

CASE 13-5
Laurel MacKinnon
24 Brookdale Road

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
Monday, April 1, 2013

The Board consisted of:

Jonathan G. Gossels, Acting Chair; Jonathan F.X. O'Brien, Clerk; Jeffrey P. Klofft; Stephen A. Garanin, Associate; and Nicholas B. Palmer, Associate.

Notice was published in the *Sudbury Town Crier* on March 14 and March 21, 2013, posted, mailed and read at this hearing.

Mr. Gossels, as Acting Chair, opened the hearing. He explained that if anyone is not satisfied with the Board's decision, they have the right to appeal to Superior Court or Land Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Laurel MacKinnon, applicant, and architect Michael Petrovick, were present to request a special permit for an 840 square foot accessory dwelling at 24 Brookdale Road. Ms. MacKinnon explained that the unit would include two bedrooms, a bath, and a small kitchen. A common living room would be shared with the adjoining main residence. She explained that her mother and two adult siblings would live in the accessory dwelling. There is an existing two-car garage and room for four parking spaces in the driveway. It was anticipated that there would only be one additional car after the addition. Given that the dwelling would be in the rear of the existing house it would have little visual impact on the neighborhood.

Mr. O'Brien asked for the measured distance to the rear lot line. Mr. Petrovick said that it was 96.08 feet. The side yard setback to the east would measure 29.6 feet, the side setback to the west would measure 92 feet and the front yard setback would measure 41.3 feet.

Mr. O'Brien then asked whether Ms. MacKinnon had spoken with her neighbors about the plans. She said that she had spoken with neighbors across the street but the neighbors next door had just moved in and there is no neighbor living behind the house at present. No neighbors were present at the hearing who wished to speak about the proposed accessory dwelling.

Mr. Klofft said that he was pleased to see that the accessory dwelling fit within the envelope of the setbacks. He was concerned, however, about the fact that the accessory dwelling would measure forty-five percent of the main house. The common living space also concerned him. Mr. Gossels agreed about the percentage but felt that it was still on a modest scale. Mr. Klofft said that the area was comprised of smaller homes on smaller lots and he did not want to create a two-family house. He felt the two-bedroom unit with shared living space was more than what was intended by the bylaw.

Mr. O'Brien disagreed given that there was not a second story and the accessory dwelling fit onto the back of the main house. Mr. Garanin said that he likes the scale of the proposed accessory dwelling. He said that it could perhaps be pushing the envelope a bit but it is hidden behind the house. Given that there are trees along the property line to block it from view he did not have any problems with it. Mr. O'Brien asked whether the trees were going to stay and Ms. MacKinnon said that they would.

Mr. Gossels added that since the accessory dwelling was a modest size and would be used for family members he was comfortable approving the special permit.

There being no further questions from the Board or those present, the hearing was closed.

The following motion was made and seconded:

MOTION: "To grant Laurel MacKinnon, applicant and owner of property, a Special Permit under the provisions of Section 5500 of the Zoning Bylaws in conformance with the application for the Special Permit dated March 5, 2013 and the plans submitted by the Applicant, to allow an 840 square foot Accessory Dwelling Unit for property located at 24 Brookdale Road, Residential Zone A-1, as follows:

1. The Accessory Dwelling Unit shall be occupied by no more than four persons.
2. Adequate provision shall be made for the disposal of sewage, waste and drainage generated by the occupancy of the Accessory Dwelling Unit in accordance with all requirements of the Board of Health.
3. There shall be at least two off-street parking spaces for the principal dwelling unit and at least one off-street parking space for the Accessory Dwelling Unit.
4. The property owner shall file a sworn affidavit with the Town Clerk, with a copy to the Board of Appeals, certifying such occupancy is consistent with the Special Permit, every four (4) years.
5. This permit shall be recorded at the Middlesex South District Registry of Deeds prior to issuance of a building permit for the accessory dwelling unit.
6. This permit will automatically terminate upon the sale, transfer, or other change in ownership of the principal dwelling unit.
7. This Special Permit shall lapse if construction has not begun, except for good cause, within twelve (12) months following the filing of the Special Permit approval, plus such time required to pursue or await the determination of an appeal under M.G.L., Chapter 40A, Section 17.
8. Construction must be completed no later than one year after commencement."

VOTED: In favor: 4 Opposed: 1 (Klofft)

REASONS: The petitioner requires a Special Permit to allow a single-family accessory dwelling unit. The Board finds that the petitioner has fulfilled the requirements of the Bylaw for the granting of a Special Permit.

