

MINUTES OF THE PUBLIC MEETING
SUDBURY BOARD OF APPEALS
Thursday, June 21, 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

For the Applicant:

Robert Moss, Madison Place Sudbury LLC
Steven Schwartz, Goulston & Storrs

Ms. Elizabeth Quirk, Chair of the Zoning Board of Appeals, called the meeting to order. She explained to those present the format for the meeting, noting that since the public hearing had been closed the Board could not take in any new information or public comment. The ZBA could, however, ask questions of its consultants or the applicant for purposes of clarification. The Board had forty days from the close of the hearing on Monday, June 18, to deliberate and craft a decision.

Ms. Quirk stated that the fifty-eight unit plan, if appropriately conditioned, represented the best option available. She said that it was far from perfect but added that the plan has come a long way since it was first proposed in September 2011. While she acknowledged that it could be better and zero units would be best, she said zero units is not an option. She noted that it has less than half the original number of units and while the site still has some similar impacts as with the 120-unit plan, it is less impacted in other ways. The plan now has two-story buildings versus three therefore avoiding the brick rectangle effect. There is half the amount of porous pavement and traffic should be greatly reduced with fewer residents. In regard to fire safety there are fewer units to reach with the single-access roadway. She said that she was confident that the Board could craft conditions to address remaining legitimate health and safety issues and she said that she would do all that she could do so that the 120-unit plan would never be built. She felt it was in the best interest of the Town not to risk that 120-unit plan. Areas that needed attention in terms of conditions included porous pavement and its maintenance, both routine and repair; the wastewater treatment plant, which would be permitted through a separate process through the State, and the plant's location, operation, and maintenance; traffic mitigation; and the conservation restriction on the undeveloped part of the site.

She then asked the Board for their individual comments.

Mr. O'Brien said that he was not comfortable with the 58-unit plan as the wetlands impact is too great and the land is desirable open space. He felt that porous pavement is being used to expand buildability which in turn is leading to the hardening of the site which could impact neighboring properties such as Sudbury Valley Trustees land and downstream Federally-protected land. He said that the Town has an obligation not to disturb the wetlands as much as possible. Therefore he said that the environmental impact was the most troubling issue for him. He said that he does not see a health issue. Safety issues have been

addressed with the turnaround for firetrucks and a traffic light at Route 20 and Landham Road would also increase safety. He noted that there were three developments being built in a tight radius that will have a tremendous impact on traffic. In his opinion if porous pavement were run from Landham Road to the tree setback there would be no need for drainage basins and the meadow would be preserved. He said there should not be a built up septic drainage area at the meadow. If there were fewer units there would be no wastewater treatment facility and therefore no mounding along the meadow. He said that he would rather see fewer units and regular pavement at the rear of the property because he felt it was inappropriate to use a novel technology used at a sensitive area of site.

Ms. Quirk asked Mr. O'Brien what number of units he had in mind.

Mr. O'Brien said forty units. He said that there would not be a need to have such an outlay of engineering for the septic system at the front of the site or the ongoing maintenance for porous pavement. He said that the project should be viable at that level both environmentally and in terms of construction costs.

Mr. Gossels said that although he shared the same sentiments as Mr. O'Brien conditioning at forty units would give the developer the right to build fifty-eight or 120 units. He said that he had tremendous respect for all of the ZBA members, noting that this has been the most difficult 40B they have heard. He also said that he did not want to handicap the neighbors in their efforts to end up with a neighborhood that they can live with. He felt that the meadow should not be stacked up, but rather it should look like a meadow, and he shared Mr. O'Brien's concerns about the septic area. He said that his personal preference would be to have forty-five units and no wastewater treatment plant. However, he said that option may not stand up to any appeal because that number is not based on specific documented impact. He was concerned that reducing the number to forty-five would not set up the neighbors or the Town with something that is more reasonable. He suggested reducing the units by two at the back of the site at buildings nine and ten given that fire safety and access is still a concern. He said that a few weeks prior he was adamant about finding a way to prevent the 120-unit plan. However he felt the Town could have a good defense against it due to public safety and environmental concerns. He said that he was just nervous about conditioning the project at forty-five because it could affect the ZBA's leverage in an appeal. He identified the impacts on the meadow and the overloaded south side as outstanding issues. He suggested reducing buildings 9 and 10 by one unit each, moving the dumpster and business office, and adding a turn-around at the north side.

Mr. Marchant cautioned that even if the density were reduced there might be the same amount of mounding for the septic area and the assumption cannot be made that there would be a level meadow.

