft, 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 Land Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Howard Feist was present on behalf of Susan Feist to represent a petition for renewal of Special Permit 06-38 for the practice of massage therapy at 15 Brimstone Lane. Renewal was requested under the same conditions except that a longer renewal period would be desirable.

Mr. Feist said there have been no issues associated with this business since its inception. Mr. Gossels suggested a 5-year renewal period would be appropriate.

There were no comments. No abutters were present to oppose renewal. The hearing was closed.

The following motion was placed and seconded:

MOTION: "To grant Susan J.W. Feist, owner of property, renewal of Special Permit 06-38, granted under the provisions of Section 2340 of the Zoning Bylaws, to conduct a Home Business, specifically the practice of massage therapy, property located at 15 Brimstone Lane, Residential Zone A-1, provided that:

1. Hours of operation will be Monday-Friday, 8AM-6PM.

2. No more than six clients per day will be allowed.

3. No more than two residential employees will be allowed. Non-residents are not allowed.

4. No sign will be permitted.

5. All parking will be on the premises. No parking on the street is allowed.

6. This permit is non-transferable and will expire in five (5) years on October 6, 2013, 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 massage therapy as a home business. The Board finds the use to be in harmony with the general intent and purpose of the Bylaw. It is in an appropriate location, not detrimental to the neighborhood and does not by its presence significantly alter the character of the zoning district. Adequate and appropriate facilities are provided for proper operation. This business has been in operation for three years without incident or complaints from neighbors. Therefore, the Board finds a five-year renewal period to be appropriate for this case.

Jeffrey P. Klofft, Chairman

Nancy G. Rubenstein, Acting Clerk

Jonathan G. Gossels

Stephen A. Garanin

Jonas D.L. McCray, Associate

STANISSLAV MEZHEBOVSKY
15 Willis Lake Drive
08-26

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
OCTOBER 6, 2008

The Board consisted of:
Jeffrey P. Klofft, Chairman
Nancy G. Rubenstein, Acting Clerk
Jonathan G. Gossels
Stephen A. Garanin
Jonas D.L. McCray, Associate

Notice was published in the Sudbury Town Crier on September 18 and 25, 2008, posted, mailed and read at this hearing.

The Board was in receipt of an email dated October 3, 2008 from Mr. Mezhebovsky requesting he be allowed to withdraw his application without prejudice and to resubmit it at a later date. He was also requesting a waiver of the filing fee.

A motion was made, seconded and unanimously voted to allow Case 08-26 to be withdrawn without prejudice and to waive a subsequent filing fee. (Petition for Special Permit to demolish an existing structure and construct a larger structure on a nonconforming lot)

Jeffrey P. Klofft, Chairman

Nancy G. Rubenstein, Acting Clerk

Jonathan G. Gossels

Stephen A. Garanin

Jonas D.L. McCray, Associate

WILLIAM HALL
Lot 4 Hillside Place
08-27

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
OCTOBER 6, 2008

The Board consisted of:
Jeffrey P. Klofft, Chairman
Nancy G. Rubenstein, Acting Clerk
Jonathan G. Gossels
Stephen A. Garanin
Jonas D.L. McCray, Associate

Notice of the hearing was published in the Sudbury Town Crier on September 18 and 25, 2008, posted, mailed and read at this hearing.

Mr. Klofft, 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 Land Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Attorney Robert Dionisi was present on behalf of the applicant, William Hall, who is currently residing in Naples, FL. Also present was Charles Hall, his son.

Mr. Dionisi provided a recent history of the lot. He said in December 2003, Mr. Hall received a letter of opinion from John Hepting, Building Inspector at that time, indicating that Lot 4 was a legal lot in terms of zoning. It had sufficient frontage and sufficient access. The only concern that Mr. Hepting made in his letter of 2003 was that the access would have to be approved by the Planning Board, or in its stead, the agent of the Planning Board, who was the Town Engineer, William Place.

In conformance with Mr. Hepting's letter of 2003, application was made to the Town Engineer for a driveway permit under the Rules & Regulations with respect to driveways. Town Engineer denied a driveway permit.

Mr. Place's opinion was challenged by the applicant and went before the Superior Court a year ago. The Superior Court decided that Mr. Place's decision not to grant a waiver was indeed within his jurisdiction and his right.

