

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
Monday, June 18, 2012

The Board consisted of:

Elizabeth T. Quirk, Chair; Benjamin D. Stevenson, Clerk; Jonathan G. Gossels; Jeffrey P. Klofft; and Jonathan F.X. O'Brien.

Also:

Jody Kablack, Director of Planning and Community Development

Paul Haverty, Attorney, Regnante, Sterio & Osborne LLP

Ed Marchant, Consultant

Joe Peznola, Hancock Associates

Fred King, Schofield Brothers

For the Applicant:

Robert Moss, Madison Place Sudbury LLC

Steven Schwartz, Goulston & Storrs

Paul McManus, EcoTech, Inc.

Glenn Dougherty, Tetra Tech

Ms. Elizabeth Quirk, Chair of the Zoning Board of Appeals, re-opened the hearing. A motion was made to approve the minutes from the February 15, 2012 hearing and the Board unanimously approved that motion. She read the list of documents received for the June 18, 2012 Meeting which included:

- 5/16/2012 – Extension of Time Form from Bob Moss to the ZBA
- 5/17/2012 – E-mail from Peter Anderson, 113 Landham Road, to the ZBA
- 5/21/2012 – E-mail from Stan Kaplan, 98 Victoria Road, to the ZBA
- 6/6/2012 – Wetland Replication Area Plan, 58-unit Townhouse Plan
- 6/6/2012 – Memo from Tetra Tech to Jody Kablack and the ZBA
- 6/6/2012 - Grading and Drainage Plan
- 2/3/2012 – Existing Watershed Map
- 6/6/2012 – Proposed Watershed Map
- 6/6/2012 – Proposed 58-Unit Layout Plan
- 6/6/2012 – Proposed 58-Unit Utility Plan
- 6/6/2012 – Proposed Culvert Stream Crossing Sections
- 6/11/2012 – Letter from Sudbury Valley Trustees to the Conservation Commission
- 6/13/2012 – Memo from Eco Tec, Inc. to the Sudbury Conservation Commission and ZBA
- 6/14/2012 – E-mail from Frank Huntowski and Sudbury Residents to the ZBA
- 6/15/2012 – Memo from Hancock Associates to the ZBA
- 6/16/2012 – E-mail from Sudbury Resident Peter Griffith, 30 Rambling Road to the Planning Office, Conservation Commission, and Sudbury Valley Trustees
- 6/18/2012 – Memo from Fred King, Schofield Brothers, to the ZBA
- 6/18/2012 – Memo from Glenn Dougherty, Tetra Tech, to Jody Kablack and the ZBA
- 6/18/2012 – Revised list of waivers
- 6/18/2012 – Memo from Jonathan Witten, Huggins and Witten, LLC to the ZBA

Mr. Moss reported that he had performed the engineering for the proposed 58-unit alternative townhouse plan. He submitted revised drainage calculations for peer review and had received two comment letters, one from Fred King, Schofield Brothers, and Joe Peznola, Hancock Associates. There had been no significant changes to the plan since the last hearing except that it had been thoroughly engineered. Updated traffic counts, fill volume related to the amount of sand and gravel that would be brought to the site, and a rendition of the duplex townhouse to be built at the site of the existing farmhouse were also submitted to the ZBA.

Glenn Dougherty of Tetra Tech then reviewed the 58-unit townhouse alternative site design. Changes include the use of standard paving from Landham Road, over the wetlands crossing, and up to the point just past the pavement at the northern end prior to the start of the townhouse buildings. The fifty-eight units are comprised of ten buildings at the back of the site and a duplex at the front of the site which is basically a conversion of the existing farmhouse. The ten rear buildings have roof drainage directly into the porous pavement and he described the system of drains and detention basins through which roof drainage would be accommodated. He said that he attended several meetings with Hancock Associates and Schofield Brothers to work through issues.

Mr. Peznola, Hancock Associates, discussed the contents of his June 15, 2012 comment letter. He confirmed receipt of Tetra Tech's revised engineering plans, drainage calculations and supporting documentation. In his letter he revisited his initial comment letter from February 14, 2012 where they identified thirteen outstanding items. Then he compared the outstanding items with the recently engineered plans. Hancock Associates' findings were that the applicant had addressed those open items in the revised plans. He noted that several of Hancock Associates' prior comments had to do with stormwater and the analysis methodology. He said that they had met with Mr. King of Schofield Brothers, Tetra Tech, and Dr. Roseen from UNH to work on the differences of opinion on the methodology and analysis. Prior to that February 2012 letter Hancock Associates had performed independent hydrology runs using their own methodology and their findings were that the applicant's methodology did match their results. Given that the results were the same he said there was a comfort level of how the system would function.

Mr. Peznola noted that a large snow storage area is located at the front of the site and another was added to the back near the emergency access connection. It abuts a proposed basin and, as designed, snowmelt would be treated. He was fine with the location and pleased that there is a second alternative instead of having to rely on trucking out the snow. Several original concerns have been overcome by these changes and the elimination of a large section of porous pavement.

The second part of the review focused on the initial comments on the alternative plan. In March of 2012 he reviewed the alternative plan without any engineering details and had come up with issues. By and large these issues identified in March had been addressed through plan revisions and engineering documentation. Outstanding issues now include the need for an operations and maintenance plan, revisions to stormwater operations and maintenance, and there was still a question about vacuuming frequency of the porous pavement. The applicant has proposed four times per year supplemented by the use of a commercial landscape vacuum that the applicant will purchase and leave on site to be used as needed. Mr. Peznola felt that was a good compromise.

