VERRILL ET AL
142 North Road
02-6

MINUTES OF THE PUBLIC HEARING CONTINUATION
SUDBURY BOARD OF APPEALS
TUESDAY, MAY 28, 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. He read two documents into the record, both submitted by Mr. Tyler, one a letter dated April 29, 2002, with attachment of exhibits and a letter dated April 30, 2002 in reply to Attorney Fox's remarks made at the end of the April 23, 2002 hearing.

Mr. Kablack noted that at the last session, the Board asked Attorney Fox to address two issues: (1) -whether or not Cummings as the owner of the property could make improvements now within the Water Resource Protection District (WRPD) zone to bring the percentage of impervious surface area down below what the permitted amount is under the special permit issued by the Planning Board that's under appeal right now, and (2)-whether the 1995 subdivision plan increased any nonconformity having to do with percentage area of impervious surface.

Present: Attorney Myron Fox, Mark Knittle, representing Cummings Properties
Before responding to the issues, Attorney Fox summarized what he said at the last meeting. To address oral statements and written statements made by Mr. Verrill regarding the contamination, he said the contamination was caused by Unisys, not SRC. He said none of Mr. Verrill's statements on contamination are relevant to this hearing. The hearing is with regard to zoning matters.

With regard to Mr. Tyler's statements, he would concentrate on some of the major points as it was impossible in a reasonable amount of time to point every statement of fact or conclusion of law in over 200 pages which where submitted.

Also, at the last hearing Chairman Kablack pointed out some of the statements at the original March hearing. Mr. Kablack stated that using Mr. Tyler's December 20, 2001 submission there were 10 allegations of zoning violations; that 1,2,3 and 9 were not relevant because they had to do with the WRPD. On that subject, only the Planning Board has jurisdiction, as it is the special permit granting authority. The ZBA does not have the authority to overturn, overrule or reinterpret a decision of the Planning Board on WRPD issues.

The petitioners in this case appealed the granting of that special permit to the land court. And as Mr. Kablack also pointed out, the ZBA does not have the authority to overturn the land court.

Attorney Fox said Mr. Tyler made the statement that when you have a subdivision it takes away all protection of nonconformity that was granted to that land. And Mr. Kablack pointed out that there are instances in which that is simply not true. One good example of that would be the height of an existing building where you don't lose your nonconformity merely by subdividing.

Attorney Fox added that this is an appeal by the petitioners from the Building Inspector's Decision stating that there are no zoning violations on the site. Therefore, he said the petitioners have the burden of proof. Merely stating firmly that the facts are X and that the law is Y doesn't make it so. No matter how many times you say it, no matter over how many pages you write it, no matter how firm you are when you stated it, you need hard, documentary evidence on the issues. There may be documentary evidence, it may be hard, but it may not be on the issues that are before you.

Attorney Fox proceeded to address the 10 alleged zoning violations which Mr. Tyler wrote to the ZBA in his memorandum of December 20, 2001.

1. Mr. Tyler states that there is a violation because the impervious surface is in excess of the 15%. That is true, it is more than 15% but you can get a special permit in a Zone II from the Planning Board to go up to 25%. And that is in fact what we did. The ZBA has a copy of that decision. Based on the Planning Board decision as to where the Zone II line is they stated that we are just now under 25%.

2. The next alleged zoning violation charges that SRC failed to recharge the impervious surface runoff from the Zone II into Zone II. That is simply untrue and is an incorrect statement of fact. Attorney Fox read from paragraph 2.d of the WRPD Special Permit Decision as follows: "Stormwater management. The petitioner proposes improvements to the stormwater management system as a means of increasing recharge of runoff in Zone II with this proposal." He said the Planning Board apparently doesn't agree with Mr. Tyler and believes as we believe that Cummings is recharging into Zone II.

3. The third alleged violation is that the AT&T monopole does not have a valid WRPD Special Permit. Attorney Fox said this is also incorrect. He said the Town issued permits, the Selectmen gave Site Plan Approval to the AT&T monopole, the Planning Board granted a WRPD Special Permit, and the Building Inspector subsequently issued a building permit for the monopole to be built. Subsequent to even that the Planning Board validated whatever argument there was that the town may have made a mistake. The Planning Board validated the monopole when it heard the SRC case and made their January 30, 2002 decision at which time Mr. Tyler made all the

same arguments including the AT&T monopole. The Selectmen were also made aware by Mr. Tyler in his arguments and they granted SRC Site Plan Approval.