The applicant challenged the decision of the Superior Court and this matter is now pending in appellate court. Mr. Dionisi said they are appealing Mr. Place's refusal to grant a waiver to the access down Hillside Place across the Myerow property. There is a 20-foot access there for purposes of serving access to Lot 4.

Pending the appeal, Mr. Dionisi said he was able to work out a plan with Mr. Place which is a compromise with what was originally filed and the plan which is before the Appellate Court. He said for practical purposes they have developed a plan that meets the satisfaction of Town Engineer to the extent that access and egress is achieved down Pokonoket – from Pokonoket down Hillside Place across the Myerow property to the rear of the Myerow property and accessing up to Lot 4.

In trying to achieve a building permit, Mr. Dionisi said he asked Building Inspector James Kelly whether he should formally file for a building permit or whether he would give an opinion as to his interpretation of Lot 4. Mr. Kelly advised that he would provide a letter of opinion, which was attached to this application. In summary, the letter says that Lot 4 does not have the required frontage and does not have access. Mr. Dionisi says this is in contrast to Mr. Hepting's letter of 2003.

Mr. Gossels questioned whether there can be frontage on a way that has not been constructed.

Mr. Dionisi said Lot 4 is shown on a 1959 plan that was signed by the Planning Board and is properly before the Registry of Deeds. It shows the requisite frontage and the requisite area of the Zoning Bylaw, then and now. He said it is Mr. Hall's position that he has a legal 40,000 s.f. lot with the requisite 180 feet of frontage.

With regard to Mr. Gossels comment, Mr. Dionisi said the frontage for Lot 4 has not been constructed nor does he think that it needs to be constructed inasmuch as there is access by way of a 20-foot access right of way across the Myerow property which is adjacent to Clifton Avenue. He said there is Mass. case opinion which suggests that if a lot has frontage along a way that has been approved as a subdivision which was in effect at the time, it does not have to be built so long as it has access.

Mr. Klofft asked whether, instead of applying for a Use Variance, should the applicant have obtained an official denial of the building permit and then be challenging the Building Inspector's decision.

Mr. Dionisi said they are challenging the Building Inspector's opinion. He said Mr. Hall has to satisfy his administrative remedy and come before this Board.

Mr. Gossels asked whether Mr. Dionisi had a letter from Town Engineer which states his satisfaction with the new plan.

Mr. Dionisi said he did not. He could only represent that he was sure Mr. Place would advise Town Counsel that the matter is under appeal and that with negotiations between Mr. Hall and Mr. Place he could represent to this Board that those matters are at a conclusion providing Mr. Hall is able to get a building permit. His approval of a driveway permit is conditioned on obtaining a building permit.

In response to questions from Mr. Gossels, Mr. Hall said he thought Lot 4 was taxed as a buildable lot but wasn't sure. He did not have a tax bill with him. He asked for, and was granted, permission to call his father to ask what the assessed value was.

Mr. Dionisi said he was agreeable to having neighbors come forward while Mr. Hall was out of the room.

Michael Myerow, 79 Pokonoket Avenue, abutter, said his property abuts Hillside Place to the north and he owns the land over which Mr. Dionisi says there is an easement. He said that easement is 30 years old and was reserved in the deed to the builder of the house that he lives in. He said it is unclear as to whether there really is an easement over his property. However, he said even assuming there is, he wanted to know the status of Hillside Place and who has the title to the land. He said he and his neighbor have been using it for 25 years simply as a driveway. The town doesn't plow it – Mr. Myerow said he paved it and extended it about 10 or 15 feet to allow cars to park down there. It's basically a driveway that serves two homes. It's paved for about 130 feet from Pokonoket Avenue and is 12 feet wide in places so two cars can't pass.

Mr. Myerow questioned where the frontage is – if it's on Hillside Place, the property doesn't really abut Hillside Place at all. Also, looking at the approved subdivision plan of 1959, he said that was approved because there was a road – Clifton Avenue. It was a cul de sac which looks like it's on the petitioner's property but actually at one point extended all the way to the other end of Pokonoket. He said while the lot was approved, it was approved based upon the existence of that road, but the road was never built. He was against approval of this application.

Discussion followed on the 1959 subdivision plan. Mr. Myerson said Clifton Avenue was originally supposed to go all the way to Pokonoket Avenue. That plan was discussed from the point as to how lots were configured from smaller lots.