An additional unresolved issue involves earth migration; how much and how many loads of material are being removed or brought to the site. It is essential to know the trucking routes during construction.

Lastly, in thinking about conditions of approval, Mr. Peznola wanted more information on porous pavement sequencing. He said that construction would be easier now that there is a mix of pavement. There are more opportunities for stock-piling materials and equipment storage. He said that he could work with the Board to extract those items contained in the February letter for the conditions.

Mr. Dougherty said that in regard to the operations and maintenance plan Tetra Tech will work to incorporate the drainage structures that are part of the design because of the standard pavement along the access drive. He confirmed that Mr. Moss was agreeable to purchasing the vacuum to supplement commercial vacuuming. Earth Removal plans were submitted to the ZBA at this hearing. Earth removal modifications from the 120-unit plan were minor in that the net fill for the 120-unit plan was 44,850 cubic yards and is now 45,500 cubic yards for the 58 units. He said that if the ZBA was amenable truck routes could be submitted when the applicant reaches the construction phase and the contractor is chosen.

Ms. Quirk noted that the ZBA habitually includes earth migration and truck routes in their standard conditions. Ms. Kablack agreed that it was essential to know where the trucks would be going and at what times of the day. Additionally, hours of construction should be noted along with standard hours that the material would be trucked in.

Attorney Schwartz suggested that a condition could be worded in a manner to state “upon the condition that routes and times are acceptable to the Board,” since the contractors have yet to be hired. Mr. Moss asked to see examples of what developers have submitted to the Town in the past. Ms. Kablack said that she would work with Town Engineer Bill Place to provide examples.

Mr. Dougherty briefly discussed the rendering of the farmhouse structure. He then handed out a calculation of the traffic trips for the 58-unit plan. He said that it was a conservative estimate based on the apartment land code. Ms. Kablack had questioned whether since the units were townhouses that was the appropriate method to calculate. Mr. Dougherty said that when the development went from apartments to townhouse condominiums there would actually be fewer vehicle trips. The land code for condominiums shows less. Therefore morning peak hours would have thirty fewer trips between the 120 units and the 58-unit townhouses. The afternoon peak hours would have forty-nine fewer trips. The overall weekday total count was 850 for the apartments and 400 for the townhouses.

Ms. Kablack asked Mr. Peznola whether the vacuuming frequency seemed plausible since there are large lengths of roadway for a walk-behind vacuum. Mr. Peznola said that it was comparable to how a landscaping company would do such work using leaf blowers. One or two landscapers would be walking the property in the same manner with the vacuum, which is a large machine with five foot blade and large bag to dispose of pick-up. Purchasing the machine would show the property manager’s commitment to cleaning the pavement more often as the manager would have a sense of how much vacuuming was necessary. Mr. Moss said that Dr. Roseen noted that if there are certain problem areas at the site they would get spot-vacuumed more frequently.

Ms. Quirk confirmed that the walk-behind vacuum would not be responsible for vacuuming the entire paved surface. Mr. Moss said that was correct adding that the pavement would be vacuumed four times per year with commercial vacuum and more frequently it would be spot vacuumed, particularly after rainstorms and when there are leaves down. Ms. Quirk asked Mr. Peznola what the best number per year could be. He said that the number would depend upon the intended use of the parking lot and where there are loading and input issues. He said that he felt that this struck a happy balance to stay on top of maintenance.

Ms. Quirk said that she was still hung up on porous pavement as being somewhat of an untested technology and how to adequately condition the maintenance of it. Mr. Peznola said that the applicant had committed to commercially vacuuming four times per year. Mr. Klofft questioned whether from the vacuuming one could get a sense of how much is picked up from the pavement. The answer was yes. Mr. Klofft said that therefore the Board could be conservative in its conditioning of the number of times the pavement should be vacuumed. Mr. Gossels suggested that it is not only the amount of debris but the characteristics of particles that would have to be examined.

Mr. Peznola referenced language from his February memo stating that who does the maintenance would be important. The Board could condition this issue so that top-rated stormwater maintenance professionals are doing the work. With regard to this project, four times per year is most likely sufficient but he said that there is data on poor maintenance and resulting issues. He said that if the company does not have a lot of real-world experience then the maintenance will not be done at an appropriate level.

Mr. Moss suggested that a condition of the decision could include that for the first two years of operation an inspection report could be submitted to the Town and if it were negative then efforts could be adjusted.

Ms. Kablack noted that the peer reviewers would be helping the ZBA to craft the conditions.

Mr. Klofft asked a technical question about the amount of porous material under the pavement. Mr. Peznola explained the composition of the pavement which is noted on the engineer's plan sheet C.82

Mr. O'Brien asked why it seems that the only companies that deal with porous pavement appear to be located in Maine or New Hampshire. He asked why Massachusetts does not yet have this expertise and regulate this pavement. Mr. Peznola said that it could be due to the fact that cities and towns in Massachusetts have active Conservation Commissions that oversee stormwater management. In Maine, for example, maintenance is state-driven which ensures that appropriate maintenance happens. In New Hampshire it just happens that the UNH Stormwater Center are champions of porous pavement and so their nationally renowned resources are available. Mr. Peznola said that he looked carefully at this component and what would be the ramifications for not keeping up with maintenance.