4. Violation 4 – Failure to adequately shield the parking so that it is not visible from Route 117. Attorney Fox said this is not correct because the Selectmen approved both the old site plan years ago and the new one on November 5, 2001, which included landscaping. That Board would not have approved a plan if it had not met the current requirements for landscaping. Attorney Fox said if you're standing on Route 117, the landscaping is approximately 680 feet away. It is also 42 feet higher than the road. Not only was the screening discussed at great length by the Selectmen but also by the Design Review Board who approved it. For further evidence, he suggested the Board look at the Site Plan Approval where the Selectmen go at great length to show that not only had they looked at the landscaping in paragraphs 10 and 11 of the decision, but paragraph 11 even goes further to be sure there is adequate screening.

Attorney Fox said Mark Knittle will discuss Items 5, 8, and 9. He will continue with the others.

6. Is similar to Item 4 in that it says SRC have failed to shield the garbage dumpster so that it's not visible from Route 117. Actually the garbage dumpster is even further away. It is approximately 900 feet from the road and approximately 50 feet in elevation from the road. One would need binoculars to see it from Route 117. Attorney Fox said it is not necessary to delve into this because after the Selectmen's Site Plan review, SRC agreed to locate the dumpster to the rear of the building so it won't be visible at all.

7. Talks about the creation of offensive noise from the air conditioning system adjacent to the Frost Farm development. Attorney Fox said it would be fair to say that the air conditioning system predated the Frost Farm development by many years. The Selectmen looked at great lengths at the subject and did a fair a fair amount of research during the site plan review. They actually set a very specific standard in their decision. In paragraph 15b in the November 5, 2001 decision, they stated a standard of 60 decibels that this air conditioning system should achieve. SRC will achieve that as the Frost Farm development goes in. In any case, SRC is putting up a sound attenuation wall that will take care of this matter.

10. In this item, Mr. Tyler is suggesting that the ZBA should not allow the occupancy of the existing building and he cited Chapter 40A, Section 7; that because there are alleged zoning violations, Cummings should not be allowed to occupy the existing building. Attorney Fox would submit that there are no zoning violations. He said all the Boards who were required to give permits have done so, and each of those Boards have taken the position that there are no violations.

Mark Knittle spoke to the following items:

5. Use of the shared Northwood/Sudbury Research Center access way as a parking lot and use of interior driveways to access parking spaces.

Mr. Knittle would counter that by saying that the access way for shared driveway is not striped nor has it ever been striped for parking. Also, that the end of day pickup for the Montessori School site, where somebody is parked for a few minutes, does not constitute parking. Parking is accessed from the maneuvering aisle which is allowed under Section V,C,1,1,c of the Bylaw. He noted that both the Town Planner and Building Inspector approved the parking lot configuration in its current configuration in advance of any work that occurred on the site in 1977 when the additional pavement was applied, which included this particular area that is alleged to be in violation in advance of all work occurring on the site. If the Board were to refer to Mr. Tyler's April 10, 2002 correspondence, Exhibits 20, 29 & 28, they will see the correspondence and plans that were approved in advance by those two town officials.

8. The front parking lot configuration violates the Zoning Bylaw.

This configuration is currently striped for one-lane access and that one-way access and the striping configuration again was approved in advance of the work by the Town Planner. The 1995 Bylaw, like the current Bylaw, requires 24-foot, 2-way clear travel lanes between perpendicular parking spaces. It also requires 18 ½ feet be provided for standard parking car spaces. It requires 15 feet be required for compact car spaces. If you add that all up, it comes to a total curb-to-curb dimension being required by both current and 1995 zoning of 57 ½ feet. By Mr. Knittle's measurements there is a total curb to curb distance of 59 feet which is a foot and a half more than is required by the total overall dimension in the Bylaw. He also measured the travel lane, the distance between the end of the striped area, which turns out to be 22 feet. It's one-way access, not two-way. There are signs posted and they have been posted on the site indicating one-way access. The striping is somewhat off of current and 1995 Zoning Bylaw in its current condition. There is 19 feet instead of 18 ½ feet for standard parking spaces. We also have 18 feet for compact space when it should be 15 feet. So we've exceeded the parking dimensional requirements by striping and we are 2 feet shorter than the access width as defined by current zoning.

9. Parking is regularly occurring on unpaved areas in Zone II of the Water Resource Protection District.

Mr. Knittle said this area is not paved or striped for parking. And this area of parking is not required to meet the current or 1995 Zoning Bylaw parking ratios to support the uses at the site and the building. When we are made aware of a parking violation occurring out there we send notices to the appropriate tenants to ask them to discontinue using that particular unpaved, unstriped area.

Attorney Fox read excerpts from the following letters:

- Letter dated October 9, 2001 from the Planning Board to the Selectmen which was relative to the site plan review. "The Selectmen should be aware that both the Board and the Town Planner spent significant time listening to and evaluating Mr. Tyler's allegations regarding alleged zoning violations at the site, most notably allegations regarding excessive amounts of impervious surface in the Zone II area. As noted above, these alleged zoning violations are based substantially on the premise that the applicant (Cummings) miscast the Zone II, Zone III demarcation line on the plan, a contention that we thoroughly investigated and flatly rejected."