Jonathan G. Gossels, Acting Chair

Stephen A. Garanin, Associate

Jonathan F.X. O'Brien, Clerk

Nicholas B. Palmer, Associate

Jeffrey P. Klofft

CASE 13-6
New Cingular Wireless PCS, LLC/
AT&T Mobility
199 Raymond Road

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
Monday, April 1, 2013

The Board consisted of:

Jonathan G. Gossels, Acting Chair; Jonathan F.X. O'Brien, Clerk; Jeffrey P. Klofft; Stephen A. Garanin, Associate; and Nicholas B. Palmer, Associate.

Notice was published in the *Sudbury Town Crier* on March 14 and March 21, 2013, posted, mailed and read at this hearing.

Mr. Gossels, as Acting Chair, opened the hearing. He explained that if anyone is not satisfied with the Board's decision, they have the right to appeal to Superior Court or Land Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Applicants Michael Dolan of Brown Rudnick LLP and Peter Reed of Centerline Communications were present to request a special permit to add a ten foot extension to an existing monopole creating a height of 100 feet and to expand the fenced equipment compound at the Sudbury Water District-owned property at 199 Raymond Road.

Since the application was filed the Board and the applicants were in receipt of a memo from Director of Planning and Community Development Jody Kablack noting that she had reviewed the application for conformance with the Zoning Bylaw and noted eight requirements needed in order for the application to be complete, including authorization by the property owner, the Sudbury Water District, and a balloon test.

Mr. Gossels suggested that the applicants withdraw their petition without prejudice and submit at a later date. The application fee for the new filing will be waived.

Mr. Dolan then requested that the application be withdrawn without prejudice.

The hearing was closed.

The following motion was made and seconded:

MOTION: "To accept a request from the Applicant to withdraw Case 13-6 without prejudice."

(Request for a Special Permit to add a 10' extension to an existing monopole creating a height of 100' and to expand the fenced equipment compound, 199 Raymond Road)

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

REASONS: More requirements are necessary to complete the application and for the Board to make a determination. The applicant will schedule a balloon test that coincides with the next available ZBA hearing and will re-submit a revised application.

CASE 13-6
New Cingular Wireless PCS, LLC/
AT&T Mobility
199 Raymond Road
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Jonathan G. Gossels, Acting Chair

Stephen A. Garanin, Associate

Jonathan F.X. O'Brien, Clerk

Nicholas B. Palmer, Associate

Jeffrey P. Klofft

CASE 13-2
David S. Kaplan
9 and 23 Old County Road

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
Monday, April 1, 2013

The Board consisted of:

Jonathan G. Gossels, Acting Chair; Jonathan F.X. O'Brien, Clerk; Jeffrey P. Klofft; Stephen A. Garanin, Associate; and Nicholas B. Palmer, Associate.

Notice was published in the *Sudbury Town Crier* on March 14 and March 21, 2013, posted, mailed and read at this hearing.

Mr. Gossels, as Acting Chair, re-opened the hearing continued from February 4, 2013.

Minutes from the February 4 meeting were updated to reflect changes requested by Marie and Denis Lewis and the Board voted unanimously to approve the revised minutes.

To ensure that discussion stayed on topic Mr. Klofft specified that the ZBA would have to determine where the Board had any standing on procedural matters, namely should the Acting Building Inspector's decision as written in his December 6, 2012 letter stand or be overturned.

Mr. Kaplan then summarized his appeal by stating that Acting Building Inspector Mark Herweck's determination in his December 6, 2012 letter declared that the properties in question, 9 and 23 Old County Road, were essentially grandfathered so that current zoning laws do not apply. Mr. Kaplan felt that the property is not grandfathered although it has been an industrial site since 1958. He said that Mr. Herweck further opined in his December 6 letter that the property owners may be violating bylaws pertaining to noise and glare as caused by their tenants. Mr. Kaplan asserted that the zoning bylaws related to noise (Section 3423), glare (Section 3425), unregistered motor vehicles (Section 2321), air quality (Section 3424), solid waste storage (Section 3424) and screening and landscaping (Section 3550) do, in fact, apply at the properties. He questioned zoning compliance at 9 and 23 Old County Road to the detriment to 6 Old County Road across the street and whether the transfer of solid waste was an allowed use which he felt was a modification of use on the property that was not authorized through site plan approval.

