MINUTES OF THE PUBLIC HEARING CONTINUATION
SUDBURY BOARD OF APPEALS
MONDAY, MARCH 13, 2006

The Board consisted of:
Stephen M. Richmond, Chairman
Jeffrey P. Klofft, Clerk
Jonathan G. Gossels
Constantine Athanas
Richard L. Burpee, Alternate

This hearing, originally continued to March 7, 2006, was rescheduled to March 13, 2006 in order to convene with a 5-member Board.

Mr. Richmond reconvened the public hearing for Case 06-11 – 10 Phillips Road.

Present were Attorney Joshua Fox, Mark Cautela, Salvatore Cautela and Michael Romano, Attorney for the Cautela family.

Mark Cautela read a statement with regard to events leading up to the intent to sell the property and the resultant problems with the portion of the land. The house was put on the market in July 2005 and the original asking price was $725K. They had a potential buyer in September for a price of $645K. The buyer was planning to do some remodeling and expansion of the side yard, and during a survey of the land prior to the closing it was discovered that there was a land issue concerning the side yard property line between the Cautela and Wolfman properties. The buyer then pulled out of the sale.

For the next several months the Cautelas continued to market the property and to work out a resolution of the land issue with the Wolfmans. During this period they were not able to show any prospective buyers a plot plan. There were two buyers who showed interest but refused to consider making an offer until they were able to see a revised plot plan.

Mr. Cautela said the hardship is the marketability for anyone who owns this property. The feedback received is that buyers are unwilling to consider the property until the land issue has been resolved. The price has been dropped $100K from the time it was originally placed on the market. He said the longer the issues are unresolved and the property stays on the market, the harder it becomes to sell.

Mr. Cautela would like to settle this land dispute amicably with the Wolfmans and feels that the land swap is the only answer to the marketability of the property. Although relations with the Wolfmans are cordial, the Cautelas have been told that if the issue can't be worked out, the Wolfmans may proceed with an adverse possession claim which will leave the land in a worse situation because it will not have the necessary area.

Mr. Fox submitted a set of photographs of the property in question – two were views from the Wolfman property and the other two from the Cautela property.

Continuing with the variance requirements discussed at the previous hearing, Mr. Fox this is clearly a “pork chop” shaped lot which the courts have determined meets the uniqueness requirement in variance cases.

Mr. Richmond felt Mr. Fox’s statement was too broad - that in one case the court did find that a pork chop shape was unique.

Mr. Fox said his statement was not meant to imply that all pork chop lots are unique and meet the variance requirement. He said he looked at the zoning map in this particular neighborhood and general vicinity and there are no “pork chop” shaped lots adjacent to this property or one over. Although there may be some in this zoning district, he did not think that would prohibit the granting of a variance.

Even though Mr. Cautela spoke about his personal hardship, Mr. Fox said this is not a personal hardship but it actually runs with the land and is unique.

Mr. Fox believed the nexus between the unique shape and the hardship suffered is there. To illustrate, he gave examples of the resulting perimeters for a square and rectangular lot with the same area and frontage noting that only because of the shape of this lot is the perimeter lacking and unable to meet the Bylaw requirement.

With regard to precedent, while Mr. Fox said he couldn’t find any case law on point, he felt it clear that a variance cannot be used as precedent for a future variance. Each case is decided on a fact-by-fact ad hoc basis and each particular case is peculiar.

Recognizing that variances are granted very sparingly by Zoning Boards, Mr. Fox said this is a situation where there is no opposition and where there is no conceivable detriment to the neighborhood or to the town. Given the totality of the circumstances, he felt the Cautelas have an ethical right to this variance.

Mr. Romano said this isn’t a case of a developer trying to come in a squeeze out another lot. It is basically what others in town are trying to do – sell a home. The concern is that if they are unable to resolve this here, the Cautelas or anybody else will not be able to sell this house if the Wolfmans proceed with an adverse possession case which has been talked about.