- Letter dated October 17, 2001 from Town Counsel to Town Manager Maureen Valente, "This letter is a joint letter of the Building Inspector, Town Engineer, Town Planner and myself as Town Counsel. The plan that Cummings has submitted in fact accurately reflects the demarcation line between Zone II and Zone III. It is our recommendation that the amount of impervious surface in Zone II be reduced to the maximum allowed, 25% of the lot area within Zone II, and that Cummings apply for a Water Resource Protection District Special Permit from the Planning Board."

Attorney Fox said that's exactly what we did and that's exactly what the Planning Board granted.

With regard to Mr. Kablack's two issues, Attorney Fox said historically when Cummings subdivided back in 1995, and for some years thereafter, the town's method of calculating the Zone II percent was different than today. Under the town's 1995 interpretation, Cummings was within the Bylaw. At that time, both immediately before and immediately after the subdivision, when Cummings went to the Selectmen to seek Site Plan approval in 2001, it was the first they were made aware that that the method of calculating had been changed and Town Counsel's letter refers to this.

In accordance with the Town Counsel's recommendation, even though Cummings didn't have to do it, it was determined that since Town Counsel recommended it, we would do it. Again, it is merely a recommendation. So Cummings immediately applied for the WRPD special permit to remove impervious surface so that the total percentage is under 25% even under the town's new calculation. That special permit was granted by the Planning Board and was appealed by the petitioners to the land court thus preventing Cummings from removing the impervious surface until the land court decides the case.

Attorney Fox the reason we went to the Planning Board was to be able to remove the impervious surface. He said it seems odd that the Petitioner would come here and say we violate zoning because we haven't removed the impervious surface, yet it's the petitioner who appealed the decision of the Planning Board to the land court thus preventing us from removing it. In law, when a case is appealed, you wait until the appeal is completed before you do the work; otherwise you're at total risk. The risk is if you go in and remove the surface now as the Planning Board said we could, that's been appealed to the land court. The land court could say

for some reason that the Planning Board was wrong; we don't think they were; we don't think the land court would do that, but they certainly have the capacity to do that. In which case we would have removed soil in Zone II illegally. So effectively the petitioners' appeal stops us from doing what we wish to do which is to remove the impervious surface to get down to 25%.

With regard to Mr. Tyler's April 30, 2002 submission, Attorney Fox presented the following:

SRC assertion #1 – Mr. Tyler disputes what Attorney Fox said about the Planning Board having exclusive jurisdiction over WRPD.

Attorney Fox reiterated that the Planning Board under Chapter 40A is the special permit granting authority on WRPD Zone II issues. Nobody in this town has authority over the Planning Board; the only authority that has authority over the Planning Board on those issues is the land court.

SRC Assertion #2 – stating that Attorney Fox said that the Board lacks hard documentary evidence showing SRC's zoning violation. Mr. Tyler points out that one thing that is not lacking is hard evidence and cites all the numerous submissions that were made. Attorney Fox would argue evidence of what? The quantity of submissions to the Board is not evidence of anything other than a large quantity. It has to be relevant to these issues. He would submit that it is not.

SRC Assertion #3 – SRC has under 25% impervious surface and refers to Attorney Fox's statements of April 30, 2002. What Mr. Tyler is trying to do is bring this down to a he-said, she-said and thus obscure the underlying issues. Under the town's current method there is 38.8% impervious surface. After it is removed in accordance with the Planning Board's WRPD Special Permit and if the land court allows, it will be just under 25%.

SRC Assertion #4 – the difference between the DEP and SRC's Zone II lines which are shown incorrectly. Attorney Fox said he does not agree with Mr. Tyler but doesn't think it's a germane issue.

SRC Assertion #5 – Mr. Tyler said Attorney Fox said the decrease of R&D lot size from 20 to 8 acres is relevant, and it is not relevant. Attorney Fox said the reason he said it is relevant is because what the Annual Town Meeting did in April 2002 is that there may be a freeze on the subdivision plan that is up relatively soon and the April 2002 vote to lower the requirement of R&D in a research district from 20 acres to 8 acres is very relevant.

Mr. Knittle presented the following with regard to SRC Assertions #6,7 and 8.

SRC Assertion #6 – A very slight increase in impervious surface resulted from the subdivision. Mr. Tyler claims this is not the case, that there is false testimony there. Mr. Tyler refers to page

11 of his April 10, 2002 package of information and there's a letter that summarizes the percentage based on the current method of calculating the Zone II impervious area and not the method used in 1995 which, is what we were referring to. The fundamental issue there is that these numbers were derived using the current method of interpretation or applying the percentages in Zone II as opposed to the then applicable method of calculating Zone II impervious percentages.