The Board was previously in receipt of a memo from Mr. Kaplan dated April 1, 2013 in which he provided a brief history of the 1958 establishment of Industrial District #12. Uses for Industrial Districts were defined in the Town's bylaws two years prior in 1956. He noted that the site underwent a site plan review with the Board of Selectmen in 1987. In that 1987 Notice of Decision the Site Plan Special Permit was, "...subject to compliance with all governmental laws and regulations including but not limited to zoning, building and health laws and regulations, and further subject to the following conditions..." of which there were fourteen. It was Mr. Kaplan's contention therefore that at least the 1987 bylaws did apply and this was perhaps not fully considered by Mr. Herweck. Mr. Kaplan then pointed to examples of testimony in the 1987 Site Plan review that concerned the aesthetics of the property even then.

Mr. Gossels noted that there was an area on the site plan that was designated as open space. Mr. Kaplan said that area of the lot that was set aside for open space on that 1987 site plan comprises Mason Works today. Condition 10 of that decision states that any changes to the as-built plan requires approval of the

Board of Selectmen but no such approval appears to be on record for Mason Works. He passed out photographs of existing conditions and questioned whether the property is being used according to the site plan. Mr. Klofft suggested that the ZBA could concur with the appeal that the Building Inspector's decision is not accurate but actual enforcement would be an issue for the Selectmen and the Zoning Enforcement Agent to consider.

Mark Bobrowski, attorney for property owners Marie and Denis Lewis, then submitted to the Board a twenty-five page memo dated April 1, 2013 which addressed Mr. Kaplan's December 26, 2012 appeal. He contended that Section 3423, the noise provision in the bylaw, falls under the DEP requirements for air quality. Any allegations that excessive noise is coming from the property would have to be accompanied by handheld sound meter readings that indicate that DEP standards are not being met. He discussed the difference between steady sounds versus peak emissions which are not typically enforced by the ZBA. He said that this is a matter of DEP interpretation and there is nothing in the record that any noise has been recorded over 10 DBA above ambient.

Mr. Gossels said that it was his understanding that the burden of proof that there are noise violations lies with the applicant. Mr. Bobrowski agreed.

In regard to Section 3425, Glare, Mr. Bobrowski noted that the Acting Building Inspector indicated that glare was somewhat of an issue in the area over by the stone mason. He said that any problems with glare in the pre-dawn hours that came from headlights used to illuminate the yard area have been alleviated because the Lewises have installed electrical connection for overhead lighting, therefore the tenants can comply with the bylaws and the mason does not have to keep his headlights on to illuminate the area. He said that the mason's lease is nearing an end so a new lease could include a clause that no generator be used which would alleviate that noise.

Mr. Gossels asked about the noise caused by truck loading. Mr. Bobrowski said that some morning noise is confused with noise caused by the Wayland Trucking garbage disposal company operating at the adjacent site. Mr. Gossels said that noise is different than noise caused by dropping stone into trucks. Mr. Bobrowski said that DEP's noise standard is the same as Sudbury's noise standard and the sporadic and infrequent noise caused by dropped stone is not the same kind of continuous noise that DEP is seeking to regulate.

In regard to Section 2321, Unregistered Motor Vehicles, Mr. Bobrowski said that the Lewises have informed him that there are no such inoperable vehicles on the property. He said that there may be some vehicles there that are unregistered but operable which falls within the bylaw. Examples of those types of vehicles are snow plows and other seasonal vehicles that are being stored on the site.

Mr. Bobrowski said that the Air Quality provision, Section 3422, is again triggered by state regulations. He suggested that Section 3422 pertains to facilities that are regulated by the Department of Public Health and there are no facilities on the premises that are required to be licensed by the Department of Public Health.

He said that Section 3424, Solid Waste Storage, is a provision that calls for any solid waste storage to be situated more than ten feet off of the property lines and in a receptacle of 100 cubic yards to be screened from the adjacent properties of mixed use.

As to Section 2248, Limited Industrial Parking requirements, Mr. Bobrowski said that these provisions only apply to the industrial park and the limited industrial parking restriction does not apply to the industrial district.

Mr. Bobrowski said that Section 2247, Outdoor Storage, has to be read in common with regulations for landscaping and screening, Section 3580. He said that under Section 3580 there is an ancient provision of the Sudbury bylaws dating to 1956 that states that any open displays, signs, service operations, storage, parking, and manufacturing that would be visible from any point in a single residence district of less than 150 feet must be screened except when the business or industrial use is separated from the single residence district by a public street. A public street measures forty feet in width or more. Old County Road is considered a public street as verified by the Sudbury Department of Engineering. Mr. Bobrowski said that there are approximately eight to ten trees that serve the purpose of screening for 9 Old County Road.