Mr. King then walked the Board through his findings on the project as they pertain to the wetlands bylaw. He said that improvements have been made through the alternative plan but there are still some issues, including the single-access crossing, similar building footprint, and the proximity to the wetlands resource areas. The access road was narrowed by two feet which reduces direct alteration of the wetlands. The sub-surface sewage disposal system has improved due to the reduction in number of units and bedrooms. The amount of sewage flow is reduced by a third and the infiltration of the leaching facility has also been reduced by a third.

At the westerly end of the site where there was originally proposed a drive and culvert over a wildlife habitat, changes have been made to eliminate the culvert and reduce the drive to twelve feet. The use of side sloping eliminates the need for a cross-culvert. This allows for improved mitigation for the inner vernal pool. A cross culvert is still needed on the east end.

He reiterated that since the winter and spring were dry there were only marginal vernal pools on site. Therefore the study showed that the XA vernal pool which is inside the loop was the least productive of the vernal pools. The XB vernal pool to the north was the most productive of the four on site and more valuable. Improvements were made in the vicinity of buildings eight and nine at the northwest corner of the site in that the buildings have been pulled back substantially and setbacks measure on average about

seventy-five feet. Units throughout the site have also been tightened up to provide more open space between the development and vernal pool areas. The total hard footprint has been reduced slightly. He noted that there might be more building footprint but there is less paved surface. The plan includes more detail on the AURA replication. Total permanent alterations are reduced slightly. He noted that the applicant has offered to do some off-site mitigation on three conservation areas elsewhere in Town to try to off-set overall environmental impacts and improve habitats. The riverfront alteration is increasing from 5.3 percent up to 6.27, which is roughly an increase of 5,200 square feet. Given that there is less AURA alteration this balances things out. Wetlands replication was originally going to be two to one but now will be one to one.

Mr. Gossels said that he had attended a work session with the Conservation Commission and it was his understanding that the scarce resource was the upland area. He said that the decision to do only a 1:1 replication was because the upland area was the more useful habitat. Mr. King agreed. He said that EcoTec pointed out that there will be a need to replicate isolated wetland. The plan will need to go to higher court for determination so replication will likely be required.

Mr. King explained that the remainder of his report had to do with the adequacy of information required by the bylaw. Because of the enormity of the upland resource alterations the plan still does not meet the bylaw standards so the applicant will need a waiver from that or more information.

Mr. Gossels questioned if the plan does not meet the requirements of the bylaw then what does this mean. Mr. King said that typically the Conservation Commission wants to know where the wetland is migrating through the site. And they want to know if the plan is viable. Mr. Gossels asked for confirmation on whether this was a documentation issue or a real deficiency that should be addressed. Mr. King said that if the ZBA agrees with information that has been provided then the ZBA can proceed to grant the waiver.

Mr. Gossels asked what the ZBA should know in order to make its decision. Mr. King said that the wildlife study is a soft issue. However, he said that a migration study would determine whether the area is a major corridor. Mr. Stevenson asked if, short of a study, does Mr. King have any ideas what those corridors might be. Mr. King said that more than likely wildlife would be heading toward Hop Brook and the upland area, going west, toward the open areas.

Attorney Haverty asked Mr. King whether there was a specific requirement in the bylaw that requires that habitat study. Mr. King said there was not but that it would be done to exercise discretion. Therefore the applicant does not need a waiver for this. Mr. King said that this information is traditionally supplied.

Mr. McManus said that the applicant has submitted a wildlife habitat evaluation along with the Notice of Intent to the Conservation Commission with a copy to the ZBA. He said that it met the requirements of the Wetlands Protection Act. The Sudbury bylaw does not have specifically enumerated requirements as the Act does. He said that the habitat study would have met the requirements if the site had rare species. Lacking direction from the bylaw the Conservation Commission and ZBA asked for more information and EcoTec went to the State rare species regulations to do the report because the Town wanted it. As there are no known rare species in the vernal pools here, they evaluated amphibians that would have used the vernal pools. He said that the bylaw does talk about multiple years of studies for vernal pools and so they have provided three years of springtime evaluations of the vernal pools. He pointed out that the information provided was consistent with the documentation that was required for the vernal pools across the street that were actually filled in when the Conservation Commission was the implementing authority for the development at Brookside Farm. Mr. McManus said that the applicant was not requesting a waiver of any particular issue but the language in the bylaw says that there cannot be a significant impact. He

said that he did not think it represented a significant impact, which is a discretionary term. He said that if the ZBA were to find that it was significant then the applicant would need a waiver. And this is essentially what the waiver request is stating.

Mr. King said that there was no finding of endangered or state-listed species. But he added that he was not less concerned about migration with a pool that dried up because in another year it could be productive. It is a vernal pool. He said that the applicant has gone beyond the state's requirements but is lacking in town bylaw requirements.

Mr. McManus said that he disagreed with Mr. King in terms of the typical requirements for Sudbury because this level of study did not occur when Brookside Farm was being developed which was of particular interest to him due to its proximity to Johnson Farm and knowing that there were vernal pools there.

