

Case Number: 02-43  
Filing Date: November 18, 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
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Location: 138 North Road

After a hearing held on September 23, 2002, in the matter of Case Number 02-43, that of Stephen Verrill et al, appealing a decision of the Building Inspector not to revoke Building Permit #00-150 for the revised Northwood At Sudbury Activities Center, the Board of Appeals, concluded its deliberations on October 29, 2002 and voted its Decision.

Following that vote, a duly posted meeting was held on November 7, 2002, at which time the Board was presented with information from Town Counsel regarding the Board's lack of jurisdiction in this case.

As a result of this new information the following MOTION was placed and SECONDED:

MOTION: "To reconsider Case 02-43 (Verrill et al) and to withdraw the previous Decision based on new information that the Board lacks jurisdiction."

VOTED: In favor: 4 (unanimous)

Members present and voting: Patrick J. Delaney III, Chairman, Jonathan G. Gossels, Clerk, Thomas W.H. Phelps; Richard L. Burpee, Alternate

The Minutes of September 23, 2002, October 29, 2002 and November 7, 2002 are on file with the Town Clerk and are incorporated and made a part of this Decision.

**BOARD OF APPEALS**

By \_\_\_\_\_ Clerk

MINUTES  
SUDBURY BOARD OF APPEALS

THURSDAY, NOVEMBER 7, 2002

The Board consisted of:

Patrick J. Delaney III, Chairman  
Jonathan G. Gossels, Clerk  
Thomas W.H. Phelps  
Richard L. Burpee

Executive Session

At 7:30PM it was on roll call

VOTED: To go into Executive Session for the purpose of discussing ongoing litigation and to convene the regular meeting following the Executive Session.

The regular meeting was convened 7:37PM by the Chairman, Mr. Delaney.

Meeting with Town Counsel to discuss the ZBA vote on Case 02-43 Verrill et al appeal, 138 North Road

Present: Town Counsel Paul Kenny, Richard McCarthy, Esq./Northwood Properties, Ralph Tyler, William Wagner, Susan Sherwood

Mr. Kenny said after learning of the Board's vote on Case 02-43, he requested this meeting in order to inform the Board of his opinion that the ZBA did not have jurisdiction to issue the decision that was made.

By way of explanation he said site plan review in a research district is significantly different than it was in any other district. He said all over town it used to be a special permit, and back in the late 80s, early 90s, the town was offered 120 acres in the area of North Road for approximately \$1 million. It went to Town Meeting, a couple of people spoke against it, and it was voted down. After it was turned down, the Trust for Public Lands (TPL), a charitable organization, came in and said they would like to purchase the property as a go-between and then sell it back to the town, and sell the contaminated property to someone else, who happened to be Cummings Properties. The town got about 70 acres for \$1.2 million. The Trust for Public Lands said they would buy all of the property from Unisys (owner at that time) because the price now had substantially increased over the amount over the amount originally offered to the town.

The TPL said they would sell off what is now owned by Cummings, but at that time Unisys, and before that Sperry Rand who was the actual culprit in the contamination. However, in order to do this the TPL couldn't market the other piece of property which would allow them to market the whole thing. As part of this, the town received an indemnification agreement for the contaminated material so that Unisys remained responsible for removing all of the contamination.

MINUTES  
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Unisys said they needed a new site plan review. That site plan review wouldn't be the same as a site plan special permit; it was merely a review of the site plan by the Selectmen who would then make a recommendation to the Building Inspector which he would either accept or not accept in issuing the permit. The items that the Selectmen would recommend on were with respect to 6a through f of the Zoning Bylaws. Those items are:

- That the internal circulation and egress are such that safety will be reasonably protected.
- Visibility from the public way as the parking area is located in the front yard should be reasonably minimized.
- Adequate access to each structure for fire service will be provided.
- Utilities and drainage will be adequate for the improvements.
- Effective use will be made of topography, landscaping and building placement to maintain to a reasonable degree of feasibility the character of the neighborhood.
- It meets the criteria listed on the section 3G6f Water Resource Protection District.

Mr. Kenny said those are the items that the Selectmen recommend to the Building Inspector. The items with regard to what he understands this appeal to be are items with regard to size of the activity room, the kitchen, the size of the interior of the buildings, and the fact that there was a story taken off one of them. However, he said the footprint of all of them was the same. Therefore, anything that 6a-f covers, and which the Selectmen have to deal with, is already covered. He said there is nothing more for the Selectmen to do so it doesn't change.