Mr. Kaplan argued that there are two residential properties on the industrial property so the argument about the nearest residences being across the street was not fully accurate.

Lastly, Mr. Bobrowski said that none of the uses on the property are nonconforming, all are uses allowed in the industrial district and the owners are able to swap the uses in and out of the site as they see fit as long as they fit the category of Industrial. He said that the 1987 Site Plan Decision does not state that the uses must strictly comply with the approved site plan.

Mr. Kaplan asked to rebut the matter of who bears the burden of proof regarding noise being outside the allowable limits. He said that since he is the one complaining about it it would seem that he should bear the burden of proof, however the Department of Environmental Protection states otherwise. He said that he spoke with DEP Representative, Mr. Natsios, who said that the procedure was that the DEP maintained the expensive hand-held equipment and the Town could borrow the sound testing equipment to conduct tests. Mr. Kaplan said that Mr. Natsios told him that he had spoken with Mr. Herweck and with Town Counsel Paul Kenny about doing so. He said that the equipment is expensive and needs to be operated by an expert. Regardless the DEP makes the equipment available to the towns to measure. Mr. Kaplan said that his original submission to the Board included correspondence asking the Town to borrow the equipment. Mr. Gossels said that the Town's use of the equipment is no different than Mr. Kaplan's use of it given that neither had expertise. He said that Mr. Kaplan would have to hire someone who does have the expertise to get evidence in the way of facts that the ZBA can study to back up any opinion.

As to air quality, Mr. Kaplan said that Mr. Bobrowski said that there are no facilities requiring Board of Health approval yet Mr. Herweck informed the Trustees of The Villages at Old County Road by e-mail that the property has Board of Health approval for the transfer of sewage. He said that this seems like a new development since the February 4 ZBA hearing. Attorney Bobrowski said that it is not the facility itself that needs regulation by the Board of Health but instead it is the transfer that needs approval, therefore the tenants making the transfer require the supervision by the Board of Health, which he contends is a different matter. He defined the transfer as temporary storage.

Mr. O'Brien referenced condition 9 of the 1987 Site Plan Decision which states that the disposal or removal of effluent and waste be governed by the Board of Health.

Mr. Lewis said that sewage is not stored at 9 Old County Road. Mr. Kaplan said that the smell from the transfer of sewage is traveling to 6 Old County Road and is a common law nuisance that zoning laws prohibit. Mr. Bobrowski said that the 40B at the Villages at Old County Road was built after the 1958 industrial park. Given that the Town cannot stop development due to 40B laws the Town is not at fault, rather the developer should be at fault because he would have known what was going on at the industrial site as far back as 1958.

Mr. O'Brien said that the 1987 Site Plan decision is subject to regulation so the uses at the site can continue according to that decision.

Chuck Mills, 47 Rolling Lane, said that in respect to the sewage transfer the language in the 1987 Site Plan document predated Title V regulations which standardized septic regulations for the state so prior to that each Town had to regulate their own systems which is probably why language for sewage storage appeared in the Site Plan decision.

Phillip Regan, along with his brother John, were present. The Regans own the sewage trucks at the Lewises' property. He said that the septic trucks have been fitted with filters so there should no longer be smells from the septage. Mr. Kaplan said that a complaint was filed with Mr. Herweck as recently as two weeks prior to this hearing. Mr. Regan said that parts are still coming in and are being installed. Approximately \$30,000 has been spent to solve the problem.

The Board then discussed where things stood on the decision. Mr. Klofft said points that were matters of zoning, for example glare, noise, and smell the Board could address. He felt that the other issues are matters of site plan enforcement. Mr. Bobrowski said that Mr. Herweck's December 6, 2012 letter specifically stated that noise and glare may be an issue, but odor was not addressed in that letter. Mr. Kaplan said that he was asking the ZBA to rule on the odor issue by overturning Mr. Herweck's assessment. Mr. Bobrowski said that Mr. Herweck addressed the other itemized bylaw sections that Mr. Kaplan included in his appeal, odor included, as being inapplicable. Mr. Kaplan disagreed with that determination.

Board members agreed that there was progress made toward making a determination, however some felt that more facts were needed and they needed more time to review the materials submitted by all parties before they could issue a final decision. Mr. Gossels recommended that the hearing be continued so that all Board members could have a chance to read through the materials that were submitted on April 1.