At Mr. Kablack's request, Mr. Knittle reiterated, from a conceptual standpoint, what the change was between the 1995 calculations – how the town used to calculate impervious areas and how it now does it.

He explained the conceptual current method is to apply a Zone II impervious area to the lot area in Zone II. The Northwood method was to apply the entire lot impervious area to the entire lot area. If one was to read the Zoning Bylaw, taking a literal interpretation, the way we interpreted it when we applied in 1995 was to take the Zone II impervious area and apply it to the entire lot area regardless of zone delineation.

Mr. Kablack said there are actually three ways. Mr. Knittle replied in the affirmative.

Mr. Delaney said they would be Zone II to Zone II total area, total impervious to total area, Zone II to total area.

Mr. Knittle noted that to assertion #6, in our calculations what we refer to was using our Zone II line delineation documented as accurate by various town officials and not Mr. Tyler's Zone II line delineation. So there's another distinction in percentages here.

He said the pre-subdivision percentages, before the lot was broken up into our site and Northwood's site, the total percentage of impervious area was 11.1%. After the subdivision, and prior to the 1997 paving – in other words in 1995 at the time of the subdivision – the day after it was subdivided, the percentage of impervious area actually decreased on our site to 5.6%. That's a net reduction of impervious, under that method of interpreting the Bylaw, (total Zone II impervious to total lot area). And these lot areas were derived from the MetroWest Engineering plan.

Mr. Delaney asked where that came from. He said originally the Planning Board apparently applied the total to total for Northwood, then they applied the Zone II to Zone II to SRC. Who was applying this third method?

Mr. Knittle said this was the method that we at Cummings Properties applied in advance of applying to the Planning Board for the subdivision.

SRC Assertion #7 – claims that SRC was in full compliance with the Planning Board's previous method of interpreting the WRPD impervious area restriction.

Mr. Knittle said the statement that SRC was in compliance with was 15% allowed by right in WRPD Zone II at the time of the 1995 subdivision and prior to the 1997 paving is in fact accurate for the reasons stated above. He said under our application of the numbers at the time of the subdivision we were at less than 15%. We were at 5.6% before the 1997 paving. After the 1997 paving, it increased the percentage to 7.6% which is still substantially less than 15% allowed by right. With the change of interpretation, using the current method, Zone II impervious to Zone II area, prior to the 1997 paving, in other words in 1995, if you were to apply the now interpretation of percentages you would end up with 24.9% impervious. Post subdivision, pre 1997 paving.

Mr. Phelps asked whether this was pre-paving or post-paving?

Mr. Knittle said these are post-paving numbers contained in page 11. He said after the 1997 paving, under the current method, of interpreting percentages, that is Zone II impervious t Zone II area, if you were to walk up there today there would be 38.8% of impervious area. This is under the current method, not the applicable method of 1995.

Mr. Kablack asked whether the 1997 paving, was a result of another site plan application?

Mr. Knittle said that work was not the result of a subdivision, it was the result of a plan that was submitted to the Planning Board and the Building Department. They reviewed the parking configurations. There was correspondence and approval letters from the town to Cummings (Exhibits 29, 20, and 28 of the April 28, 2002 letter provided by Mr. Tyler).

Mr. Kablack asked whether that review was in conjunction with a review that was pending before the Planning Board?

Mr. Knittle said he came to the town, first to the Building Inspector to ask if a building permit was required to increase the paving area. He didn't believe so but said let's go talk to the Planning Board who has the jurisdiction in the WRPD. A review was done in 1997 to make sure that it did not exceed those percentages allowed by right and that a special permit was required. It was determined through those letters and review that no special permit was required. So we proceeded with the paving.

When we increased the paving in 1997 there was full disclosure and full review by the Zoning Enforcement Officer and the Town Planner who wanted to make sure that we were ok from a percentage basis that no special permits were required. There are letters of correspondence in your packages from Mr. Tyler confirming that we did that. Mr. Knittle said

they tried to do the right thing; they believe they did the right thing, and did do the right thing based on the then applicable interpretation of the Zoning Bylaw. It subsequently has changed, we all know that, which is why we are here today.

Mr. Knittle said now we are here to apply a new standard of interpretation to an old standard of interpretation. He would suggest that the definitive subdivision which was approved applies for eight years. Shouldn't the interpretation that applied in 1995 also apply for eight years, unless we come in and propose a substantial alteration to the building, which we did, and it was discovered that there was a new interpretation. He said he applied for a special permit and complied with the new interpretation. Then we get appealed and cannot go and remove it while it's under appeal, or we'd be in violation.