Mr. Stevenson said that his opinion had not waived since June 18. He agreed with Ms. Quirk that the 58-unit plan was better than the 120-unit plan but he suggested that if the Board went a little further to scale back the number of units this could perhaps make a difference with all of the outstanding issues that have been identified. He said that the Board had heard from the applicant that the 58- and 120-unit plans yielded the same financial return. He was not suggesting reducing the applicant's return but he did feel that there was room to work in regard to the financials. He felt that the neighbors were well-spoken and well-represented and have done their homework. The density and open space concerns are still issues for Mr. Stevenson. He said that Mr. Moss intends to build nice homes, but they are in the wrong spot and the project is too dense. He said it was unfair to this neighborhood which has already other developments going in. He said that the neighbors have caucused behind forty-five units and he said that he did not feel that he knew better what was good for their neighborhood. He said forty-five units would reduce porous pavement and take care of the wastewater treatment plant problem, would increase the wetlands setback, create more open space, and help with fire safety issues. He felt that the forty-five unit proposal was

reasonable and well-thought out and the ZBA should honor it. He said that he was willing to take the risk on an appeal.

Mr. Klofft said that there have been a number of impassioned pleas from the neighbors to do what is right for Sudbury. He said that the assumption is that a denial of this application would be the right thing but while the neighbors might be willing to risk the consequences of a denial he felt the Board should consider this very carefully. He described a very low probability of success with a denial. He said that he is not happy with where things stand, but there are substantial differences between the 58- and 120-unit plans. He said that while the income is similar between the plans the 58-unit plan will be more expensive to rent. Families willing to pay that expected rental cost could probably afford a single-family home in town. Therefore he felt that this development would attract families in transition to, from, and within Sudbury, as well as non-custodial parents and empty-nesters. Alternatively he said that lower rents in a larger project would draw an expanded pool of renters. He said that townhouse units have become the standard for 40B projects in Sudbury due to the lower density and rural nature of the Town. In contrast garden-style, three-story structures are not characteristic of Sudbury and come with increased traffic and public safety risks and could signal a change in the nature of future 40B projects in Town. He reminded those present that the 120-unit plan was solely reliant on porous pavement. Being one hundred percent reliant on this new technology is the least desirable option. He said that the regulations and guidance is clear that when the Town gets to its limit of 10% affordable housing then it gets safe harbor from other 40B development. There are very few circumstances for which denials or overly-conditioned permits would be upheld. Therefore he said that the ZBA must carefully chart its actions.

Mr. Gossels said that he was not suggesting that there be a denial but rather an approval with conditions.

Mr. Klofft said that he was hearing from the neighbors that the Board should deny the project, and most recently he heard this from the neighbor's editorial in the *Sudbury Town Crier*.

Mr. Stevenson said that in an e-mail signed by the neighbors that the ZBA received he read their suggestion of forty-five units and he felt that the forty-five units directly correlated to specific concerns.

Mr. O'Brien said that his motivation for reducing units was to protect the wetlands as some encroachment could be avoided if the units were reduced. He said that the footprint is significant on a sensitive site and he anticipates downstream impacts.

Mr. Gossels asked Attorney Haverty about the risks the ZBA might be facing if they conditioned the project at forty-five units with no wastewater treatment facility and 90 bedrooms, compared to fifty-four or fifty-two units. Attorney Haverty then discussed the differences between the risks. He explained the Board's task to either approve, approve with conditions, or deny the project. As the Board has discussed an approval with conditions the next task is to determine what is the purpose of doing so. There will not be a second opportunity to review the decision as the developer then determines whether he can live with the decision or appeal. Attorney Haverty said that if the developer is going for the 120 units then the Board has to lay out what are the specific issues for health, safety, and open space concerns. Even if the ZBA establishes those concerns the HAC might grant the developer the right to build more than 58 units.

Mr. O'Brien asked about using open space as the reason for reducing units and questioned why HAC ignore this. Attorney Haverty said that the ZBA would identify that as an issue, and then argue that the concerns outweigh regional standards of affordable housing.

Mr. Stevenson thought it was helpful to a point to consider what might happen in appeal. But he said he was struggling to do what was right. In his view Mr. Moss wants to build a nice development, and he has reduced the number of units to fifty-eight to respond to local concerns. He said that the 64-unit plan has approximately the same return as the 120-unit plan.

To clarify, Mr. Marchant said that Mr. Moss has not said that he would generate the same return but rather he stated that the revenue for 64-unit development would be equal to or close to the revenue on the 120-unit project. Revenue is not cash. Costs are higher for townhouses. They are larger units so costs per unit would be significantly higher and even the fixed costs would be higher. The infrastructure plan is not a significant savings either and the costs for the treatment plant might only be marginally lower. He said that since the land value has only been valued at \$700,000 it is not a significant cost, but there is still a higher per unit cost. Therefore he said that the assumption cannot be made that the return would be the same.

