

MINUTES OF THE PUBLIC HEARING CONTINUATION
SUDBURY BOARD OF APPEALS
TUESDAY, APRIL 23, 2002

The Board consisted of:

Mark A. Kablack, Chairman
Patrick J. Delaney III, Clerk
Thomas W.H. Phelps
Lauren S. O'Brien
Jonathan G. Gossels

The public hearing was reconvened by the Chairman, Mr. Kablack.

Mr. Verrill reported he received a report dated April 16, 2002 from ERM which contains the latest depiction of the plume inside the dotted lines on the map. He said it is many times larger than was identified several years ago now traveling all the way down to Cold Brook. There seems to be no doubt of the migration.

Mr. Verrill said his whole concern with the zoning question is to not allow development in excess of what is allowed by zoning. He felt any addition development will impact him further. Copies of the map were submitted for the record.

Mr. Tyler said at the last session there was the question of the ZBA's jurisdiction over matters that might be related to the WRPD special permit. In response to that he prepared a comprehensive memorandum that demonstrates that it is the Building Inspector alone who is the first line of defense in the town to enforce the Zoning Bylaw. The fact that the Planning Board issued a WRPD Special Permit has nothing to do with the zoning violation which is the 38.8% impervious surface by SRC's calculation. By Mr. Tyler's calculations it is 41% impervious surface, or a much larger area because SRC is using the wrong Zone II line.

Mr. Kablack wanted to reiterate the comments he made at the previous hearing. He said he has reviewed all of Mr. Tyler's recent submissions in response to the last hearing and felt it is to the petitioners' to focus on the zoning discrepancies on the property and, in particular, how the discrepancy differs from the appeal of the special permit issued by the Planning Board. He said the Board is aware of them, Mr. Tyler has documented them, and the Board will deliberate on them. I felt it best to focus on those areas that are different from areas that you have raised before.

Mr. Tyler said everything is different because when we appealed to the land court that then determines whether the Planning Board exercised appropriate discretion in issuing the

permit. The Planning Board has no authority to issue variances or to grant a license to continue to violate zoning bylaws. He said if the ZBA doesn't understand its statutory responsibility for enforcing zoning and taking action now, he is wasting his time talking about the other things. Mr. Tyler felt that, from what Mr. Kablack said, that the Board does not understand. Therefore, he wanted to spend some time going through the law to demonstrate that the law says the ZBA enforces zoning.

Mr. Kablack said this Board's jurisdiction does not lie with reviewing matters of the Planning Board or any other Board in this town. Mr. Tyler's recourse with respect to whether or not the Planning Board exceeded its jurisdiction with the special permit is in the appeal which is in the land court.

Following further discussion on the subject of the Board's expectations of the petitioners' presentation vs. Mr. Tyler's, Mr. Tyler began with Exhibit 11 of his March 15, 2002 memorandum.

Exhibit 11 contains the calculations handed to the Selectmen by Cummings which indicate that 25.5% of the entire site is impervious by the Northwood method which is calculated by taking the total impervious surface over the total lot area. This exhibit shows that they are in violation of the Zoning Bylaw. Current by-right impervious surface allowed is 15%. They don't have a valid special permit because it's under appeal. Mr. Tyler said he has had issues with Cummings because they used the wrong Zone II line and the impervious surface is actually much worse than what is shown. However, it demonstrates that there is an existing zoning violation. There is nothing that prevented Cummings from going up there tearing up the pavement and every day this violation isn't cited the town is losing \$100-\$300 a month. So this is an existing violation.

Mr. Kablack asked what figure was Mr. Tyler saying is evidence that Cummings itself is admitting that they exceeded the percentage.