SRC Assertion #8 – which implies somehow SRC has lost its nonconforming status based on the fact that a certain time period had expired before the first building permit was issued in 1996 to Focus Enhancements. Mr. Knittle would argue that the reason Mr. Tyler has not discovered any building or occupancy permits prior to 1996 is because they were not required by the occupants of the premises at the time. Under Section 780CMR, it specifically states that a building permit and/or occupancy permit is not required where there is no construction or change of use to the premises. This rule applies throughout the state.

Attorney Fox said Town Engineer scientifically determined that the Zone II line is exactly where Cummings said it was, but Mr. Tyler disagrees with that. The Town Planner, from a WRPD, joined in a letter and said that Cummings' determination of the Zone II line is accurate, and Mr. Tyler disagrees with her. The Building Inspector, from a zoning enforcement point of view, in a joint letter stated that he determined the Zone II line to be where Cummings' stated it was, and Mr. Tyler disagrees with him. The Town Counsel, from a statutory construction point of view, has opined in writing that Cummings was accurate in the Zone II line, and Mr. Tyler disagrees with him. The Planning Board as a special permit granting authority unanimously stated that Cummings was accurate in stating the location of the Zone II line, but Mr. Tyler disagrees with them. Finally, the Board of Selectmen, in their Site Plan review, unanimously have stated that Cummings was accurate in stating the location of the Zone II line, and Mr. Tyler agrees with them also. He said what Mr. Tyler would have you believe is that basically only he understands where the Zone II line is, what Town Meeting intended to do when they created the Zone II line, WRPD, nonconforming uses, etc. But what is really true is not that we don't understand all these things, it's simply that we don't agree with Mr. Tyler.

In summary Attorney Fox would request that the ZBA uphold the Building Inspector's decision and find that there are no zoning violations.

One additional letter was read into record which was submitted by Mr. Tyler and dated May 21, 2002.

Mr. Phelps could not understand why the appeal of the WRPD special permit precludes Cummings from removing the impervious surface mandated by in that permit. He asked, if in the event of a finding by the land court against the special permit that Cummings before that finding had removed the pavement, could they then be required to put it back.

Attorney Fox said if the pavement is removed, it creates an illegal act. In order to remove that pavement from the Zone II, he would have to go to the Planning Board. If the court rules that the Planning Board made a mistake then they would have done something illegal.

Mr. Phelps asked why this wasn't done before.

Attorney Fox was because SRC was unaware. Until SRC went to the Selectmen in 2001, they were unaware that the town had changed its method of calculation. The last thing that Cummings knew was that in 1997 when they put their paving plan before the Town Planner and Building Inspector, they blessed it and said it was okay, the percentages were okay. So they went ahead and did that and had no indication that the town had changed its mind or perhaps might someday might retroactively try to apply a different standard. And then when Town Counsel in his letter of October 17, 2001 said we recommend to go to the Planning Board, it was based on the fact that we knew that the petitioners were there and might appeal; therefore it made no sense not to apply to the Planning Board so we did and they blessed it. So no matter what position we take, we're okay because we were in compliance with the standard that the town used at the time of the subdivision. Or if you take the position that the new rule applies we've got that too because we applied to the Planning Board and complied with the new way of calculating by getting a WRPD Special Permit.

Mr. Knittle added that the wording of the Bylaw has not changed. It's how it gets interpreted which is why we were unaware that there was a change in the calculations.

Attorney Fox felt that if the town takes the position to try to retroactively apply the new method of calculations to prior instances Cummings I think would be fine because the Planning Board granted a WRPD Special Permit. However, half the town would probably be in violation.

Mr. Delaney asked where the section of the bylaw that prevents removal of something is located.

Mr. Knittle read from page 96 of the 1994 Bylaw which states: "Any use that will render impervious more than 15%, but less than 25%, of any lot, or 2500 square feet, whichever is greater."

Mr. Delaney asked if Mr. Knittle was interpreting this to mean decrease as well.

Mr. Knittle said it assumes you're going to increase but it doesn't address a decrease. To remove the 15,500 s.f. which is the number that puts it at 38.8% to get it down to 25% requires a special permit. I'm more than 15% which is allowed by right but once you're over 15% the removal of 15,500 s.f. would put us at just under 25% and you need a special permit to do it; which will render the site in a condition between 15-25% and requires a special permit.

Mr. Delaney referred to a handwritten page in Mr. Tyler's March 5, 2002 submittal. (Exhibit 11 Zone II Calculations) He asked Mr. Knittle whether this was his page or an impression of his numbers.