Mr. King said that previous comments on the hydrologic model have been resolved. With respect to the septic system there has been a reduction in the size of system but he still had questions about the setbacks from the infiltration system to the wetlands. It still appears to be thirty-five feet from the leaching field to the wetlands and less than one hundred feet from the river itself. He wondered whether the setbacks to the wetlands and shape of the system could be adjusted. Ms. Quirk asked Mr. Moss if this could be done.

Mr. Moss said that the wastewater treatment plant and location of the leaching field had not been redesigned yet but would be finalized for submittal to DEP. It will be farther away from the wetlands than originally proposed. He said that when the revisions were made originally they included the 4-unit town house and barn configuration which limited space available for the septic system. Since the barn building will not be built that frees up some space for re-shaping the septic system.

Mr. Gossels commented that there appeared to be a steep gradient going up to the leaching field which created a plateau effect. He asked if this could be re-worked to make it look more like an open field.

Mr. Moss said that the infiltration basin would be a vegetated basin a few feet deep on the right-hand side of the site. It would have a gravel road around it and is located on the west side of the Tennessee Gas Line. Mr. Dougherty said that the front meadow would not be re-graded and is reserved as a snow storage area. Mr. Moss said that when the redesign is done the appearance of the leaching field would be softened as the septic area is stretched out. Mr. Gossels said that he wanted the meadow to look like a meadow.

Mr. King said that he had one concern with the retaining walls in relation to the porous driveways which he said could be resolved by using geo-fabric liners. He said the porous pavement system is near versa lock walls with a drainage layer behind it so there is a danger of the storage layer short-circuiting and going into the wetlands. He and Mr. Dougherty have spoken about this and Mr. Dougherty said he would address that issue.

Mr. Stevenson said that he appreciates the off-site mitigation efforts as explained by Mr. King, but he said that it would be unfair to this neighborhood not to do the work at sites that more directly affect this neighborhood. Mr. Moss said that the Conservation Commission proposed the sites for the mitigation projects. Ms. Quirk agreed that it was within the Conservation Commission's jurisdiction to approve mitigation sites. Ms. Kablack said that the Conservation Commission was continuing its hearing on this case and the ZBA could write a letter as a Board to bring these concerns to their attention.

Ms. Kablack then presented her comments. She noted that on the plan there are retaining walls along the driveway and main road that are on average five feet high. She asked whether there would be fencing or guardrails along this area and if so the details need to be noted on the plan.

Mr. Dougherty said that there would be guardrails on retaining walls adjacent to roads, and at the retaining walls adjacent to buildings there would be four-foot high black coated vinyl fences primarily for safety. The guardrails would be wooden.

Ms. Kablack noted that the Fire Chief had indicated that there is no way for a fire truck to turn around in the area of the small spur road between buildings nine and ten. What was shown on the plan were three parking spaces and no turn-around. She said that if that area could be turned into a Y or a T that configuration could work, but it is the Fire Chief's request that there be a way to turn trucks around.

Mr. Moss said that the area measured approximately 125 feet and was near a vernal pool. Ms. Kablack suggested that the parking spaces could be revised to become the turn-around. Ms. Quirk asked whether this could be engineered since the Fire Chief was requesting it. Mr. Dougherty said that he would look into it. Mr. Klofft questioned which would be more important, the fire truck turn around or the wetlands. Ms. Kablack explained that the Fire Chief was concerned about backing his fire truck up in that area of the development. Backing up is less desirable than having a space in which to turn it around and correlates to overall safety. A truck has no difficulty getting in to any potential emergency but would have difficulty getting back out. Mr. Moss felt that he would have to ask the Conservation Commission about this possibility. Mr. Klofft asked how large the turn-around would need to be. Ms. Kablack said that it would need to be thirty-five feet by thirty-five feet. Discussion ensued about leaving the design as is or working on it further to accommodate the Fire Chief's request.

Ms. Kablack said that the surface materials for the access roads need to be noted on the plan. She also said that utilities, a typical cross-section of paved areas, and other details such as lighting should be added as well so that the Town Engineer Bill Place could review. Floorplans were also needed. She said that there should be some discussion about the bus shelter plan noting that the recently approved Landham Crossing development simply utilized a marked space for the bus stop with pavers rather than creating an entire structure. Also a final landscape plan had not been submitted.

Attorney Schwartz said that in his experience a number of those requirements are shown on the final plans which are conditions of the permit and submitted after closing of the hearing.

Ms. Quirk then opened the floor for public comment.

Stan Kaplan, 98 Victoria Road, said that during the hearing there was discussion about mitigation at the local level. He felt that given that there would still be 400 vehicular trips a day to and from Landham Road, he wanted advisement from the DPW as to whether traffic lights at Landham and Boston Post Roads could be necessitated before this application moves forward. He said that traffic is the most important mitigation issue, particularly for residents along Landham Road.