Mr. Kenny said this issue has taken on a life of its own with litigation. He said there are three more buildings scheduled to be built there and the ZBA is going to be faced with at least three more appeals. He said none of these appeals are necessary. All the issues are the same every time. These things are in court and they should be decided in court, whatever the outcome.

With regard to the litigation, Mr. Kenny said he is not actively participating in the litigation to any great degree. He was monitoring the litigation for the purpose of making sure that the Board of Appeals, the Selectmen, the town, the Building Inspector isn't maligned or attacked in this litigation. He said the parties are attacking each other and so be it; let them do that.

Mr. Kenny said when he saw a draft of the Board's decision, he realized there was a problem. He understood the rationale because the ZBA was looking at what was called a decision, but it wasn't a decision. The document said it was a decision but it shouldn't have been

a decision. He thought that, back in 1997, what happened was that the Selectmen just took the decision they usually use in special permits and applied it to this. When it was typed up they just followed the format of a special permit when it really didn't apply at all.

As a result, Mr. Kenny said he spoke with Mr. Delaney and explained to him what the situation was and he suggested he would get back to the other members and schedule a meeting. He believed the situation is such that there is a non-issue before the Board and it was his opinion that the ZBA should take no action on this whatsoever because there is no jurisdiction. Mr. Kenney didn't believe the appellants have a valid appeal but they can appeal it. He said if they appeal it, the same issue applies, but it doesn't put us in a position of having gone and done something that should not have been done which would then put the town in a position of going in and getting in the middle of this fight.

Mr. Phelps said the Board was looking at the actual appeal which was very specific to the conditions of the Selectmen's "decision," and which the ZBA found were quite different from the other appeals. He said this looked like a stand-alone case. The two specific conditions that were in the Selectmen's decision were those which were addressed in the appeal. Looking at appeal, one would see that that was what the appellant was looking at. The Board looked at them and said this is different. Isolate that activities building and it is different from the towers or anything else, which is why the Board came to its conclusion.

Mr. Delaney said Mr. Kenny just called the Board's attention to something that no one concentrated on, which is the fact that for years there have been two types of site plan review, one for research districts and one for everything else; and in the one for the research district, the Selectmen's role is advisory to the Building Inspector. In fact he doesn't even have to take any action based on their recommendation.

Mr. Delaney believed what the Board has been trying to do in all these cases is stay out of the way and leave the very first decision, which was the 1998 decision; let it work its way through someone else's judgment process. Mr. Delaney felt the Board has essentially been trying to do what Mr. Kenny was outlining. He said, at least for himself, in this case, what he heard is that the appeal was an appeal of the decision of the Building Inspector to grant an occupancy permit for something that was different. Most of what was discussed about what constitutes different was relative to what was presented to the Selectmen and what was approved by the Selectmen, and there are conditions regarding changes. But another aspect of that is that it was different than what was presented to the Zoning Board in 1998. Mr. Delaney was not so sure that when that case is resolved that that resolves this issue as well. Because, looking at what the Zoning Board said in 1998, it said if you build these buildings and this activity center with recreation, fitness center, health care facilities and communal dining and cooking, our decision is that that constitutes a residential care facility, the reason being that the bylaw doesn't give anything else to go on as to what a residential care facility is. For the purposes of Northwood, Mr. Delaney said he always thought that what was presented to the Zoning Board and accepted is

the de facto definition of a residential care facility. It appeared at least that if Northwoods was to deviate from what was approved in 1998, then that would have the unfortunate effect of raising that question again. So trying to keep in tune with the philosophy of not deviating from that decision that the Board made, which Mr. Delaney said he voted against, the best course of action seemed to be to try and make sure that there was at least a little bit of pressure that one of two things would happen – either there would be an official sanctioning of those changes, which the Board now knows isn't appropriate for the Selectmen, or what he (Delaney) suggested to the Board, which it did not do, was to do what it could do to make sure it would be constructed with approximately the floor space and function as was presented originally in 1998. Not just to the Selectmen but also to the Zoning Board.

Mr. Kenny said this appeal doesn't deal with Mr. Delaney's statements. He said if the Board feels that based upon what is being done up at Northwood now is a problem, perhaps the Board might want to send a letter or ask the Building Inspector whether it complies with the 1998 ZBA to allow this under the Zoning Bylaw. Because the Building Inspector is the one who enforces and interprets the zoning bylaw.