Mr. Hall returned. He said his father is paying taxes of $700/quarter. The Board was unsure as to whether this meant the property was assessed as a buildable lot.

Mr. Myerow said the petitioner's family created the subdivision and they did it based upon that road being there. He felt it inappropriate to now claim a hardship because the road wasn't built and also because it's difficult to access the property because of the topography.

Mr. Klofft asked whether Mr. Hall owned the property before it was subdivided and whether he filed a subdivision plan.

Mr. Hall said his grandfather and then his father owned it.

Mr. Klofft asked why this would not then be a self-imposed hardship.

Mr. Dionisi said there is no hardship because the lot has frontage and access. He said he is challenging the decision of Building Inspector Kelly who says there is no frontage or access to Lot 4. He said he has been able to demonstrate that from 1959 the Planning Board created the frontage on Clifton Avenue.

Mr. Klofft said even going back to the letter from Mr. Hepting, that letter states that a plan must be presented to the Planning Board under subdivision control to construct a road over the 25 feet right of way designated in the deed of 1978.

Mr. Dionisi said that is the access across the Myerow property which accesses Lot 4. He read from Mr. Hepting's letter which opines that Lot 4 is determined to be a legal single family dwelling lot for zoning purposes.

Mr. Gossels replied that would be the case provided one can get to it.

Mr. Klofft added that Mr. Hepting's letter also says that Clifton Avenue as shown on the 1958 subdivision plan has never been constructed and therefore a plan must be presented to the Planning Board under Subdivision Control Law to construct the road of over 25 feet right of way so designated in the deed dated Nov. 6, 1978. The letter further states that the Planning Board can waive the roadway design criteria provided clear and adequate access is provided to the subdivision lot.

Further discussion followed on the interpretation of Mr. Hepting's letter pertaining to access and right of way. No one present at the hearing had a copy of the easement over the Myerow property.

Commenting on the assessment, Mr. Dionisi said the taxes paid extrapolate to a $200K assessment. Discussion followed as to whether a buildable lot costs more than $200K.

Attorney Robert Landry was present on behalf of Diane Blumenson and Paul Cook, 73 Pokonoket Avenue, abutters on the corner of Hillside Place and Pokonoket Avenue. He was under the impression that the case before the Board is a request for a variance. He said he hadn't seen anything that says that this is an appeal of Mr. Kelly's opinion.

Mr. Klofft agreed. He said what was advertised and applied for was a use variance for the property for what he believed was insufficient frontage. It was not advertised as an appeal of a decision of the Building Inspector.

Mr. Dionisi said the request was an appeal and the reason was stated in Part IVb of the application form which was submitted.

Mr. Landry said he was present to state that his clients are opposed to the request for a use variance – which is what they thought they were here for. He said the property is landlocked, has no frontage, it is not located on Hillside Avenue, has inadequate access and does not meet the hardship requirement.

Mr. Landry said this property has been around for a long time – there was a decision by Mr. Hepting which seemed to have reported favorably. Mr. Kelly is not the first Building Inspector to deny based on frontage. In a letter of July 7, 1976, then Building Inspector Francis White also denied it because of insufficient frontage. He said he looked at the history of Clifton Avenue in more detail and the only place that it ever exists anywhere is on a 1929 plan of land that was recorded in the Registry of Deeds. It was acquired by Leslie Hall, Mr. Hall's grandfather, and Howard Goodnow in 1948, consisting of a lot of the land that was still remaining on the King Philip Heights subdivision. Over the course of years, during the late 40s and early 50s, the lots along Clifton Avenue were deeded out to various parties. The deeds that conveyed out those lots along Clifton Avenue were joined with lots along what is shown on this plan as Wilbert Avenue and what is now Indian Ridge Road to create two lots for access, combining the lot on Wilbert Avenue with a lot on Clifton Avenue and conveying a portion of Clifton Avenue to those same owners when the deeds were conveyed out, with no reservations of passage and no reservations of rights of way.

In reviewing some of the deeds Mr. Landry said there is at least one in 1950 containing wording "to the easterly side of proposed discontinued avenue of Lot 100." He contended that the then owners of the property back in the early 50s clearly established by public record that this is a discontinued way that has never been in existence – or ever existed as a path.