Mr. Stevenson said that he may have misspoken. He was left with the impression that the numbers worked out to be substantially similar. Ms. Quirk agreed with Mr. Marchant. Several Board members discussed how the revenue and return was not their concern. Mr. Stevenson said that he brought it up only because if the numbers worked then he would still argue for reducing the number of units to forty-five.

Mr. Klofft said that regardless he had a huge problem with a development that has 3-story, garden style apartment buildings, and a predominance of porous pavement. He suggested that if neighbors dislike the development then they might take a financial loss on their own property and move. However the Town would be left with that bad development forever.

Mr. Klofft also reminded those present that this was not the first wastewater treatment plant to be approved since the development on Boston Post Road proposed by Russ Tanner included a wastewater treatment plant located in the riverfront area. DEP approved its location and so there is one on record.

Mr. O'Brien said that one argument for the wastewater treatment center would be that it would emit cleaner water, but there is a high overhead in building and maintaining it. If the developer does not have that higher overhead then fewer units could be economic.

Ms. Quirk asked about the comparative costs for wastewater treatment plants versus septic systems. She asked Mr. Marchant which would be more expensive. Mr. Marchant said that he was not qualified to answer specifically but he has heard that wastewater treatment plants could cost in the neighborhood of \$2,000 per unit per year which is significantly more expensive than septic fields that require little maintenance.

Mr. Marchant said that in regard to the economics, if it this case does go to the HAC it will probably come down to economics. The ZBA is at a disadvantage because they do not have the pro forma. However the assumption could be made that Mr. Moss would not have offered to build 58 units if it did not make economic sense. Cutting units in a smaller development has a significant impact, even by twelve, because the developer would be fighting against fixed costs and costs per unit.

Ms. Quirk noted that the fifty-eight-unit plan is a twenty-nine percent reduction from the 120 units.

Mr. Marchant added that Attorney Haverty has advised the ZBA about recent decisions related to wetlands matters where local requirements exceed the Wetlands Protection Act. Mr. O'Brien asked whether the Army Corps of Engineers would have to look at the replication issue. Ms. Kablack said that

they would but it is a very minor issue and can be accomplished quite easily. They would have to approve the plan due to downstream impacts.

Mr. Stevenson said that if 58 units are being proposed then it is safe to assume that 58 units are economic. He therefore felt that the Board should be discussing 58 or 45 units, and not 45 and 120 units. He felt that the risk is well-grounded in local concerns. He said that reducing to 45 would be a small risk. With the 58 unit plan he did not feel that the HAC would then turn around and approve the 120 units. Ms. Quirk said that if the 58-unit plan were approved with appropriate conditions then the applicant would take the 120-unit plan off the table.

Attorney Haverty said that the issue has come up previously with the HAC. He said that it is not unusual for a developer to put another on table without formally withdrawing the original plan because a developer would not want to give anything away without getting something in return.

Mr. Klofft said for clarification that the ZBA could still end up with a plan that was as bad as the 120-unit plan.

Mr. Stevenson asked why the Board had a change of heart from the tone of a few months ago when the Board was ready to deny the 120-unit plan outright.

Ms. Quirk explained that in late February there were no alternate plans but only the 120-unit plan and its attendant issues regarding public safety, porous pavement, and engineering. After many discussions with Attorney Haverty she said she felt the argument for a denial at that point was defensible and would be upheld in an appeal based on the cumulative impacts of that plan. But then Mr. Moss presented an alternate plan.

Mr. Klofft added that the neighbor's counsel, Attorney Witten, switched tacks. He said that initially Attorney Witten made an impassioned plea that the ZBA not deny the permit because a denial would take away the neighbors' rights to appeal. He asked that the ZBA issue an approval with conditions. It was at that point that the ZBA asked Mr. Moss to come up with another plan which led to the 64-unit plan and now the 58-unit plan. Then, at the last few meetings, memos and public comment from the neighbors then asked the ZBA to deny the permit outright and proposing a 45-unit plan. Mr. Klofft said that he would have to know what the 45-unit plan would look like and would need to understand the rationale for the removal of units in order to support that position.

Mr. Stevenson said that one of the significant local concerns is the cumulative density of the South Sudbury area. He said that he did not feel that the ZBA needed to consider this plan in isolation of the other 40Bs in the area. Ms. Quirk asked Attorney Haverty whether the density argument could be used by the Board. Attorney Haverty said that he is not aware of any cases that have been upheld. Mass Housing does look at this issue at the time a developer's project eligibility letter is submitted for project determination. This presumption of approval from MassHousing would be something that would work against the ZBA's case in a denial.