Mr. Delaney said the Building Inspector hasn't actually been asked that question.

Mr. Kenny pointed out that that's also not the question that's been presented to in this appeal. This appeal was entirely something different. However, it is a very valid question to ask.

Mr. Delaney asked what would happen if, in light of what Mr. Kenny said, the Board decided that the only thing it needed to do was to go back to the decision and remove all of the references to the site plan and simply say that the occupancy permit would expire in 120 days unless the applicant could obtain approval of the changes by the Board of Selectmen with no reference to condition 25 or the Selectmen's authority.

Mr. Kenny did not believe the Board had that kind of authority and would be going beyond where it should go. He said the question here is whether or not this should have been before the Board or not. He thought it shouldn't have been before the Board. Therefore, if the Selectmen don't have the authority, the Board can't condition something upon them doing it, even if it had the authority to hear this.

Mr. Delaney replied that unfortunately, if one follows that conclusion, which seems to make sense, it leads this Board to conclude that it needs a reconsideration and reversal of the vote.

Mr. Phelps asked what would happen if the Board just met tonight and past the date by which our decision would have had to be filed - what would have happened to the case.

Mr. Kenny replied that he didn't know. He said he would be in a position of saying that on one hand he has a Building Inspector's decision. On the other hand he has a Board of Appeals decision. He believed the ZBA doesn't have jurisdiction here and would have to say that the Building Inspector's decision stands. He thought the Board had the opportunity to say there was a mistake – it's not a reconsideration, the Board was just saying it does not have jurisdiction to hear this.

Mr. Delaney said the wording of MGL 40A gives the Board jurisdiction for anyone appealing – anyone aggrieved by a decision of the Building Inspector.

Mr. Kenny agreed; however, he said there has to be a basis for that being aggrieved. And the basis for that being aggrieved was the Selectmen's decision – but there is no decision. He added that jurisdiction, even in litigation, can be raised at any stage of litigation or at any stage of ZBA proceedings. He said this opinion isn't trying to affect the litigation in any way; he just didn't think that this particular appeal should have been dealt with; it just wasn't what it appeared to be.

Mr. Delaney asked whether the only course of action if the Board assumes that it has to undo that decision somehow and we can't just fail to file it, is to reconsider it and then to reverse it. He said that was a decision that was voted in a posted public meeting.

Mr. Kenny felt the Board should reconsider the decision and then make a determination that based upon the information that was received that the Board did not have jurisdiction in this particular issue to hear that issue. Because in fact, he said there is no issue in this regard. Mr. Kenny believed the Board could do this.

Mr. Gossels asked whether Mr. Kenny was saying that the conditions on the Selectmen's decision have no standing whatsoever and don't apply.

Mr. Kenny said the Selectmen's decision is not a decision, it's a recommendation. When it was voted for at Town Meeting it was very clear that that's what it was and the very clear reason for that being there was so that they wouldn't have the constraints in a site plan special permit. He said this was absolutely intended not to be a special permit; it was only those six items. None of those six items has been changed. The footprints of all the buildings are the same; to his knowledge there is no indication that any of the approaches have been changed.

Mr. Delaney felt the bylaw should have said this is site plan review for everything except the research district. In the research district there is no site plan review. Because that's essentially what this is. Pointing out all these things is meaningless if the end result is all that just goes out is just a report that says to the Building Inspector that he doesn't have to take any action.

Mr. Phelps asked hypothetically what would have happened if the Board had not met with Mr. Kenny, went ahead with its original decision, Mr. McCarthy submitted revised plans to the Selectmen who put it on their agenda, with the end result being that everyone was happy.

Mr. Kenny said if all that happened he wouldn't say anything at all. However, his guess was that Mr. McCarthy would have appealed. Mr. Kenny said he would have come to the ZBA and said there is no jurisdiction here.

Mr. Tyler said he read provision 6 differently. He believed that first there is a threshold decision which has to be made which is whether the project complies with the zoning bylaw. He read from the bylaw: "If the Board of Selectmen should determine that the application and plan do not in its view reflect compliance with the provisions of this bylaw, then the Board of Selectmen shall disapprove the same." Mr. Tyler said Mr. Kenny is having the Board focus on the part of it they do agree with it, but there are some things that they find are problematic, then they make that recommendation to the Selectmen. He said the central issue that is before the Selectmen was whether this a residential care facility. In deciding that question the Selectmen said yes it is as long as all these conditions are met. Mr. Tyler believed this appeal was properly before the ZBA because that is the central issue about the size of the activities building.