Mr. Tyler referred to the memo where it says 27.5% of the total lot. In this memorandum there were two methodologies. He said if SRC advocated to conform with the Zoning Bylaw with impervious surface – for the Northwood project, he argues in his appeal with Northwood that the proper method should be the Zone II impervious area divided by the lot area that was in Zone II. He argues that 38.8% is the right one, but the Planning Board, Town Counsel and the ZBA endorsed what we have come to call the Northwood method which says the Bylaw is clear. The Bylaw says it is the percent impervious on the total lot; that is the first number - 27.5%. However, adopting the petitioners' viewpoint from the Northwood situation, you use the second language which says 38.8% impervious surface. Again, he said that is far above the 15% allowed by right or even if SRC had a special permit, it is far above what would be allowed. Mr. Tyler reiterated that the Planning Board has no power to grant a license for that zoning violation

to continue. So whatever is above the 25% as of October 3, 2002, when this was prepared, and as of today is a zoning violation.

Mr. Kablack said one of the conditions of the issuance of the WRPD Special Permit was actually to remove impervious surface. It was his understanding that it was a removal of that impervious surface to bring it below what the percentage of coverage requirement was. He asked if Mr. Tyler's argument was that because SRC hasn't done that work, because the special permit has been appealed, they are in violation of the zoning requirement of 25% because their coverage regardless of how you look at it is either 27.5% or 38.8%.

Mr. Tyler said the records show that SRC had no intention of bringing this down for about a year following issuance of the permit because they want to use that construction staging site. He said SRC took their special permit as a license to continue zoning violations irrespective of all the other problems. He said they are not entitled, and there is nothing that prevents them from taking the bulldozers up there tomorrow and removing the pavement. All of this is a problem for a very long time and they haven't done anything about it. Mr. Tyler said he asked the Building Inspector to enforce the Zoning Bylaw and he said is someone else's responsibility. We're here because we think it is the ZBA's responsibility.

Mr. Kablack asked Mr. Tyler if the relief he was requesting is that they remove the impervious material, the same action that would result from the special permit that Mr. Tyler have appealed.

Mr. Tyler replied that it is a timing issue in that the zoning violations are now. He said the Planning Board has no power to deal with anything over 25%.

Considerable discussion followed between Mr. Kablack and Mr. Tyler on the issue of jurisdiction, enforcement, Zone II lines, and the items under appeal.

Mr. Tyler wanted to move on to where the Zone II line is.

Mr. Kablack felt Mr. Tyler would be best served, by focusing on those things that are squarely before this Board, which are zoning violations.

Mr. Tyler began with page 5 of his March 5, 2002 memorandum. He said the Zoning Bylaw is very clear and determines the statutory construction. There is a case from Judge Lombardi who talks about how you have to treat the Zoning Bylaws as a harmonious whole and not focus on one set of words. Mr. Tyler said the Zoning Bylaw is very clear that the Zone II line is either the default Zone II line which is a half-mile radius or it's a scientifically determined Zone II line. And DEP in this exhibit on the top of page 5 of the memorandum shows the DEP approved Zone II line. Mr. Tyler said he didn't think there was any question in anybody's mind

where the line is that the DEP approved because it can be seen on the exhibits. Mr. Tyler submitted a map which is contained in the ERM report referred to earlier by Mr. Verrill.

Mr. Tyler said the petitioners' believe that the Zoning Bylaw read as a harmonious whole says that the Zone II line is either the default line or it's the scientifically determined line but it's not some line that somebody else dreamed up. He said on the map, over in the left hand corner the Zone II area on the Cummings property is not 111,000 s.f. as was shown in the calculations prepared by the Cummings people. It is 219,000 s.f., so it is over twice as much area and there is 89,000 s.f. impervious surface not 43,000 s.f. existing. There is 41% of that twice as large area that is impervious and so they have in excess of 35,000 s.f. impervious surface not 15,500.

Mr. Tyler said he thought that when the Board looks at this material and deliberates, taking the fact that it is responsible for enforcing the Zoning Bylaw and the Zoning Bylaw is very clear as to which line is to be interpreted, it will see that Cummings continues to be in zoning violation and must remove 35,183 s.f. if you use this the Zone II impervious surface divided by the Zone II area.