Mr. Gossels then asked whether Mr. Herweck had anything additional to add. Mr. Herweck said that as the Building Official and Zoning Enforcement Agent he receives complaints at 9:00 at night about noise when snow plows are getting ready for storms. He said those are unfair complaints that he has to deal with. There was a discussion about whether Sudbury had a provision for exemptions in these cases. He said that he has had lengthy discussions with the DEP about noise but that he himself would not be able to do the noise testing because he was not qualified to operate the equipment. He said he was told that by a higher authority. He said he gave the Trustees of The Villages at Old County Road the contact information for DEP so that they could handle obtaining the tests. He said he has had many phone calls with the property owners and the tenants and the Lewises have tried to work out the noise impacts. He said that the sewage smell is a duration issue but not constant. He said that he understood that the odor was unpleasant but he questioned how he is to make a judgment on odor when the law is vague and he

does not know how to enforce it. Mr. Herweck added that some of the uses are 24-hour uses when service calls are necessary.

Mr. Klofft clarified that it is up to the Acting Building Inspector to make a judgment call and if there is an aggrieved party then the ZBA's job is to decide whether it was poor judgment.

Walter Bent, 539 Hudson Road, said that the vents for the septic fields at The Villages at Old County Road are in the same vicinity and perhaps the vents are causing the smell.

A resident from The Villages at Old County Road whose condominium is located along the road agreed that the smell lasts for about a half hour at a time. But the smell that comes in is strong and powerful. He said that what has yet to be fully addressed is noise from early morning work. He said that the ZBA began to address zoning issues as they pertain to the times during which businesses can work but he didn't think there was a conclusion. He said that his back yard abuts Mason Works and he cannot sleep, he cannot grill in his back yard or use the patio due to the noise. He said that during the summer there was consistent back-up signal beeping as early as 4:00 a.m. but usually around 6:00 a.m. and lasting for hours. He said the noise is caused by rocks being dumped into the back of trucks, fork lifts, and other masonry equipment. He can look out onto the site from his bedroom window to observe this. Mr. Kaplan added that these are very large diesel-powered trucks that residents can hear start up. Mr. Lewis said that those sounds are typical on industrial land.

Mr. O'Brien asked whether the trucks are equipped with silencers or mufflers. Mr. Lewis said that they were DOT-inspected vehicles and operators are not allowed to turn off the back-up devices by law.

Mr. O'Brien asked whether the Lewises could restrict the hours during which this work occurs. Mr. Lewis answered that these workers have to get up early and work long hours due to the nature of the businesses. Mr. Bobrowski said that the matter before the ZBA is an administrative appeal and not a special permit, so conditions cannot be imposed at this point. He said that the Lewises have been given the Acting Building Inspector's determination and they have heard the complaints and will continue to work with Mason Works to lessen the impact.

A resident at Unit 19, 6 Old County Road, asked why the residents should have to prove the noise suffering additional costs when so many residents are saying the noise is loud. Mr. Gossels answered that it is a legal technicality of the bylaw. Mr. O'Brien said that the burden is on the plaintiff to show proof because the Board would need data to make an appropriate decision. Mr. Kaplan said that he had suggested that the Building Inspector use the equipment to measure noise but if the person using it is not qualified then the data would not be accepted.

Another resident of 6 Old County Road who did not provide her name, said she has called the Sudbury Police at 5:00 a.m. to make a complaint about noise but she has been told by the police that all they can do is make a note of it but can do nothing further. She asked why the police, when she calls, cannot drive by the site to stop the noise. She said that the police are public servants of her community who she is paying for. She asked why her complaints to the police would not suffice as evidence that there is a noise issue. She said that there is no reason why she should be woken up by someone else's noise. She said that the noise is not neighborly and she further felt that the Town is punishing the neighbors by telling her that

they cannot do anything about it. She said that she was expecting from the last ZBA meeting that times would be enforced during which the businesses could work. She said that is really what she is asking for.

To summarize Mr. Klofft said that the ZBA has a good idea about the situation at this point but cannot act without facts. He said that the Acting Building Inspector agrees that there is noise and is working with the owners and tenants to alleviate noise. He said that while he understands the residents' issue with police complaints, the police are the enforcement agents rather than the ZBA.

A motion was made and seconded to continue the hearing to Thursday, April 11, 2013 at 7:30 p.m. at the Town Hall.

Jonathan G. Gossels, Acting Chair

Stephen A. Garanin, Associate

Jonathan F.X. O'Brien, Clerk

Nicholas B. Palmer, Associate

Jeffrey P. Klofft