Mr. Knittle said it sounds to me like it's an impression of our numbers. The only thing he could think of is that it could have been a verbal communication from a combination of himself and perhaps his engineer to a town official. He did not know the exact derivation of those numbers and didn't recognize the handwriting. He said Cummings did not write this.

Mr. Delaney asked whether he disagreed with the numbers.

Mr. Knittle said it appears to be accurate for the most part.

Mr. Kablack said the Board has heard two things tonight from Cummings: (1) it would put them at risk in the event of an adverse land court ruling (2) that they are outright prohibited from doing something without going for a special permit – this is in regard to removing the pavement.

Mr. Knittle said he could a third. He said if Cummings were to remove the impervious area that we placed in 1997 to bring us down to the 25%, assuming none of the other issues mentioned apply, it would put the building in a deficit of required parking to support its uses. We would then have to go and take an alternate area outside of the Zone II to bring the building back into compliance.

Mr. Kablack asked whether that alternate area was picked up as part of your larger site plan approval that you got from the Selectmen in November.

Mr. Knittle replied that it was. He said the most logical place to do it would be on top of the existing septic system in front of the building. Which is going to be replaced, it is part of our removal process. Which means that you have to go and dig it up and then put it down again.

The floor was turned over to the petitioners.

Mr. Verrill said With regard to statements that the contamination issue is not relevant, Mr. Verrill felt it to be very relevant. He believed that any additional development on the property, whether allowed or not, increases the risk of increase contamination. It would seem to

him that between the Northwood and Cummings properties that Zone II is being interpreted to maximize both developments under different ground rules.

Mr. Tyler believed the answer to interpreting the Zoning Bylaw is that the order probably has to go down that that they're in violation of the Zoning Bylaw and they have to go down to 15%. They could apply to the land court for an exemption to allow them not to go the last 10%, assuming they win their appeal and are granted a special permit. Right now they don't have a special permit; it's under appeal and they're entitled to 15%, and they have a zoning violation.

With regard to the handwritten chart Mr. Delaney asked about, Mr. Tyler said it was handed out at a Selectmen's meeting. He asked for a copy and put it in his records.

Mr. Tyler's presentation consisted of various plans which were used as visuals to describe the events occurring on this property. He began by saying that this all started back in June 2000. Cummings came to the town with preliminary plans showing existing conditions, existing Zone II area, and they also had proposals to expand the building. His understanding from talking with Town Engineer and others was basically, that SRC was built out, you couldn't do anything.

From the preliminary plan, just to show you where that line came from, Mr. Tyler said Northwood and the Selectmen signed a site plan. Mr. Tyler pointed out where the line was drawn but it could not be seen because of the building. So a same set of maps with the same dates by the same engineer but a different sheet shows an overview. It also shows that through the process of determining with Dr. Chiang where Zone II was supposed to be at that time. It went right through the middle of the building. This was what actually forced Northwood to move their septic system into Zone III.

Mr. Tyler showed another map where he said the line shown was approximately correct, it was not exactly as shown on the previous map but sort of right in the general vicinity.

Mr. Tyler then displayed a plan entitled C1 Existing Conditions, 142 North Road. The red denotes the SRC property line and includes an approximate Zone II location. The calculations show, and on what everybody now seems to agree is, that there is a 38.8% impervious surface area. That area is shown in orange.

Mr. Tyler said this is what SRC came to the town with in August. In July they came to the Conservation Commission with this map and they had two different lines. They had this approximate location, the Board of Health Well #5 line. Mr. Tyler said he has shown the Board in all kinds of extensive documentation that Town Meeting made a zoning change. It intended to adopt the DEP approved line. The Board of Health is using the DEP approved line. So that's the line Town Meeting tried to adopt.

Mr. Tyler added that there is some belief in the Engineering Department that Town Meeting actually adopted some other line and now for some reason we have two lines and this is sort of where the differences are.

One of the issues, besides the issue of the 38.8% that they should be down at 25%,is that Attorney Fox had had implied that the Planning Board has exclusive jurisdiction over zoning matters that relate to the WRPD. In fact, even within the WRPD Bylaw, it says that the Building Inspector has the responsibility to enforce zoning, and if you don't like his decisions, under the statutes we can appeal to the ZBA. So yes, the Planning Board is the special permit granting authority, but they're not the exclusive interpreter of the Zoning Bylaw. If fact you could probably say that if they have a question about zoning interpretation they should ask the Building Inspector what he thinks because he is the one who's supposed to be interpreting the Zoning Bylaw. They're supposed to be doing things like adding conditions and things like that. Mr. Tyler believed he was properly before the ZBA over the issue of where the Zone II line is.