Mr. Richmond said he heard several times that there is a problem that is incapable of resolution. At the last hearing an easement was discussed and a statement was made that the easement wouldn’t work. He asked why an easement wouldn’t completely solve this problem.

Mr. Romano said they met with Schofield Brothers when drawing up the plan for a land swap. He said there has been a cordial relationship with the Wolfmans but there are indications that if a land swap fails, they will go for adverse possession. The concern is that an easement will not entirely satisfy the Wolfmans.

Mr. Richmond felt an easement would be easier than pursuing an adverse possession case.

Mr. Fox said if the Cautelas grant an easement over this parcel to the Wolfmans, they have to retain some rights to that property. Otherwise, it's a deed. If it's an easement in name and a deed in fact it's actually creates an illegal lot for the Cautelas.

Mr. Richmond said he believed they could still own the fee - they would just give an easement that would give an exclusive access right to their neighbors.

Mr. Fox said he felt they can't give up their right to access the land.

Further discussion followed on whether there can be easements with exclusive rights to access, with some Board members maintaining that there was a way to do this and Mr. Fox maintaining there was not.

Mr. Romano said one of the problems is that just this past spring the Wolfmans put a significant amount of money into this property redoing the driveway and the landscaping, so they're not particularly inclined to be overly generous with his clients. He said no one would have been here this evening if they could have done an easement. Conversely, he said there's nobody in the world who is going to care about this little swap of land.

Mr. Athanas asked whether any thought was given to a situation where an adverse possession claim was filed and there was agreement that the Cautelas would default in exchange for a piece of property on the top.

Mr. Fox said this was considered. However, he said that by allowing this taking by adverse possession, the Cautelas are still in a position where they're creating an illegal lot. Even if Parcel A were deeded over, it wouldn't make legal what was illegal because of the perimeter issue. He said all of a sudden this so-called conforming perimeter becomes illegally nonconforming and they would have to come back to the ZBA for a variance.

Mr. Klofft felt that then the land court would have created the situation and the ZBA couldn't undo what they have done.

Mr. Fox said the ZBA couldn't but for those people who were looking into buying the property who had the tools, ability and the time to analyze this would find that this is an illegal nonconforming lot.

Mr. Klofft asked why it would be illegal if it was the result of an adverse possession judgment.

Mr. Fox said it doesn't matter whether it was voluntary or involuntary. Section 2640a of the Bylaw says that you can't carve it up – it doesn't say voluntarily – it says you can't carve it up. It basically says any lot created before adoption of the bylaw – this lot as it presently stands – and conforming to the then applicable requirements shall be considered a conforming lot. So, today this is conforming. After the adverse possession case, it won't be. The language makes no distinction of whether this is through no fault of the landowner.

Mr. Klofft asked how the lot is presently conforming since it doesn't meet the 50-foot width requirement. He asked when the lot was created.

Mr. Fox said the lot was created about 1967. It comes down to the language in 2641a and it's different from all the conventional nonconformities that you see with single family homes in that you can change them, increase them, decrease them with a special permit from the ZBA. All of a sudden this one does an about face and says even though you're nonconforming, you're conforming – therefore, you would need a variance. So it comes down to this specific provision.

Mr. Gossels asked whether the lot could be reconfigured differently.

Mr. Fox said he checked with Schofield Brothers Engineering as to whether anything could be done to keep the perimeter at about the same amount. They said absolutely not unless you make it a lot under 40,000 s.f.

Mr. Gossels asked for some background on the adverse possession issue.

Mr. Fox, who said he represents the Wolfmans in the adverse possession issue, said he could only say that Mr. Wolfman feels that he has a very strong case – that he has maintained this area in question for over 30 years and his wife has gardened that area on her own for over 30 years and looks at that area as hers. To reiterate, he said they did spend an enormous amount of money excavating an area that includes this particular area in question.

Mr. Gossels said the Wolfmans caused this problem by taking over that land.