Colleen Labib, 9 Stagecoach, noted that there were now two detention basins shown on the plans but that there was only one in the last revised plan. She wanted an explanation about why they were there, how they worked, whether they clogged, and what way do they flow. Mr. Dougherty explained that the detention basins, which were both shown in roughly the same locations on the earlier designs, pick up runoff from the access road which goes through a water quality receptor for treatment, and then the stormwater discharges into the basin and will either infiltrate into the ground or, during extreme storms, it

would be discharged into an outlet control structure which controls the rate of flow out of that basin. Mr. Gossels asked how deep the basins were. Mr. Dougherty said that they were two and a half feet deep. Ms. Labib asked how far off of her property line the basin closest to her was. Mr. Dougherty said that they were fifteen feet off of her property line including the gravel road. The basin itself is approximately 25 to 30 feet away from her property line. Ms. Labib asked if the basins could back up or flood. Ms. Quirk said that the basins would have to meet DEP stormwater management guidelines and Mr. Dougherty concurred. Ms. Labib asked if there was to be any mitigation in the plan in case of flooding because she felt there should be. She urged the Board once again to stop the fifty-eight unit plan by not approving it. She said the ZBA should drop the number of units to forty-five. She said the ZBA should let the applicant appeal because the area cannot support fifty-eight units. And lastly she said that the ZBA should require the applicant to get rid of all of the front building, the wastewater treatment plant, the stormwater basins, and mounding.

Mr. Gossels asked about the purpose of the gravel road around the catch basin and whether the gravel road needed to go all the way around it. Mr. Dougherty said that its primary purpose was for maintenance of the detention basins they were required by DEP for access. Mr. Moss said he felt that access roads that surround the basins were overkill and suggested simply having a road leading to the basin. He added that they would be made of gravel and not pavement but still needed to be firm enough to support a small backhoe. Mr. Dougherty felt that would be adequate.

Mr. Peznola concurred that the road is needed to get to and into it but they do not need to have it go all the way around. The applicant can also work on a planting plan. It was discussed that while the Tennessee gas line was in the vicinity the basin the basin could move ten to fifteen feet south and further away from the property line. The 25 foot wetland buffer needed to be maintained. The back and front gravel road around the basin could also be eliminated as long as access remained.

Martin Greenstein, 9 Brookdale Road, said that Sudbury has many children and he asked where the sidewalks were to be placed, if there would be streetlights, and if the developer was going to provide a playground for residents of the development. Mr. Dougherty explained that sidewalks would run along the main access road and to the bus stop at Landham Road. There is no playground proposed.

Attorney Jon Witten, representing the neighbors, submitted a letter to the Board in which he cited that there had been no pro forma review. He said that there was no support for the density the applicant proposed, there have been no engineering plans that would identify how wastewater would be disposed of on-site, no plans for how the project conforms to the Wetlands Protection Act and the Sudbury Wetlands Bylaw, or any evidence that rebuts the regulatory presumption that preservation of open space outweighs the local need for affordable housing. He also requested that the Board approve far fewer units and that it not waive the Sudbury wetlands bylaws. He requested that the Board impose the conditions suggested by his clients as listed in his memo.

Tom Fosnot, 22 Winsor Road, said that as a geologist he did not feel that the project made sense. He said that anyone living close to this large development would be unhappy. He said that driving on the roads to and from Loring Elementary school and on Route 20 traffic will be much worse without any traffic light. He questioned how one would expect teenagers to drive safely on the roads. He also noted water quality issues with muddy water that he is experiencing as far away as Winsor Road from what he assumed was the Landham Crossing construction work and he questioned what would happen once the Johnson Farm project was underway.

Brian Cain, 33 Victoria Road, said that the reason there are so many issues was that the developer is trying to build on wetlands, which he felt was ludicrous. He asked about the impacts porous pavement would create should vacuuming not be successful thus rendering the porous pavement useless. He was also concerned about having four new 40B developments in a one-mile area. He asked whether porous pavement was being used at these other developments and if anyone was collectively looking at the impact on the Town's drinking water and aquifers. In regard to the vernal pool study he said that this past year's drought conditions would have impacted the study and he would like to see the study done during a more normal season. He asked the Board to consider making a motion to wait a year to study the vernal pools prior to making a decision. Ms. Quirk confirmed that none of the other sites are using the porous pavement technology. Mr. Peznola said that all pavement, whether it is regular asphalt or porous, has a life expectancy so it would have to be ripped up should it not work. He felt that it would be unlikely that the failure would be wide-spread but perhaps only in concentrated areas. Ms. Kablack added that Mr. Peznola would be working with the ZBA on the conditions for approval. Ms. Quirk added that the Town would be closely watching the development to ensure that the pavement functions properly.

In regard to the vernal pool issue Mr. McManus said that last year was a dry year but the two previous years, for which there is consistent data, were more typical.

Mr. Cain said he was speaking with one voice with neighbors stating that South Sudbury is seeing a tremendous amount of development. He implored the Board to make it stop.

Larry Wolpe, 25 Wright Road, said that he could no longer sit by as an idle bystander. His list of concerns included traffic, overcrowding, and the environment. He likened Boston Post Road to a superhighway and said that 400 trips per day would be a disaster. He said that people all over the Commonwealth move to Sudbury to take advantage of the wonderful educational system. He said that the residents of the development would essentially be renting the school system. As a school teacher he said that he was concerned about overcrowding in the classroom and he said that it would lead to problems if the project was allowed to proceed. As to environmental concerns he was concerned about flooding of yards as his own yard on Wright Road has become flooded even in this dry year and has cost thousands of dollars to fill to solve the problem. He said that everyone in the room is concerned as a Town and he urged the Board to do what is best for Sudbury.

Frank Letteri, 208 Landham Road, said his family had sold the land that is now Brookside Farm and when Brookside Farm was built there were thirteen vernal pools. He claimed that only the man-made one was filled in. He said that the Conservation Commission studied the area for two years. Mr. Moss said that Debbie Dineen, along with the Chairman of the Conservation Commission, had an open invitation to the site throughout the spring to check on the presence of vernal pools.