With regard difference between the 41% and 38.8%, from the map Mr. Tyler pointed out the area that is between the two lines. He also pointed out the SRC property line and the Frost Farm, and this area that's in the 38.8%. He said where you put the Zone II line is critically important in terms of what you have to do to be in compliance with the zoning. Mr. Tyler maintained it's the first order, the Building Inspector, who has to interpret the Zoning Bylaw where is the line and then we, the petitioners, disagree with him. Actually, he said Mr. Hepting didn't make the decision as to where the line should be; in his letter he said that was somebody else's responsibility.

As a result, Mr. Tyler was before this Board for it to determine where the line should be He showed the line which represents the impervious surface in the scientifically delineated Zone II noting that SRC has admitted that for this area here they're not in compliance, they're way over.

Mr. Tyler said the ultimate responsibility is for the landowner to be in conformance with the Bylaw, which is the reason that even that with the building permit issuing somebody can challenge a zoning violation on an existing permit and for six or seven years later you can actually do the zoning enforcement action and get them to change it. Which might be to move the building, take it down or different things like that.

Mr. Tyler said the exhibits he submitted contain the calculations used to arrive at the amount of impervious surface and he believed they demonstrate that SRC is not in compliance.

With regard to the correct method calculating of calculating the impervious surface, Mr. Tyler would request the Board, in its Decision, to make some opinion as to what the right

methodology was because there have been two different methods. He believed that would be very helpful.

Mr. Verrill agreed. He said it seems very obvious and a common sense thing. It seemed to him that the Town Meeting wanted to protect the area that does recharge the well and that has to mean that a percentage of that area. If you were to take a well that had 25 acres in Zone II and that entire 25 acres was part of a 100-acre parcel it would mean that under the Norwood procedure you could pave over that whole Zone II area and you'd still only be at 25%.

Mr. Tyler submitted some pictures for the record to document some of the other violations that he talked about. One showed the parking area in the front, the front of the children's center and the dumpster that's kind of set out there in the middle.

Mr. Tyler said he believed everyone agrees that SRC is over 15% impervious surface and the Bylaw, special permit or not, requires that they recharge into certain kind of basins, not just pipe it off. What you actually find in the plans is that it's just basically piped and discharges into surface and we made some comments that they took exception to that it not all goes into Zone II. He pointed out on the map those areas it discharges into. He said if there are no catch basins between the paved area and the area he pointed out on the map, it is going from Zone II to Zone III and is not being recharged and SRC and therefore is not in compliance with the Zoning Bylaw.

Mr. Tyler said that completed his presentation.

There were no question from the Board at this time.

In response to the allegation that there's not proper recharge in Zone II and using Mr. Tyler's map, Mr. Knittle described the drainage system. He said the way it was designed was to try and proportionally replicate the recharge in Zone II and Zone III and was approved by the Town with the 1997 submission.

Mr. Kablack asked whether there was there a 1997 WRPD Special Permit. Mr. Knittle replied that there was not.

Mr. Kablack asked whether there was site plan review or was it more informal.

Mr. Knittle said he was not formally before a Board. The process is that after the subdivision we recognized that there was a shortage of parking on the site based on zoning. And recognizing that we prepared a parking plan that showed increased paving in Zone II. We took it to the Building Inspector and asked him what process we had to go through to pave this area and get the parking ratios in line for zoning. He said he didn't believe they needed anything;

however, he suggested talking to the Town Planner. Her review was that there were a series of additional information that both the Town Planner and Building Inspector requested in their correspondence that we then modified and revised the drawing, came back to both those town officials, and they said no permit is required. You may proceed with paving. That is documented in the exhibits.

Mr. Phelps said according to the Bylaw, a permit is needed.

Mr. Knittle said at the time, the interpretation, in 1997, was different than it is today. Had we gone through this same procedure today, the answer would have been that we cannot pave, that we have to get a special permit. It is a different method of calculation that applies today than applied in 1997.

Mr. Tyler said it was his understanding that that using either the Northwood method or the SRC method, they're not in compliance now. This is documented in his memos. He said he used the lower number using the Northwood method, which is Zone II impervious area over total lot area. He said the record shows no evidence of complex drainage calculations being submitted. If there is runoff going down the driveway and it's caught somewhere and treated and put into Zone III, it still came from Zone II and went to Zone III. And the Bylaw says you have to recharge from Zone II into Zone II. Mr. Tyler said he categorically rejects the idea that SRC complied with the Bylaw.

William Wagner 36 North Road felt that in order to remove some ambiguities or misunderstandings of where each of those lines are, he would ask the ZBA to provide in its decision a determination of the Board's understanding of each of the lines. He said in that way there is a basis for understanding where your decision comes from. Then, if this thing goes further there will be some understanding as the Board will have removed some of the ambiguities.