Mr. Romano said as explained to him by his clients, they (Cautelas) didn't even realize it was their property. They thought it was part of the Wolfman property. Mr. Romano felt the Wolfmans have a pretty good argument for the adverse possession claim.

Mr. Richmond asked Mr. Romano if his clients had a problem with an easement.

Mr. Romano said they didn't but the Wolfmans seem to not want to do this.

No abutters were present to speak to this petition. There was no further input. The hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: "To grant Salvatore J. Cautela & Mark-Anthony Cautela, owners of property, a Variance from the provisions of Section 2641a and such other relief as may be required under the Zoning Bylaws, to allow a land swap in accordance with the Plan prepared for Harvey T. Wolfman by Schofield Brothers of New England, Inc. dated December 19, 2005, which is incorporated and made part of this Decision, property located at 10 Phillips Road, Residential Zone A-1."

VOTED: In favor: 4 (Klofft, Gossels, Athanas, Burpee) Opposed: 1 (Richmond) GRANTED

REASONS: The petitioners require a Variance to allow a land swap which will settle a dispute over a portion of property which has been used by the abutters for over 30 years. The lot is conforming in terms of area and frontage but not perimeter. The Bylaw specifically states that any lot created before adoption of the Lot Perimeter provision of the Bylaw which conformed to the then applicable requirements shall be considered a conforming lot for purposes of the Zoning Bylaw, hence the requirement for a Variance.

With regard to the conditions which must be satisfied before a Variance can be granted, a majority found that the lot is unique in terms of it's "pork chop" shape which, although was legal prior to the perimeter provision, cannot comply with the current provision. In its current configuration, this lot could not be created today.

The majority found that there would be a substantial hardship if the Bylaw was to be literally enforced. Specifically, a portion of this property was adversely possessed by the abutters for over 30 years without the knowledge of the owners, and there exists the potential of a valid adverse possession claim which, if successful, would render this property illegally nonconforming as it would then lack the required area. A consequence would be the virtual inability to sell this property.

The majority found that there would be no detriment to the public good if this variance is granted. The result will be a land swap which is agreeable to both parties and will resolve the potential adverse possession issue. No other abutters will be affected by the granting of this variance.

Granting of this Variance will not nullify or substantially derogate from the intent or purpose of the Bylaw. The land swap will have the effect of the petitioners' ability to retain a legal lot which is the most appropriate use of the land.

Stephen M. Richmond, Chairman	Jeffrey P. Klofft, Clerk
Jonathan G. Gossels	Constantine Athanas
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MINUTES OF THE PUBLIC HEARING CONTINUATION
SUDBURY BOARD OF APPEALS
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The Board consisted of:

Jeffrey P. Klofft, Acting Chairman
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Constantine Athanas
Richard L. Burpee, Alternate
Stephen A. Garanin, Alternate

This hearing, originally continued to March 7, 2006, was rescheduled to March 13, 2006 in order to convene with a 5-member Board.

The public hearing was reconvened by the Acting Chairman, Mr. Klofft who read a letter dated February 14, 2006 from the Planning Board in support of the grant of a variance for this case. The letter states the that Planning Board was aware of the creation of a zoning violation when the subdivision plan was approved – that the wetlands required the roadway to be pushed further northward creating the setback deficiency. There is a notification on the subdivision plan which requires the applicant either to remove the structure or apply for a variance.

Mr. Gossels felt it important to look at this in the larger context. He said this is part of a larger property overall which includes conservation land, recreation land and a small subdivision. As is typical with agricultural land, it is typical to have a collection of buildings. He saw this as more of a technical administrative correction rather than a substantive issue. He said the applicant is not building a new structure – it's already there and it's on a small, private low traffic volume road.

Understanding the standards for a variance, Mr. Gossels said the land slopes down; – there is a finger of wetland which required the resultant road configuration. He said it would clearly be a hardship to remove the structure.

Mr. Garanin expressed curiosity as to why the Planning Board would force the applicant to ask for a variance. It seemed to him that the Planning Board was forcing this Board to grant the variance.