Mr. Landry said it is his clients' position that those conveyances clearly establish that there was an abandonment and it begs the question of how later on after the way had been discontinued that there can be an extension of that roadway created for a lot that isn't even part of this subdivision plan. He said basically, what is being asked for is a building permit for a lot that has zero frontage and is accessed by a right of way, and not only is that without precedent in this town or anywhere else in the Commonwealth, but he felt it sets a very dangerous precedent.

In terms of the hardship, Mr. Landry said it is his client's position that this is a self inflicted hardship. The family that is currently asking for special treatment owned the property and created these issues. He said Mr. Hall owned the Myerow's property and other land abutting Lot 4 and deeded it away. Their proposal is to excavate a privately owned road. There is nothing to show that there was a public dedication. He felt the land on Hillside Place is owned by the Myerows and other owners of the property, including his clients, to the center of the roadway from their property line.

Mr. Landry said it is unclear whether or not Lot 4 has any legal right to use that right of way since they weren't in the original subdivision plan. He said they have a right of way that they reserved over a road that never existed and over property which he was not sure if that ownership has been maintained or who owns that part of the paper road.

Referring to Mr. Landry's comments, Mr. Dionisi stated that there has been no abandonment of Clifton Avenue. He said admittedly there were deeds from Mr. Hall's successor in title which transferred some of the property on Clifton Avenue which extends southerly down the hill, but with respect to the 180 foot frontage shown on the 1959 plan, there has been no abandonment of Clifton Avenue.

Mr. Klofft asked about the portion that would be from south of Lot 4.

Mr. Dionisi said if you extend beyond the cul de sac, that portion of Clifton Avenue has been abandoned by virtue of deeds of Clifton Avenue to two abutters.

Mr. Klofft asked if Mr. Dionisi was saying that the only part of Clifton Avenue that remains is the cul de sac circle.

Mr. Dionisi said that was correct and it is disconnected from everything else.

In response to Mr. Klofft's question as to what the applicant's claim was, Mr. Dionisi responded that his claim is that the successors deeded the fee interest in Clifton Avenue below the cul de sac to abutting property owners. Those abutting property owners are on Indian Ridge. What was retained was the 180 foot cul de sac.

Mr. Gossels said that cul de sac is landlocked.

Mr. Dionisi said it is landlocked except that it has access across the Myerow property. It has access out across Hillside Place to Pokonoket Avenue.

Mr. Klofft said there appears to be two points - whether or not that part of the cul de sac still exists, whether or not there truly is access across the Myerow property.

Mr. Landry submitted for the record a letter dated October 6, 2008 with regard to his discussion.

Helen Casey, 85 Pokonoket Avenue, abutter on the east side just above Lot 4 – read a letter dated May 9, 1963 from Attorney John Powers which notes that after spending considerable time in the Registry of Deeds, he has been unable to find the proper reservation of sufficient rights to allow Clifton Avenue to be considered as an existing roadway, either public or private. The letter states "if for any reason whatsoever, it might be considered that Clifton Avenue did in fact exist, it is also my firm contention that the "owners" of whatever rights of easement might have been claimed, have clearly abandoned any claim in or to Clifton Avenue by executing a series of deeds to parties abutting the ways as shown on the plan, which deeds clearly extend across the way in such a manner as to indicate an extinguishment."

John Viele – 69 Pokonoket Avenue, abutter since 1962 said the Highway Dept. told him that that Lot 4 was behind the Caseys and the only access is supposedly an easement through the Myerow property onto Hillside Avenue. However, Hillside stops basically at the Casey,

Myerow and Cook driveways. There are boulders there and it drops down steeply. He believed it was rejected because it was too steep – you couldn't get a fire truck down there.

Mr. Viele said this hill area has history and was the site of a battle in 1676. He suggested the possibility that Mr. Hall could perhaps consider selling it to the town as a historic park, possibility using CPC funds.

Edgar Sjolund, 32 Indian Ridge Road, abutter, lives downhill from this property. He referred to one the criteria for granting a variance which is that it would not create a harmful environment for the area. When this was initially attempted back in 1966-67, a rain storm occurred and there was a very significant slide which reached down to the rear stone wall of his place as well as the property of the Donaldsons who were the owners at that time. He said this hill is a drumlin with a long access and very steep slopes, and any construction of that nature would constitute a hazard with regard to boulders, glacial deposits and the till rolling down that hill causing damage to those houses in the area.