There were no further comments. The public hearing was closed.

Mark A. Kablack, Chairman

Patrick J. Delaney III, Clerk

Thomas W.H. Phelps

Lauren S. O'Brien

Jonathan G. Gossels

Filing Date: June 10, 2002

NOTICE OF DECISION

ZONING BOARD OF APPEALS
TOWN OF SUDBURY, MASSACHUSETTS

Petitioners:	Stephen & Joan Verrill 415 Wheeler Road Concord, MA 01742	William Wagner, Jr. 36 North Road Sudbury, MA 01776	Ralph S. Tyler One Deacon Lane Sudbury, MA 01776

Location: 142 North Road (Sudbury Research Center (SRC))

After hearings held on March 12, 2002, April 23, 2002 and May 28, 2002, in the matter of Case Number 02-6, that of Stephen Verrill et al, appealing a decision of the Building Inspector contained in his letter dated November 30, 2001, with regard to the following 10 zoning issues at the Sudbury Research Center (SRC), 142 North Road, Research District Zone, the Board of Appeals of the Town of Sudbury on May 28, 2002 voted:

Item #1. Impervious surface in excess of the 15% allowed by right in Zone II of the Water Resource Protection District (WRPD).

The Board finds there to be a violation of the impervious surface coverage based on the current calculations (Zone II impervious surface divided by Zone II lot area). However, that violation has been attempted to be addressed by the SRC petition to the Planning Board; that a WRPD Special Permit has been issued and is currently under appeal.

No further action is required to be taken by the Building Inspector under Item #1.

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

Item #2. Failure to recharge impervious surface runoff from Zone II into Zone II as required when the impervious surface exceeds 15% in the WRPD.

The Board finds there to be insufficient materials submitted to be convinced there is a violation. The Board takes comfort in knowing that the WRPD Special Permit issued by the Planning Board deals specifically with the stormwater management system contained in Item 2.d of that Special Permit.

No further action is required with regard to Violation #2.

Item #3. The AT&T monopole does not have a valid WRPD Special Permit or proper system of stormwater recharge as required by the Sudbury Zoning Bylaw.

The Board finds there to be a violation; however, that violation has been attempted to be addressed by the SRC in its petition to the Planning Board for a WRPD Special Permit. That permit, issued by the Planning Board, is currently under appeal.

No further action is required to be taken by the Building Inspector with regard to Violation #3.

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

Item #4. Failure to adequately shield parking so that it is not visible from Route 117.

The Board upholds the decision of the Building Inspector with regard to Item #4. In addition the Boards notes that additional screening has been proposed by the recent Site Plan Decision approved by the Board of Selectmen who, in that Decision, have retained jurisdiction over the requirement for additional landscaping in the event it is needed.

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

Item #5. Use of the shared Northwood/Sudbury Research Center Access Way as a parking lot and use of interior driveways to access parking spaces.

The Board finds insufficient materials were provided to indicate a violation exists and upholds the response of the Building Inspector in his letter dated November 30, 2001.

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

Item #6. Failure to shield the garbage dumpster so that it is not visible from Route 117.

The Board upholds the decision of the Building Inspector as being reasonable with regard to Item #6. It further notes that there is additional protection afforded by the recent Site Plan Decision in the event that additional screening is deemed necessary.

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

Item #7. Creation of offensive noise from the air conditioning system adjacent to the Frost Farm development.

The Board finds there was insufficient evidence to support this violation. Further, the matter has been addressed in the Site Plan Decision.

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

Item #8. The front parking lot configuration violates the Zoning Bylaw.

The Board finds there was no hard evidence submitted to support this violation and supports the decision of the Building Inspector. Further, testimony presented by SRC at the ZBA hearing indicates that parking lot dimensions were met.

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

Item #9. Parking is regularly occurring on unpaved areas in Zone II of the WRPD.

The Board finds that the information submitted was insufficient to support evidence of a violation. Therefore, the Board upholds the decision of the Building Inspector with regard to Item 9. Further, this matter is addressed in the recent Site Plan Decision.

Item #10. Occupancy of the existing buildings is not permitted until these zoning violations are fixed. Permits are void as MGL c. 40A, Section 7 does not allow the Building Inspector to issue permits for a new use where the use would be in violation of the Sudbury Zoning Bylaw.

Having found that there are no violations not being addressed in Items 1 through 9 above by either the Site Plan Decision issued by the Board of Selectmen or the WRPD Special Permit issued by the Planning Board, the Board finds no further action is required under Item 10. The Board finds the decision of the Building Inspector to be reasonable.

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

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

The Minutes pertaining to this petition are on file with the Town Clerk and are incorporated and made a part hereof to this Decision.

BOARD OF APPEALS

By_____, Clerk