Mr. Gossels felt that during the subdivision process the Planning Board tried to balance a number of interests. He said he looked at their recommendation as he would any other recommendation the Board would receive from town officials as input to apply towards a decision.

Mr. Klofft agreed but suggested that this be brought up at the next joint meeting with the Planning Board to ensure this situation doesn't happen again.

Mr. Gossels asked to see the subdivision plan in order to see where the wetlands are located.

Mr. Cutting: presented a locus plan of the property and pointed out the location of the lots, the road and the wetland area. The plan was reviewed by the Board with questions asked for clarification.

There was no further input. No abutters were present to speak on this application. The hearing was closed.

The following motion was placed and seconded:

MOTION: "To grant John C. & H. Rebecca Cutting, owners of property, a Variance from the provisions of Section 2600, Appendix B, of the Zoning Bylaws, to legalize an outbuilding having a front yard setback deficiency of 12 feet ± on Cutting Lane, property located at 381 Maynard Road, Residential Zone A-1."

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

REASONS: The petitioners require a Variance to legalize an outbuilding having a front yard setback deficiency. The Board finds there are special conditions relating to the soil conditions, shape or topography in that the proximity of a wetland resource area on the property necessitated the road layout which ultimately resulted in a setback deficiency for this outbuilding.

With regard to hardship, this outbuilding has been in existence for decades and contains a basement. To relocate the building would cause financial hardship to the applicant in terms of construction costs.

The Board finds that there will be no substantial detriment to the public good if the variance is granted. The amount of deficiency is minimal and the structure presents no problem to the surrounding abutters in terms of a visual nuisance. It is to be noted that no abutters were present to oppose this variance.

The Board was in receipt of correspondence from the Planning Board which indicated that that Board was aware of the creation of a zoning violation when the subdivision plan was approved citing the existence of the wetland resource area which required the roadway to be placed in a position which caused the setback deficiency. Therefore, the Board finds the creation of the deficiency was not caused by the applicant.

For the above reasons, the Board finds that the granting of this variance will not nullify or substantially derogate from the intent of purpose of the Bylaw.

Jeffrey P. Klofft, Acting Chairman

Jonathan G. Gossels, Acting Clerk

Constantine Athanas

Richard L. Burpee, Alternate

Stephen A. Garanin, Alternate

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This hearing, originally continued to March 7, 2006, was rescheduled to March 13, 2006 in order to convene with a 5-member Board.

The public hearing was reconvened by the Chairman, Mr. Richmond who acknowledged receipt of a letter from the Planning Board dated March 7, 2006 addressed to the Cheraus which indicates that it would be inappropriate for the Planning Board to comment on this matter as it is clearly within the jurisdiction of the ZBA and does not have relevancy to the Planning board.

Also submitted this evening from Ms. Cherau was a written history of this property.

Attorney Lisa Mead said at the end of the last meeting there was a request for more information concerning the Bylaw in effect in 1969 at the time the sliver was taken off the property. She submitted a letter dated March 13, 2006 which she said sets forth what she believed to be the relevant portions of both bylaws.

Ms. Mead recapped her presentation made at the previous meeting for the purpose of discussing the information she provided this evening. This is an appeal of the Building Inspector's denial of a request to determine this lot a preexisting nonconforming legal lot. At the last meeting Ms. Mead said she presented evidence that under Chapter 40A, Section 6, para. 4, the lot was held in separate ownership at the time the zoning bylaw changed and had a minimum of 5,000 s.f. and 50 feet of frontage. Specifically in 1955 the lot contained 28,290 s.f. and 198 feet of frontage. In 1955 the bylaw changed to require 30,000 s.f. and 180 feet of frontage. Prior to the 1955 change the requirement was 22,500 s.f. – the lot contained 28,290. The frontage requirement pre-1955 was 150 feet and the lot contained 198 feet.

To this point Ms Mead said she and Building Inspector agree that this is a preexisting nonconforming lot that was properly grandfathered. In 1969, Mr. Cherau, after discussion with the Planning Board Chairman at the time, deeded out 3,800 s.f. to his neighbor under the assumption that he would still have a preexisting nonconforming lot.