Further on in his memorandum Mr. Tyler said there are references to cases Judge Lombardi talked about – the intent of the legislature. Mr. Tyler said he presented all of the exhibits demonstrating that Sudbury Town Meeting in 1994 intended to adopt the scientifically determined Zone II line. The only thing that seems to have happened is that the Engineering Department engineered a line by 3/16s of an inch on a map on a scale of 1 to 1,000 so now someone is saying this controls and the building somehow moved. He was not sure exactly what the rationale was. Mr. Tyler said we know what Town Meeting wanted to do. We know that DEP approved the line; we know where Dr. Chiang thinks the line is and we know where the land court proved it for Northwood. In the maps here there's no question where the Zone II line is.

Continuing on, Mr. Tyler said there were problems at the 1994 Town Meeting. Some who say you can't look at the intent, you have to look at what was actually done. And the map is done and this is the map and therefore intent doesn't matter. If you go on that line of argument then you also have to go along the line of argument that says that if you're amending a section of the Bylaw that doesn't exist, you haven't done anything. And if you fail to make an amendment to the title of the map, as they did in 1993, you also haven't done anything. So in 1994 there were technical problems with what they did so they never amended the title of the map and some other things. If you're going to argue intent, it was the intent of the Town Meeting to go with the scientifically determined line even though it was flawed in their execution and everybody agrees it was the intent. We think you can argue intent, and intent is good, but the intent was clearly the scientifically determined Zone II line.

Mr. Tyler described where some of the data came from in some of his exhibits with regard to his calculations on impervious surface which came to 41%. He said Exhibit 4 is a

tabulation of SRC's data of the entire site. Exhibit 5 provides data on the wells and include drainage calculations.

Looking exhibit 7 the Zone II line that is shown is the DEP approved Zone II line. You then can see where their lot area is and it is more than 15% of the area. There is also no question that it is more than 25%. This exhibit attempts to show visually, that clearly that SRC is above 25% impervious surface area in Zone II.

Mr. Tyler believed he had demonstrated a zoning violation that's currently in existence. However, he wanted to get back to this idea that there is just no licensing to continue this that is associated with a special permit. He said in the ordinary course of circumstances the WRPD Special Permit is a permit that allows someone to go from what they are entitled to by right to be able to increase it. Now the situation facing this plan is that without permits they exceeded and added to it without ever getting a permit. A permit is actually to be allowed permission to go from 15% to 25%. So there is nothing that gives the Planning Board authority to allow more than 25%.

Exhibit 9 is basically a comparison of their preliminary site plan that SRC put together to show that a year or so ago they knew where the correct Zone II line was. When they showed the plan to different town officials, the town officials told them basically that they couldn't do anything because Zone II was a problem for them. What we show is their line, the one that was cut off at the top which shows the approximate location of Zone II, and then the other one which I (Tyler) added to their chart that was taken from the Northwood final plan that was approved by the Planning Board. The lines are pretty close.

Mr. Kablack asked if it is shown anywhere here in the exhibits where the Zone II line is that was considered by the Planning Board.

Mr. Tyler replied that it is shown in Exhibit 10, which is an exhibit that SRC submitted to the Conservation Commission where it shows both lines; he thought it was called the Title 5 line. The Title 5 line is the DEP approved line and is the line that the Zoning Bylaw protects and is the Zone II line. It is also the scientifically determined line. Somewhere the location of the lines came to be about 180 feet apart.

Mr. Kablack asked whether Mr. Tyler was saying that the correct line is the one that goes through the middle of the building.

Mr. Tyler said the correct line is Title 5 line because the Board of Health says they are only going to use the line DEP approved and the line DEP believes is correct. Dr. Chiang thinks it's the correct one as does ERM. thinks it's the correct one. The Board of Health, when they approved the septic plan, thought it was the right one. And the Mass. Graphic Information

System thinks it's the correct one. Mr. Tyler also believed it to be the correct one. He said there are very few people that think that that isn't the line.