Mr. Gossels asked how much weight would this parcel's listing on the open space plan carry. Attorney Haverty said that there is no case law on this. This parcel is listed on the Open Space Plan as approved by the Town Warrant and so it would create the presumption that it is necessary for the Town's open space. However, there is nothing further that says what that means.

Mr. O'Brien still felt that reducing the number of units to protect wetlands was the utmost importance.

The Board then discussed the Open Space Plan issue. Mr. Stevenson said that the town has recognized the parcel as significant for open space, and further it is open space with other significant 40B projects planned for the area. He felt that there is a legitimate Town interest in having 40Bs spread out geographically and not just in one area. Ms. Quirk agreed but said that this issue would not be recognized in court. Mr. Klofft concurred.

Mr. Stevenson then said that the argument then becomes how much risk the ZBA would be willing to take. He said that the ZBA should go with the amount of risk that the neighbors were willing to take since they live next to it. Ms. Quirk felt that 45 units and 58 units are not close together and it would be too risky to impose a 45-unit plan.

Mr. Klofft said that the open space argument could be used to protect the front meadow since it is publically visible. He suggested that for the back perhaps some units could be cut in order to ameliorate some of the environmental issues at the back of the site. Then the ZBA could create a decision with conditions that would work. He did not want to go with a number of units that was arbitrary, such as 45, simply because the neighbors felt that was the right number but that there might not be any legal standing for that number.

There was a discussion about the site's value as open space because it was undeveloped land. Nine percent of the parcel would be developed and the rest would be conserved. Ms. Kablack noted that the applicant has discussed conditions that would create a conservation restriction or deed land outright to the Town.

Mr. Marchant said that in comparison with other developments in Sudbury where building setbacks can be only twenty to fifty feet away from adjacent properties, the actual distance between the proposed buildings and adjacent properties at this site is a great distance. He noted that there has been an attempt to mitigate impacts on the south side with the berm so he predicted that if this issue ends up at HAC then the applicant would feel comfortable defending this.

Attorney Haverty said that in terms of wetlands impact, if the case went to an appeal at the HAC and the HAC finds that the decision makes the project uneconomic, then the developer would have to show that he has designed the plan in compliance with engineering standards. The ZBA would also have to show an unprecedented local safety need.

Mr. O'Brien asked why the ZBA had to waive local wetlands bylaws. Attorney Haverty said that they are not asking for waivers of the bylaws but are asking for discretion. The example of the wildlife study was discussed. There was testimony that a wildlife study had been done, but perhaps not to the Conservation Commission's standards and the Conservation Commission might have more questions. A wild life study is not required by the bylaws and therefore does not require a specific waiver.

Ms. Kablack noted that the ZBA had hired experts to give advice throughout the process to identify outstanding issues. The engineering expert has resolved concerns for the ZBA's record and there are no major problems outstanding now so wetlands issues would be tough to uphold in court. Ms. Kablack said that Sudbury's wetlands bylaw is discretionary. There is the presumption of the 100 foot buffer which is protected area and any work being done in there would have an impact. Discussion then revolved around wetlands standards, or common practices. A discussion about the particular waivers the applicant was requesting followed.

Ms. Kablack said that there would be a condition that a performance bond would be required for wetlands replication.

Mr. Stevenson said that if this proposal was the first 40B in the neighborhood then his concerns would be manageable, but his concern was still that the Town now has a 40B development plan and there are two other significant 40Bs going in this neighborhood. He said that there is a recognized local interest to diversify housing geographically.

Attorney Haverty said that that is a very fair point with 40B however, under the regulations that is something that the HAC is supposed to look at and make a determination. The HAC can say that MassHousing, as the subsidizing agency, said the proposal was ok to proceed. He said that the ZBA can disagree with MassHousing but given that Mass Housing said ok to the plan the ZBA cannot really second-guess MassHousing.

Ms. Quirk said that she is looking for a defensible decision. She disliked the fact that the ZBA had to focus on litigation strategy and cannot instead do what many would like to do.

A discussion about level of risk ensued. Mr. Stevenson asked why going with the neighbors' approach would be a risk. Ms. Quirk said that the neighbors are not the appointed ZBA which has an obligation to weigh all sides to protect the town as a whole.

Mr. O'Brien said that he still felt that the modified 58-unit plan has the same footprint as the original 120-unit plan that the Town does not want.