In response to a question from Mr. Klofft, Ms. Mead said it was her understanding from Ms. Cherau that this was done to help the neighbor make his lot conforming.

After the 1969 deed out, the lot area became 25,167 s.f., which was still in excess of what was required in the grandfathered provision, and 177.9 feet of frontage which was still in excess of what was required under the grandfathered provision.

Mr. Richmond asked whether, in 1969, the lot was conforming or nonconforming.

Ms. Mead replied that in 1969 the lot continued to be a preexisting nonconforming lot. The nonconformity, which was grandfathered, was in area and frontage which didn't meet the change that existed in 1955. The change that existed in 1955 went from requiring 22,500 s.f. to 30,000 s.f. The change, after it was slivered off the lot became 25,267 s.f. which still exceeded the grandfathered provision to 1955. And the lot frontage, after the lot was slivered off, was 177.9 feet, which still exceeded the 150 feet of frontage under the pre-1955 zoning.

Mr. Klofft asked whether the Cheraus did not then violate G.L. Section 5 which states that "no lot or building shall be changed in size so as to violate the provisions of the Bylaw."

Ms. Mead felt that provision cannot be read alone but in conjunction with the rest of the bylaw. Going on to Section 13a, it states that any lawful building or structure or use of the building, structure or premises existing at the time this Bylaw is adopted which does not conform to the regulations of the district in which located may be continued, subject to the provisions of section 2. Section 2 refers to how a house which is destroyed or damaged by fire can be rebuilt.

Mr. Klofft felt this section speaks to the structure, not the lot.

Ms. Mead said it actually says "premises" which she felt to be the difference between the Bylaw in 1969 and the Bylaw today. The Bylaw today doesn't talk about premises. She said Section 13b goes on to say that the Board of Appeals may authorize a nonconforming use to be extended or a nonconforming building or structure altered or enlarged – it doesn't say anything about premises. It says if you're going to extend the building or enlarge a building or structure, you have to go to the Zoning Board.

Discussion followed on the definition of "premises". The Board was not convinced that "premises" referred to lots.

Ms. Mead said the question before the Board is whether, when the lot was reduced, it became an illegal lot. Her argument is that it didn't because (a) permission to do so wasn't required, and (b) it still was legal under the bylaw because it didn't go below that which was allowed when it was grandfathered.

Mr. Gossels' interpretation was that in 1969 it was not a legal building lot. Selling a portion made it a small nonconforming, non buildable lot.

Mr. Richmond added that in 1968 the lot was preexisting nonconforming. It was clearly too small for the dimensional requirements. At that time the bylaw says nothing about what you can do to a preexisting nonconforming lot but it does say what you can do to a preexisting nonconforming use. He felt that the 1968 language suggests there may have been no restrictions on what you could do to a lot, but not on what you could do to a use.

Mr. Gossels disagreed. He did not believe one could make a nonconforming lot worse.

Ms. Mead felt that if half the lot was given away and it was reduced to the size below which it was grandfathered, then it becomes an illegal lot. However, the lot still stayed larger than what it was grandfathered at.

Mr. Burpee asked what the limits were to reducing the lot.

Ms. Mead would argue that in 1969, this lot could be reduced to 150 feet of frontage and 22,500 s.f. of area because that was how it was grandfathered.

Further discussion ensued between the Board and Ms. Mead on the interpretation of the 1969 Bylaw and presumed assumptions of same, specifically as to whether or not a lot could be changed in size and still retain its grandfathered status.

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Mr. Gossels asked whether there was a sense of the Board with regard to this appeal.

Mr. Burpee said even though the current dimensions of the lot exceed the requirements at the time the lot was grandfathered, he was not convinced it would still be considered a legal nonconforming lot.

Mr. Athanas said when claiming an exemption to the Bylaw, it is the applicant's burden to show that there is justification for same. He was not sure this has been done.