Leslie Frodema, 32 Moran Circle, said that she is not an abutter but she has been attending the hearings. She said that she is a typical Sudbury mom and that she has been talking with parents to educate them on what is happening with the project. She said that townspeople cannot believe what she has told them and she is waiting for the ZBA and the Conservation Commission to take a stand. Of her concerns are the disastrous environmental footprint, the wastewater treatment facility in someone's backyard, which she said seems unreasonable. She said that in talking about home improvement projects and people's experiences with minimizing their impact it was apparent that people in Sudbury value their wetlands and she wanted the same standards for wetlands protection applied to everyone in town, homeowners and developers.

Mike Palmer, 62 Cutler Farm Road, said he would offer the ZBA some advice. He understood that the ZBA is bound by the law but at the same time is trying to do something that is devastating to Town. He referred to Mr. Moss as a salesman. He said that Mr. Moss has been winning from the beginning from the submittal of his application within a few hours of the approval of the housing production plan, to pre-application approval, to the delaying of the hearing process so that the Board was not left with many options, and he has been winning in that he seems to have convinced the ZBA that he has offered an improved plan when in reality there is not much of an improvement. He said that the ZBA needs to see the financials. He considered the hearing process a negotiation and therefore his advice to the ZBA was to offer a decision with conditions that is well-below what Mr. Moss has offered. He said that the ZBA should deny the proposal for 58 units. He does not see it as a significant enough offer. Or, he said that the ZBA should approve with fewer units and more conditions. He said that the ZBA should not waive the wetlands bylaws. He felt that thirty to forty-five units was a better range.

Mr. Gossels asked Ms. Quirk if he could make some remarks so that he audience could hear his perspective. He said that during the straw poll he was in favor of the concept plan. He said that the two-story townhouse plan was much better than the 120-unit apartment proposal and he noted that the plan had improved each time the Board had met with the developer. However, he said that he still felt that this is the wrong development in the wrong place. He felt that Mr. Moss ran out the clock and now the Board's hands were tied with 40B and are in overtime. He said that now the ZBA has a starter plan to work with. But he said Mr. Moss still controls the clock with extensions. And he did not like the fact that the 120-unit plan was still on the table. He asked Mr. Moss why. He said that the ZBA is just beginning to understand the 58-unit plan so he did not feel that he could vote today. He said the mechanics and details were not there. There are no architectural or landscape renderings. He said the rationalization for the number of units was overhead but at the last meeting he heard that there may not be a maintenance person or manager on site. He wanted to know what were the cost structures. But he said that Attorney Schwartz shut down that conversation in the past. He said that he could not accept this plan without the economics. He said that the sewage treatment plant is a concern for him. He said that if it works there will be clean water, but if it fails it will stink up the neighborhood. He said he would rather see a conventional septic system used, reducing the number of bedrooms to make it happen and therefore reducing all of the other impacts at the site as well. He said the ZBA never had a discussion about why that would not work. Addressing the audience he said that the Board had heard the concerns. He said that Mr. Moss had done such a great job of mitigating specific impacts that it would be hard for the ZBA to deny the 58-unit plan. Therefore he said that the ZBA's strategy has to be an approval with conditions.

Ms. Quirk asked Mr. Moss if he would consider using a conventional septic system.

In response Mr. Moss said that this was the first time that he was truly upset in the process and he prepared to leave the hearing. He said that he had asked the ZBA specifically at the last hearing if he should spend the \$47,000 on engineering the 58-unit plan and given the ZBA's response he did so. He said that he had provided a good alternative. Ms. Quirk said that Mr. Gossels did not speak for the entire Board. Attorney Schwartz responded that Mr. Gossels mischaracterized what had happened. He said that Mr. Moss presented a plan that he felt was defensible and could be prevailed upon at the Housing Appeals Committee. He said that Mr. Moss preferred to build the 120-unit plan and fairly late in the process the Board asked Mr. Moss to consider an alternative plan, which he did in good faith. He said that until this evening Mr. Gossels conceded that Mr. Moss was acting in good faith. Mr. Gossels said that he publicly agreed but it was the fact that the 120-unit plan was not off the table was where he was having trouble. Attorney Schwartz said that there are technical reasons why that 120-unit plan was not coming off the table.

Mr. Klofft said that there was a roomful of people saying that even the 58-unit plan was not in their best interest so in terms of negotiation he agreed with Mr. Gossel's valid point. Attorney Schwartz disagreed saying that Mr. Moss had acted in good faith by spending \$47,000 on the latest engineering plan and by granting extensions and it is not an unusual strategy to keep original plan.

Mr. Klofft said that this process has been atypical in his experience and much more contentious although now it is in a better place. Mr. Gossels added that in all of the Town's 40B cases the applicants and the ZBA have not been adversarial but instead have worked compatibly. He said that things have been more cooperative in the second phase. Attorney Schwartz said that right now the 58-unit plan is on the table but Mr. Gossels' characterization was not helpful particularly since Mr. Gossels participated in the work sessions. The applicant is not comfortable with 45 units or with conditions that would render the project uneconomic. He said that if it is the Board's prerogative to render a decision with conditions then the applicant will do what he needs to do.

Mr. Gossels then pressed Attorney Schwartz for a discussion of the financials.