With regard to the issue about what is protected, and non-protected, non-conforming, Mr. Tyler said it is clear from the cases presented in my April 1, 2002 memorandum, how this is interpreted. He said the bottom line is that the statute itself doesn't give a license to continue a nonconforming use. It's what the Zoning Bylaw allows. Sudbury's Zoning Bylaw doesn't allow for expansion of uses, it doesn't allow a use to be changed. It's very clear that in 1997 that as Cummings was putting in new tenants into the building, they changed the use of the building from what was a research and development facility to one that was a business office – a new use. In the second paragraph of Mr. Hepting's letter it says that the building is squarely an office building housing businesses and uses accessory to those uses and is not being used for research and development as envisioned under the original zoning.

Mr. Tyler pointed out that there was a change in the Zoning Bylaw so that once Cummings sold their property to Northwood, they no longer had 20 acres, so they abandoned the research and development use. They would no longer even be entitled to continue it. In other words if you're not using it you have to do something to show you're not abandoning it.

Mr. Tyler said it is clear to him that all the uses contained with the redevelopment by Cummings are under a new zoning category and new uses, and no new use is entitled to protection afforded to nonconforming uses. His memorandum elaborates on this and provides examples where nonconforming status is lost. Mr. Tyler said he would not argue that SRC had a preexisting nonconforming zoning protection. However, they would lose that the minute they divided their property. If there is a subdivision, the Zoning Bylaw in effect at the time of submission of that preliminary subdivision plan controls all the land in that subdivision which includes impervious surface, etc.

Mr. Tyler said if the Board rejects that argument, in his memorandum he said we come at it two or three other ways where we show you that once Cummings sold off the land they increased the percentage of impervious surface on their remaining property. In our exhibits we show a 25-acre lot where much was impervious. Then Cummings sold to Northwood and how much of this impervious they had left. It was more, so they increased the nonconformity. They're not allowed to do that because they didn't have the nonconforming protection. Our Bylaw says it's structures, building and structures; it does not include things like drains. It doesn't deal with drains or parking lots, etc. We use the word "premises" in our Bylaw under Uses, so it's use of the buildings, structures or premises. Mr. Hepting's letter tells us they changed the use. So when they changed the use, they lost any possibility of nonconforming protection and protection under the nonconforming statutes as well.

Mr. Tyler showed a copy of one of the exhibits he put into his memorandum was a page showing all the building permits and the building permits for new tenants. In conjunction with that one of the appeals deals with what the situation was, for example, with the parking lots. He showed a copy of Building Permits #14920. For this building permit, the existing conditions map shows what the parking lot looked like in front of the building etc., and provides a grounding for what the parking situation was in the prior use.

Another item of appeal had to do with the air conditioner noise. Mr. Tyler showed Building Permit #15202 which includes some of the plans for the building next to Frost Farm. It can be seen that they're adding new heat pumps, which is the air conditioner noise that the residents of Frost Farm are complaining about. This is something new that just occurred within 6 years, so the ZBA has jurisdiction to deal with this. Mr. Tyler also submitted approximately 5 electrical permits for air conditioning units issued from 1959 to the present. He said these are all new zoning violations that this Board has the authority to enforce.

Additionally, Mr. Tyler said the garbage dumpster was not screened properly. This is a new violation.

Mr. Tyler said his last issue is with the parking and the parking standards. He displayed a map of the area. He pointed out an area of a 58-foot wide parking lot. However, Mr. Tyler calculated that area to be 56 feet. He said the parking bylaw says that when there is 90 degree parking, which there is, there has to be 2-way traffic. SRC has 56 feet but the bylaw says they need 24 feet and 18 ½ twice, so that's a total of 61 feet. They're at 56 feet. This does not comply with the Zoning Bylaw.

Mr. Tyler says the Zoning Bylaw gives instances which are allowed. Therefore the statutory interpretation of the Bylaw is that certain things are permitted and if other things aren't discussed, they're not permitted. Where you have 90 degrees, then that's permitted with 2-way traffic with the required dimensions.

Mr. Kablack reported that the Board did get, in addition to the materials Mr. Tyler submitted, an additional packet of information from Attorney Fox. Also received was a letter from Attorney Fox dated April 12, 2002 which included three attachments, the Selectmen's Site Plan Approval dated November 5, 2002, the Planning Board's WRPD Special Permit dated January 30, 2002, and a letter from Town Counsel dated October 17, 2001.