Ms. Mead said the correspondence indicates the request was made to the Building Inspector in September 2005 and he finally issued his decision in December. She said they both went back and forth on this trying to find a case that was on point. There are several cases on subdivisions and grandfathering, several on contiguous lots and grandfathering, but nothing that speaks to this type of situation. Neither Mr. Hepting nor Town Counsel could find anything, which leaves the Bylaw and the facts of the situation. Further, Ms. Mead felt that whether or not this Board believes the Planning Board Chair at the time had the authority to make the determination or convince Mr. Cherau that it was okay to cut of a piece of the property, she believed the interpretation of the letter was that it would just make the lot more nonconforming than it already was. It was her contention that Mr. Cherau would never have done this if he thought he was going to make his lot illegal as opposed to nonconforming.

Mr. Gossels said the language in the letter does not talk about nonconforming.

Ms. Mead agreed, which was why Mr. Hepting spoke with Mr. Davison. She also did not believe that if Mr. Cherau went to the extent to find out whether or not he was going to do something bad to his lot would have done it had he thought it would make it unbuildable.

Mr. Klofft said if one agrees that the1969 Bylaw says that you can't take something and make it worse than the current standard, then the letter from the Chairman of the Planning Board in 1969 is essentially saying that the lot is now not a legal building lot. It would seem to Mr. Klofft that the Planning Board Chair was implying to Mr. Cherau that he was now losing his grandfathered status.

Ms. Mead felt the letter was confusing which is why Mr. Hepting talked to Mr. Davison – because he first uses "nonconforming" in the letter and then he uses legal – and so the question is what was it that he meant.

Mr. Athanas did not feel the Board should be spending time delving into who said what and why. Mr. Gossels agreed, feeling it impractical going back to someone 35 years later and asking them what they meant.

Understanding that Ms. Mead was unable to find case law in Massachusetts, Mr. Athanas asked whether she had broadened her search to other jurisdictions or outside Mass.

Ms. Mead said she didn't look at other non Mass. cases although she did look at other jurisdictions outside of Mass.

Mr. Richmond felt this discussion has been taken as far as it can go this evening. He said there are a couple of options. He asked whether Ms. Mead felt it would be productive to gather more information, in which case the hearing could be further continued.

Ms. Mead said she would like to confer with her client first adding that while she would not be able to provide Massachusetts cases, she was willing to look in other jurisdictions.

Mr. Athanas said he would find it interesting to see if this had come up before. While doing some research he came across a case which was in the land court which makes reference to another case which talks about what had happened to that other case – where it talked about a preexisting nonconforming use that had been made. It said the lot had been made smaller through "Mesne" conveyances. He said the case dealt with the lot itself but there was no way to get to the other decision on which this decision was based.

Cynthia Rodriguez, 252 Concord Road, said she stands to lose the most if this lot is determined to be buildable. When she purchased her property she was told that this was a nonbuildable lot. The lot is a hill and construction of a house would be very intrusive to her. In addition, there is a question of sheet flow which comes into play with the variance which may also come before the Board.

Janice Kaufman, 295 Goodmans Hill Road said when she purchased her property she was told that this was a nonbuildable lot. If the lot is deemed buildable, she said there will be no buffer between the abutting properties because many trees will have to be removed in order to construct a house and septic system.

Ms. Mead requested, and was granted, time to confer with her client with regard to a continuance for the purpose of gathering more information.

After conferring with Ms. Cautela, Ms. Mead requested a continuance for this case as well as the Variance case 06-16. The hearing was continued to April 11, 2006.

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Stephen M. Richmond, Chairman

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Jeffrey P. Klofft, Clerk

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Jonathan G. Gossels

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Richard L. Burpee, Alternate

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Inasmuch as this Variance is dependent upon the outcome of Case 06-15 (Appeal), which has been continued to April 11, 2006, the Board voted to grant of this case to April 11, 2006 as well.

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Stephen M. Richmond, Chairman

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