Mr. Klofft agreed that the modified proposal would be utilizing the same upland area but there is a large section behind the units that will connect to Sudbury Valley Trustees land and therefore not be touched. He said that the desired state of the property would be to have it remain open space. But as a risk-taker generally Mr. Klofft said he was not willing to take a risk here with the environment because if there is a loss of the case then the original 120 unit plan could be built. Mr. Klofft said that the engineering consultants showed that the 58-unit plan could be constructed properly while the 120-unit plan, which relied solely on porous pavement, could fail before construction even started.

The Board then engaged in a back-and-forth about their specific open space and environmental concerns.

Mr. Marchant said that if the back part is deemed most sensitive then building would have to go into the front. He said that even though Mr. Moss does not want to build there he supposed that if this goes before the HAC the HAC would require everything to be built in the front because the meadow does not have the same environmental value as the wetlands. And the Town would end up with more buildings and more adverse impacts at the front of the site.

Attorney Haverty said that the reality is that Sudbury is not at 10% of its affordable housing goal. But with this project the argument will be stronger when the next developer attempts to build in South Sudbury the Town could deny projects, even if it were still below the 10% requirement.

Ms. Quirk said that open space is an avenue that is closed for this project due to MassHousing's approval. Mr. Haverty clarified that it is not necessarily closed, but it does not offer the highest argument.

Mr. Stevenson said that in his mind there is no way to deny the plan outright but instead the ZBA should reduce the plan to forty-five units and approve with stringent conditions.

Mr. Marchant said that with the 13-unit reduction the number of affordable units would be reduced by four.

Mr. Gossels said that on Monday, June 18 he had concurred with Mr. Stevenson and Mr. O'Brien. However now he feels the denial is indefensible. He still felt that there were some design problems, namely with the concentration of service buildings and dumpster and fire truck turnaround. He proposed tweaking the plan to reduce building #10 by two or three units and building #9 by one unit. Ms. Kablack reminded the Board that three units would reduce the project by 5% and the presumption is that reducing by 5% would render the project uneconomic. Attorney Haverty concurred. Mr. Gossels argued that the purpose of reducing the number of units was to eliminate a design issue and not to make it uneconomic.

Attorney Haverty said that at fifty-eight units there is an extra affordable unit. If the ZBA were to cut the proposal by two units he reminded the Board that the applicant has said that fifty-eight units was his bottom-line. Mr. Marchant agreed. The applicant would then weigh the costs of appealing this decision with the reduced number of units along with the time delay for the appeal. In this case he is also expecting the neighbors to appeal.

Mr. Gossels said that the reason to reduce the plan by two would be that the fire truck turnarounds are wanted and two units could come out to make room for those. Open space would remain and there would be no building at the front of the site.

Mr. Klofft said that he was comfortable with the fifty-eight units.

Ms. Quirk said that she had spent the nights since the hearing closed thinking about what to do. She felt that if the neighbors want to appeal then it would be the neighbors' job to do so. She did not think it should fall to the ZBA to abdicate authority and take a risk with the 120-units. Mr. Stevenson clarified that he is not suggesting the 45 units because the neighbors have said 45. He said that the neighbors presented a good argument and offered a balance that the town needs. He was willing to take the risk.

Ms. Quirk said that the goal of the meeting was to determine where the ZBA was going with the decision so that Attorney Haverty could write a draft decision. Three Board members would have to be in agreement for a majority vote. The Board discussed lowering the number of units to fifty-six, adding the fire truck turn-arounds, and preserving the meadow with the farmhouse containing two units.

Mr. Stevenson still preferred 45 units.

Mr. Gossels and Mr. Klofft agreed to the 56.

Mr. O'Brien said that he was not certain that 45 was the number he would choose. But he felt that 58 was too many as construction was too close to the wetlands.

Ms. Quirk said she would approve 56 units based on the points raised by Attorney Haverty and Mr. Marchant. Lowering the unit count to 56 was less risky but she reminded the Board that they had not received assurances that the applicant would not appeal. She said that there were pros and cons of appealing and one less affordable unit would count toward the Town's inventory.

Mr. Haverly suggested that Ms. Quirk ask for an extension of time to 60 days in order to insure enough time to write the decision. Mr. Moss agreed to the extension of time making the new deadline Friday, August 17, 2012.

A public meeting to continue deliberation was scheduled for Wednesday, July 11, 2012 at 7:30 p.m. in the Town Hall.

Elizabeth T. Quirk, Chair

Jeffrey P. Klofft

Benjamin D. Stevenson, Clerk

Jonathan F.X. O'Brien

Jonathan G. Gossels