Mr. Tyler said to the extent that this decision was issued with conditions, the developer had 20 days by which to say you can't put that condition on it, and after that 20-day appeal period in 1977 or 78 expired, that was the decision that bound him and bound the town. This is why there are appeal periods. He felt the central issue that I hope the Selectmen will address is the issue you're talking about is this whether this is still a residential care facility. Mr. Tyler didn't believe it was.

Mr. Kenny said the only reason he was here tonight was because he believed this is a clear legal jurisdictional question that he thought was necessary for him in defense of the Board's position to make. If the Board were making a determination on whatever the facts are and how the bylaw applies, that's the ZBA's decision, right or wrong. He said that's no what this is about.

Mr. Phelps said the Board did go through the process of hearing the appeal, going back to the Selectmen within a time period and asked them to clarify their position, and getting a response on that, and then having our meeting and having a final decision on that. He said it's actually incredible that the Board went through that whole process and now here we are. He was willing to figure out how to resolve it in the most professional manner even if it meant calling for reconsideration, recognizing from Mr. Kenny's explanation that the Board has no jurisdiction, and then voting.

Mr. Gossels asked whether the Board could reconsider this.

Mr. Kenny said the Board has a situation where as a local Board it can always vote to suspend the rules when it believes there is no jurisdiction.

Mr. Delaney said the Board's Rules do not mention reconsideration.

Mr. Kenny said he clearly believed the Board has authority for reconsideration. He said the Selectmen have no authority to modify their recommendation. The Building Inspector has made a decision.

William Wagner said Mr. Kenny said that every subsequent building that goes up will be appealed. He asked whether an appeal could be made if his building or any subsequent building exceeds the impervious surface area allowed in the bylaw where there is a limitation which goes beyond the authority of the Selectmen or the Building Inspector.

Mr. Gossels said the last decision of the ZBA indicated that the amount of impervious surface is a zoning issue and it can't go over that.

Mr. Kenny said the process is that the matter is brought to the Building Inspector for a building permit for the building. If the building permit is granted an appeal can be made to the Board of Appeals that says this doesn't comply with the decision and goes over the impervious surface area. The Board of Appeals can act on it.

The Board members indicated they were ready to discuss reconsideration and a motion was made, seconded and unanimously voted to reconsider the decision.

Mr. Tyler raised the question of holding a public hearing for input. Mr. Delaney said this is a public meeting. Mr. Tyler said Mr. Verrill wasn't able to be present tonight; he may have some perspective on this. He said now that we know that the Board is planning on reconsideration it seems like it would be appropriate for the appellants to be able to marshal arguments as to why whatever Mr. Kenny has just told you now is not valid.

Mr. Kenny said the Board has already closed the public hearing. After the public hearing it was decided to take a vote on it. That's not part of the public hearing; it's part of the meeting; the Board is going to vote. The Board now finds there is a legal issue. It has nothing to do with fact and doesn't require input. It's simply a legal issue on which the Board must make a determination. Mr. Kenny said in his opinion that is perfectly appropriate for reconsideration. He said the Board hasn't taken any more facts into consideration. This is an issue with regard to legality and jurisdiction and Mr. Kenny said the Board ought to take a look at it.

Mr. Kenny said the Board now voted to reconsider it and take a look. Mr. Kenny said the Board can vote whichever way it wants, but he believed that based upon what he said, the decision is beyond ZBA authority – as was the Selectmen’s decision beyond their authority.

Mr. Delaney said the Board really doesn’t have anything to open up the public hearing for. What we’re doing is exactly what Town Counsel just described. He did not see the public hearing process as being necessary here.

The other Board members agreed and the following motion was placed and seconded:

MOTION:

“To reconsider Case 02-43 and to withdraw the previous Decision based on new information that the Board lacks jurisdiction.”

VOTED: In favor: 4 (unanimous)

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Patrick J. Delaney III, Chairman

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Jonathan G. Gossels, Clerk

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Thomas W.H. Phelps

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Richard L. Burpee, Alternate