Ms. Quirk asked Attorney Haverty to explain once again why the ZBA would not be seeing any financials. Attorney Haverty explained the procedures again saying that a draft decision needs to be presented to the applicant. He said that when the ZBA got to the 180 day point the Board was leaning toward a denial of the 120-unit plan and therefore was not going to request the financials. When the ZBA got to that last meeting the applicant agreed to come back with a smaller plan. Also that night the Board heard from the neighbors specific requests that the proposal should not be denied. With those two pieces of information the Board decided to move forward with the review of the smaller plan and was therefore left in the position that it would not have the opportunity to review the pro forma. The discussion never got to that stage.

Mr. Marchant reiterated the fact that the regulations state that the purpose of the pro forma review cannot be simply to determine the minimum number of units that make the project economic. He said that the only pro forma submitted was for the 120-unit plan and it is several years old so it cannot really be studied. The only reason to submit a pro forma is to argue what makes a project economic.

Attorney Schwartz said that the 58-unit plan is economic. He said that the applicant would not give several versions of a pro forma in order to get to a minimum number that the neighbors or the Board feel is sufficient.

Ms. Quirk thanked Mr. Moss for staying to continue the discussion. She said that she stood behind the straw poll and felt that at this point in the discussion the plan had been taken as far as it could go while still protecting the Town against the 120-unit plan. She said that she is well aware of the developer's strategy but that the Board has to think about risk. She said that she would rather permit the fifty-eight unit plan with stringent conditions to address existing concerns with environmental impacts, porous pavement, and stormwater management. She said that a decision could be written that would protect the Town's interests at large and in the South Sudbury area, and the abutters in particular. She said that she had come to this determination through several consultations with Attorney Haverty and through her own case law research. She reiterated the fact that the reason the Town is in this position is because private land owners chose to exercise their right to sell their land to whomever they wanted. She said that the 58-unit plan is the best that the ZBA could get at this point.

Mr. Stevenson said that the hearings have been a long process. He felt the ZBA's role is to represent the neighbors and citizens of Town and he has been impressed by the e-mail and comments from all

neighbors. Likewise he has been impressed by the dialog at the hearings. He said that everyone in the room is better educated about the 40B process and the compromises that the Town is being forced to make. He said that the development is really unfair to the neighborhood in that there is too much building in too tight of a space. He said that it might be a good project somewhere else but is the wrong project for this spot. He said that the town has legitimate interest in diversifying the burden of 40B so that is not located in one square mile. He said that he was impressed by the number of neighbors who signed the latest letter to the ZBA. He said that the neighbors are well-represented by counsel and have aligned to draw a line in the sand at 45 units and if anyone loses out on this approach it would be the neighbors. He said that the neighbors might end up with 120 units and if they were willing to take that risk then so was he. While he said that Mr. Moss had improved the plan significantly, forty-five units was the number he would support.

Ms. Quirk said for clarification that the Town isn't driving the choice of parcels for these developments. Mr. Stevenson agreed saying that the residents of South Sudbury are victims of circumstance.

Mr. Klofft said that he had been hearing through several meetings that the ZBA has the power to stop the development. He said that the Board does not. He said that after a decision is rendered the project just moves to another phase through the appeal process. The 120-unit plan is still a possibility. He said he differed from Mr. Stevenson in that the ZBA is not just gambling with how the neighbors in the room feel about the project because neighbors may eventually move away. He said that if 120 units get built and it is a bad 120 units then the development will be here forever, after everyone has gone away. He said that part of the ZBA's role is to look at the long-term interests of the Town. He said that the 58-unit plan is better than the 120-unit plan but it can still improve. He said that what he dislikes most about this plan is the nearly identical footprint. He said that while the development is smaller in many instances the environmental impact is troubling.

Mr. O'Brien felt that it was time for the ZBA to close the hearing and render its decision because he felt that the ZBA has gotten the best plan on the table that it could get from the developer and at a certain point the conversation would be taking steps backward otherwise.

Frank Huntowski, 42 Cutler Farm Road, said that he appreciated the discussion on this important decision. On opposing the 120 units, he said that there are towns that have done it successfully. In regard to the financials he said that the developer's costs are about \$13 million which translates to about \$500,000 per year in profit given treasury rates. He said that Mr. Moss said that the 64-unit plan had the same profit as the 120-unit plan for which there is a pro forma. He said that the pro forma profits \$1.3 million per year so it would be the same for the 64-unit plan. He judged that with the 58-unit plan there would probably be an 8.5 percent return. Therefore, he said it would be difficult for Mr. Moss to prove that the project is uneconomic should it be reduced in size further. He said that if Mr. Moss wants to argue about numbers then the ZBA should be given a pro forma. He said that the regulations have not changed and when parties go to court the regulations are argued and interpreted during the appeals. He said that the HAC has used this method for years. He said that he felt that some members of the ZBA only want to push the envelope a little bit and as the applicant has used all of his legal rights the Board has been taken by this. He said that the 45-unit concept is just a step there. He said that most neighbors would like the Board to go farther but forty-five units without the wastewater treatment plant would be a decision that many of the neighbors would be pleased with. It would be a compromise and a step in the negotiation.