As to general questions from the Board, Mr. Phelps wanted clarification of the zone lines.

Mr. Tyler said Exhibit 10 of his March 2, 2002 package provides a good example. Also, he said Exhibit 9 was a preliminary site plan done a year and a half ago. SRC's line was a little bit off but still went through a part of the building and not way over as was pointed out. The line SRC used was very similar to the line that the Planning Board approved for Northwood after

Northwood had originally another line that the Board of Health said was wrong. The Planning Board said it was also wrong. Northwood was forced to move their line for the site and forced to move their septic system.

There were no general questions at this time. The hearing was temporarily adjourned to reconvene later this evening after the Board's hearing on regular petitions.

The hearing was reconvened by the Chairman Mr. Kablack who recognized Attorney Fox and Mark Knittle, Director of Development for Cummings Properties.

Attorney Fox wanted to address the oral and written statements made by Mr. Verrill who spoke at the previous meeting in March and again today. He said Mr. Verrill's statements are only about the contamination that was caused by Unisys, the previous owner of the property. Cummings, the current owner, did not cause any of that contamination. He said none of Mr. Verrill's statements are relevant to this appeal.

Attorney Fox said a letter was sent to the Building Inspector indicating that there were ten zoning violations. The petitioners asked the Building Inspector to enforce the Zoning Bylaw. The Building Inspector wrote back saying there are no zoning violations. The petitioners appealed that decision, so it is the ten zoning violations under appeal. The contamination has absolutely nothing to do with those ten zoning violations. He said the ZBA has no jurisdiction in that matter.

Attorney Fox said it is impossible in a reasonable amount of time to point out every statement of fact or conclusion of law that Mr. Tyler writes in the volumes of pages contained in his submission that are not relevant to this case, or are inaccurate statements.

Attorney Fox said Mr. Kablack, at the March hearing, pointed out that zoning violations 1,2,3 and 9 of Mr. Tyler's appeal letter are not relevant because they have to do with the WRPD and that falls within the purview of the Planning Board under the Zoning Bylaw. Therefore, when the Planning Board makes a finding of where the Zone II line is, or a finding on the percentage of impervious surface, that's it. If someone doesn't agree with that, and Mr. Tyler doesn't, he can go to court. He can't go to the ZBA because the ZBA doesn't have the authority to overturn the Planning Board. The ZBA can overturn the Building Inspector, but not the Planning Board. Mr. Tyler knows that because he went to the land court.

Attorney Fox said Mr. Tyler said once there is a subdivision, all nonconformity is lost. And Mr. Kablack pointed out that's not true and gave an example of height as an existing nonconformity which would not be lost.

Attorney Fox would remind the Board that under Chapter 40A of the Bylaw the petitioners have the burden to carry and prove to what these alleged zoning violations are. He said it is not SRC 's job to try and figure out what is being said here, it's the petitioners' burden to prove their case.

In challenging Mr. Tyler's theory about subdividing canceling all nonconforming protection, Attorney Fox said Mr. Kablack gave him an opportunity to corroborate that theory. In response, Mr. Tyler said he submitted what appears to be a 50- page memorandum which is a compilation of various provisions of Chapter 40A, of the Zoning Bylaw. Although interesting from an academic sense, it has little to do with this appeal.

Attorney Fox said this evening Mr. Tyler pointed to page 5 of his March 5, 2002 memo which is a table on top of a different Zone II line location. Attorney Fox took issue with the percentages listed on that page.

Further, in Mr. Tyler's April 10, 2002 memo he states that in 1994 the Annual Town Meeting made additional relevant changes to the Research District passing Article 57 which increased the lot size to 20 acres for research development and engineering. However, Attorney Fox said the 2002 Annual Town Meeting decreased that number to 8 acres. This was passed under Article 40.