Dean Casey, 85 Pokonoket Avenue, abutter requested a definition of frontage – particularly with respect to a road that may have been conceptual since it has not been built. He also requested a definition of a road because he felt it appears that what we have is a segment of a road which is a couple hundred feet long and not sure how wide.

Mr. Dionisi read from the Bylaw which defines a street as a way in which the Sudbury Town Clerk certifies is maintained by public authority and used as a public way, or a way shown on a plan approved and endorsed in accordance with the Subdivision Control Law.

Mr. Klofft asked the applicant for an explanation as to how this segment called Clifton Avenue doesn't substantially derogate from the intent of the zoning bylaw, adding that the Zoning Bylaw clearly could not have intended to have lots of little road segments, cul de sacs or circles connecting disconnected parcels of land.

Mr. Dionisi said one can have frontage along a way through which a lot on a public way never could gain access or egress by the frontage because of wetland issues or other issues. It must have access through some other road. Those are legal lots. He said in this case there is a lot which was laid out in 1959 which was deemed to be a legal lot by not only the Building Inspector but also in his (Dionisi's) opinion based on case law. He said his client has a legal 40,000 s.f. lot with 180 feet of frontage. That road will never be built, nor was it the intention of Mr. Hall in 1978 when he parceled out some land east of this particular parcel over which he reserved the right to get to Lot 4. He said he was not here to tell this Board that they are going to build Clifton Avenue further down – in some instances they cannot because the fee interest has already been deeded to abutting property owners. But what was reserved here was frontage on a legal lot. It was endorsed by a plan by the Planning Board in 1959 and was duly recorded.

Mr. Klofft said he had two issues. He was not convinced this is not a self-inflicted hardship and did not believe that this passes the test of not substantially derogating from the intent of the Zoning Bylaw. He said the frontage essentially is created by a segment of Clifton Avenue which is the remaining cul de sac portion.

Mr. Dionisi replied that it is also shown on a plan which was recorded in 1959 which created four lots one of which is this lot which is before the Board tonight.

Mr. Klofft replied that the applicant has abandoned the lower portion and at that point the intention of what was going to happen changed. He said it appears that the frontage is being created by a segment of a road that doesn't connect to anything which seemed to him to substantially derogate from the intent of the Zoning Bylaw.

Mr. Klofft said the sense of the Board right now is that it is not going to be comfortable saying a segment doesn't substantially derogate from the intent of the Bylaw. He said there were two choices at this point – a withdrawal without prejudice or continuing forward with a decision being rendered.

Mr. Dionisi said he had no intention of withdrawing at this point – that the application was to challenge the decision of the Building Inspector.

Mr. Klofft noted an Application for Use Variance form was submitted by Mr. Dionisi. Mr. Dionisi countered that it was the Board's pre-printed application form for a use variance – he said what was being requested was an appeal of the Building Inspector's determination. Considerable discussion followed on this after which Mr. Dionisi asked what the Board would be ruling on tonight – a request to challenge the opinion of the Building Inspector or some other matter of some other substance.

Mr. Klofft said it would be on the use variance basically looking for relief from frontage as it was advertised. While he would agree that the application is ambiguous in places, there are ways to read it either way and going forward with the use variance is how this Board would choose to read it.

Further discussion followed on the wording of the easement and whether or not Clifton Avenue was abandoned. Mr. Gossels wanted to see that there was an easement and that Mr. Myerow doesn't have an adverse possession argument. Mr. Klofft said he will ask Town Counsel for his opinion on the frontage issue.

Mr. Dionisi suggested that rather than withdrawing, that this hearing be continued.

Mr. Klofft said the difficulty is that the application is ambiguous and contradictory. He felt the best way to move forward would be for the applicant to ask for a withdrawal of the use variance without prejudice and then file an application to appeal the decision of the Building Inspector. For the purposes of the date of filing the Board would consider the date of the filing of the use variance which is within 30 days of the Building Inspector's decision.

On behalf of his client, Mr. Dionisi requested the application for use variance be withdrawn without prejudice.

A motion was made, seconded and unanimously voted to accept the applicant's request to withdraw without prejudice and to waive a subsequent filing fee.

A public hearing on an appeal of the Building Inspector's decision was scheduled for October 27, 2008.

Jeffrey P. Klofft, Chairman

Nancy G. Rubenstein, Acting Clerk

Jonathan G. Gossels

Stephen A. Garanin

Jonas D.L. McCray, Associate