Mr. Marchant said that the regulations have in fact changed. He then explained that the regulations state that a project must generate a reasonable return as defined by the subsidizing agency. It goes back to the project eligibility letter application which states that if an agency approves the project eligibility letter and

if that return is less than the defined reasonable return of the subsidizing agency that number shall be the reasonable economic return. Therefore, receiving less than that, or any condition that resulted in a return lower than that, would create an uneconomic return. The low treasury rates are not going to give the same comfort level as before. He said that without numbers it is difficult to assume what the applicant's costs are. He said that if a decision is issued with conditions and if the applicant feels that it would make the project uneconomic the applicant will appeal to the HAC and part of that process includes producing a pro forma and he will demonstrate that the conditions make the project uneconomic. The ZBA will then have advisors to review that pro forma and argue its opinion.

Mr. Gossels said that he is not concerned about the developer's return. Instead he was concerned about the south side of the development where it is too crowded and he was trying to find ways to reduce the adverse impacts on the community and not get caught up in economics.

Attorney Haverty said that since the ZBA does not have the financial information the ZBA needs to make a determination on the 58 units, and whether it should be less based on health, safety, open space, or other density concerns. If it does then the ZBA needs to make the determination with the realization that the decision could get overturned.

Mr. Stevenson said that the ZBA has listened to a unified chorus saying that they are willing to take a chance on an appeal and they might end up with 120 units in their backyard. He said he was stuck on the point about why he would know better than the neighbors how to proceed. Ms. Quirk said that the 120-unit plan is so egregiously full of problems and the ZBA now has a plan that addresses many of those problems. She said again that the ZBA had been heading toward a denial of the 120-unit plan with defensible problems upon which the denial would have been based, but the process proceeded past to this point and she did not feel confident that a denial would be upheld if appealed.

Ms. Kablack noted that the expiration date for the latest extension of time would be June 19 so the hearing would need to be closed or an extension would need to be sought. The ZBA would have forty days after the hearing closed in which to write the decision.

Scott Ritter, 14 Russet Lane, asked about the wetlands replication waiver which Ms. Quirk then explained. The bylaws require a 2:1 replication however the Conservation Commission has requested a 1:1 replication in this case because it was more important to preserve undisturbed upland area rather than create more wetland area. Therefore the ZBA would be waiving the 2:1 requirement. He also asked about the significance of the animal crossing and suggested that the bylaws were too loosely written. He said that maybe it was time to revisit the language in the bylaws.

Chris Hayes, 28 Wright Road, said that he works in the construction business and knows that asphalt products today are junk and porous pavement does not work. In his opinion a town's quality of life is affected by apartment complexes. He was upset that the Johnson Family had sold the property to a developer.

Attorney Witten urged the Board to look at the 40B statute, 760 CMR 56. He said that the subsidizing agency is not a regulation, nor does it promulgate regulations. He disagreed with Mr. Marchant's earlier comments and said that the Board should only worry about the regulations and case law and not MassHousing and what it may have adopted as policy.

Virginia Buckley, 14 Patricia Road, said that she respected and admired what the ZBA is trying to do but she wanted to comment on her observations the ZBA had about the fear of the 120 units. She noted that

the Fire Chief does not approve of the shape of the access road at the back of the site, which started the conversation about public safety. But she said that the development is better since it is a smaller number of units but the idea that the fire engine would have to back out means that it is still too large. She implored the Board to be brave enough to get to the next step.

Attorney Haverty commented once more on the issue of reasonable returns and regulations. He said that the regulations do tie in to MassHousing standards and he cited the regulations stating that reasonable returns are defined as calculated according to the guidelines of the DHCD. And with respect to a) building a rental project 1) that payment of development fees with initial construction of the project is not more than a reasonable fee as determined by the subsidizing agency program limitations and no less than 10% of the total development costs, and 2) that commencing upon the project's initial occupancy distributions of profit funded by operating revenues shall not exceed a reasonable rate relative to the developer's equity in the project as determined by the subsidizing agency program requirements.

Ms. Quirk explained the process moving forward for closing the hearing and the drafting of the decision. The Board discussed whether they were at the point of closing. An extension of time would be required for the completion of the decision. Mr. Moss was amenable to giving an extension of sixty days rather than forty given that it was summertime and Board members' schedules were tight.

Ms. Quirk then asked the Board members if there was any additional information that they felt needed to be discussed prior to closure.

Attorney Witten called for a point of order. He asked the ZBA whether the applicant has any intention of submitting any more information to the Board. Attorney Schwartz said that there was no outstanding request for information from the ZBA.

Mr. Gossels asked whether lighting, landscaping, and architectural plans would be forthcoming.

Mr. Moss referenced his recently approved 40B project in Southborough where those plans were included as part of the approval process. He said that he would submit those plans and spend the money to prepare them but he felt burned by the recent expenditure of \$47,000 that he spent in good faith.

Discussion ensued among the Board about whether the hearing should be closed at this time. Mr. Marchant suggested that it was time to call to question. He said that any piece of information remaining could be required as a condition of the decision. Attorney Schwartz also said that in the context of an approval with conditions the applicant would be amenable to conditions requiring final ZBA approval of lighting, landscaping, and architectural plans.

Ms. Quirk made a motion to close the hearing and Mr. Klofft seconded that motion. The motion was unanimously approved. A public meeting to begin deliberation on the decision was scheduled for Thursday, June 21, 2012 at 7:30 p.m. in the Town Hall.

Benjamin D. Stevenson, Clerk

Jonathan F.X. O'Brien

Jonathan G. Gossels