Next is page 5 of the April 10, 2002 memo where Mr. Tyler makes a point of change of use where it was R&D and now has changed to a business use. There have been some R&D and business uses since Cummings been there and certainly since before 1995. And Mr. Tyler himself says in his memo that the business and professional office use in a research district is an allowed use. Attorney Fox said this applies only if there is a change to a use that's not allowed. R&D was an allowed use until the 20-acres came into effect and Cummings subdivided. As to business and professional office use it was added in 1991 before Cummings even bought the property.

Attorney Fox said Mr. Tyler in his memo notes that Cummings began the process of abandoning R&D when it subdivided the property. He said that is not accurate.

With regard to Items 1, 2, 3 and 9 which are not relevant to this appeal, Attorney Fox commented as follows: Item 1 states that SRC is in excess of 15% as allowed by right. The Planning Board granted a special permit to increase it to 25%.

Mr. Kablack said one of his concerns relates to Exhibit 11 which references various calculations based on total site Zone II to Zone III, pre and post development. He wanted to know SRC's position relative to current impervious surface located within Zone II. D

Attorney Fox said that figure is currently just short of 25%.

Mr. Kablack asked if Attorney Fox could speak to the reason why the Planning Board in its Special Permit Decision required removal of the impervious surface.

Attorney Fox said that was to bring it down to 25%.

Mr. Kablack asked whether this work has been done or not.

Attorney Fox replied that it has not been done because Mr. Tyler appealed the Special Permit granted by the Planning Board.

Mr. Kablack asked what the percentage is now, knowing that you have not been able to complete the work under the special permit.

Attorney Fox replied that it is 38.8%.

Mr. Kablack said his other concern is that the 1995 subdivision did reduce land area that was formerly part of the Cummings site. He asked whether, in the reduction of land area, the percentage of impervious surface increased, decreased or stayed the same?

Attorney Fox said he did not have those figures in front of him, but wouldn't be surprised if there was a small increase.

Mr. Kablack asked what was preventing SRC today from removing the impervious surface that is bringing them up above the 25% to the 38.8% and why they needed the special permit that's being appealed to remove the impervious surface.

Attorney Fox said the plan that SRC submitted to the Planning Board showed how we were going to get to just under 25% by removing the impervious soil. The Planning Board approved doing that. We were about to start doing that until the petitioners filed an appeal in the land court. So it wouldn't be prudent for Cummings to do this until we see what happens in the land court.

Mr. Kablack whether it was SRC's Is it position that they can't remove the impervious material until the special permit appeal has been resolved.

Mark Knittle replied that it was, the reason being that part of the appeal argues the accurate location of the Zone II line. If, through the course of the appeal it is determined that the Zone II line is either where we think it is or where Mr. Tyler thinks it is, we are either going to have to remove more, or less impervious area. And that's seems to be the crux of the appeal.

Mr. Kablack noted that basically there are two lines so far. He asked whether there is there a potential for further discrepancy.

Attorney Fox felt in all probability it will be the line the town says it is.

Mr. Phelps said regardless of where the line is, wasn't SRC in violation before; that you (SRC) are saying the permit was issued and you're in violation of zoning. You should be taking some action on that. Mr. Phelps felt that's what the petitioners are trying to say.

Attorney Fox said when Cummings subdivided, and for many years thereafter, the town's method of calculating the percentage was different than the way the town calculates it today. Cummings lived with that method and Cummings was in compliance.

Mr. Kablack said the calculation had to do with calculating all the area of the lot vs. area just in Zone II. The problem he had is a hurdle with the 1995 subdivision because it did increase the nonconformity as a result of that subdivision. The reduced area of the lot increased the percentage of impervious material. I think that's squarely on point here. Perhaps Attorney Fox could address this issue at the next hearing. Perhaps he could address why SRC believes it has pre-existing protection in that regard, why the 1995 subdivision doesn't affect you, and also address why, assuming you lose pre-existing nonconforming protection, why you're prohibited from making things better. In other words, removing the impervious surface and you get down to 25% or below.

Attorney Fox said he would provide this information.

The hearing was continued to May 28, 2002.

Mark A. Kablack, Chairman

Patrick J. Delaney III, Clerk

Thomas W.H. Phelps

Lauren S. O'Brien

Jonathan G. Gossels

