

Minutes Meeting of December 8, 2004 – Oak Ridge, Chabot

Members Present: Stuart Schulman, Chase Duffy, Mark Mulligan, Shaun Sullivan, Megan Mahony-Wickham

The Chairman reconvened the Oak Ridge 40B hearing.

Several memos from Town Boards were submitted and read into the record.

Mrs. Collette gave some clarification regarding the earth removal committee memo that also came from the BOS. She asked who is the enforcer if there is a major earth removal issue such as drainage or dust issues during construction. She said that ordinarily, she is called upon but noted that during a 40b, it's different.

Atty. Bobrowski said that Mrs. Collette could be appointed as inspector, if the project is to go forward.

Discussion ensued and of note: these would be conditions of the approval/permit granting process.

The Chairman noted that if it is a balanced site, as represented by the applicant, there should be no problem.

Atty. Deschenes said that his clients won't object to anything reasonable and an agent should be appointed. He said that those things apply to every construction project and stressed that they don't want to be treated differently.

The Chairman read the Conservation Trust memo into the record, which discussed the impact on vernal pools and asked that the permit not be granted carte blanche and suggested that the density be reduced.

Dr. Horowitz, BOH, said that no waivers from their by-laws should be granted.

The Chairman read the Townline Neighborhood letters into the record, as well as a document from H&H associates, which suggested conditioning 22 units with 6 affordable. The applicant submitted pro forma notes into the record.

Mr. Clemens asked for the Con. Comm. memo to be read into the record.

The Chairman read the last paragraph of the Con. Comm. memo into the record, which asked that no building occur within the 100 ft. buffer zone to minimize the impact on the vernal pool. He then suggested continuing the discussion of the economics of the waiver requests.

Atty. Deschenes said that he wants to walk through the waivers and their feasibility. He said that 1/2 of them don't have an economic impact report because without them there would be no project, 1/3 are inherent to the 40B process, and a handful or so need the economic discussion. He noted that 218-5 needs a waiver, special use, need waiver #3. because their only choice is with a single access because no other land was reasonably available for a second access and it is not possible to build the project otherwise. He said that the buildings need to have a similar appearance and they need the ZBA to do "site plan review" as outlined under 40B. He said that number 6 is obvious. 7. He said that they need to do all infrastructure up front and can't be limited to the 12-year build out rate. Other two general. Earth removal first three need to be waived as inherent to project. He said that they can't judge the need for a surety bond yet. Don't want to go to other local boards for next three (earth removal). He said that he thinks the ZBA would bring to the plan conditions regarding hours of operation, etc. and stressed that they want only reasonable conditions imposed. He said that they would then make a decision regarding the conditions applied if the ZBA goes that route. Under the wetlands protection, the first three have no economic piece. He said that they have a 50-foot no disturb zone and stressed that there would be a big impact if the Board requires a 100-foot no disturb area. He said that they have the widest roadway that can be built there and have the sidewalk as close to the road as possible. He said that there is still 375 ft of disturbance within the 100-foot buffer and stressed that they can't provide a road and a sidewalk and have the no disturb area. He said that there would be no safe means of access. Also each storm water basins are located outside of the 50 ft buffer zone but within the 100 ft. zone; because of the topography there needs to be two places to store water: one upland and one near the road.

Mr. Slager says that that is an improvement because they are not using impervious cover for the storm water retention. He noted that that area is now all paved.

Atty. Deschenes said that he doesn't know where else they can put the storm water basin. He said that Mr. Slager says that this is the lowest part of site and even with major redesign they may end up with the same things.

The Chairman said that he wants to utilize the Littleton site, possibly for the septic system.

Atty. Deschenes said that topography is an issue. Mr. Slager said that in other locations on the site they can meet Title V but not local BOH requirements. He said that the site has many boulders and bedrock in other areas and stressed that it is still their position that this is not a 14 acre vernal pool. He said that there are some pools in the area but not the entire site. He said that they have done everything they can to move the project out of the wetlands during the past year. He said that the area is not pristine and noted that they are removing the existing home and a lot of the paved. He said that they could eliminate the sidewalk but that seems to be a safety issue.

Mr. Slager said that removing the sidewalk would take that area out of the 100-foot buffer. He said that the sidewalk is only about 7 or 8 feet within buffer and noted that it is only about 5 feet in width. He said that that part is a reduction of what is within the area because of the removal of the

existing house and paved area. He said that the surface will be less impervious within the buffer than it is today.

Mrs. Duffy suggested reducing the width of the sidewalk.

Mr. Mulligan asked for clarification: whether the 2 areas closest to the wetlands are the basins and whether natural materials would be used. The answer was yes to both.

Discussion ensued regarding sidewalks and ADHD regs.

Atty. Deschenes said that they are not proposing to prevent Con. Com. access onto the site but they want notice. He said that erosion control has been reviewed by JNEI and he said he doesn't want to be unreasonable. He said that in the BOH regs. the five foot offset can be met so a waiver is not necessary. He said that under 11. 1.a.5. c. trenches, they want to be able to use the area between the system and this is allowed under Title V. He said that there is no other area on the site to use for a future reserve area.

Discussion ensued regarding the difference between Title V and local BOH regs.

Atty. Deschenes said that they will be in conformance with Title V regs. and stressed the need to have the reserve area saved.

Discussion ensued regarding some of the topographical issues regarding relocating the septic system. Mr. Slager said that the system would still need to flow to the low part of site and be pumped up 20 feet to the elevation of the Littleton portion. He said that the impact would be felt by future homeowners and not the developer and he said that he doesn't think they could locate the septic system in another town.

Mr. Sullivan felt that the Littleton portion is either in the project or not.

Atty. Deschenes said that there is not a problem with having open space in another town but it would be different if they were constructing something.

Atty. Bobrowski said that if they don't meet the standards of Littleton they will need a Comprehensive Permit from them.

Mr. Sullivan said that he wants a sketch of the septic system.

Mr. Slager described the system in general detail and gave some specifics related to Title V and the site system. He said that they originally wanted to split the system but hit bedrock and said that they would need a waiver to build any type of system, split or whole. He said that they can't shift the septic because of the storm water management system and noted that they wants to keep the

systems apart. He said that he felt that as designed there is the least environmental impact since the system meets Title V. He noted that there are different types of walls for septic system retention.

Atty. Deschenes said that the septic box is same size even if the reserve areas are moved. He said that they still need to provide 6 feet and they want it 9 feet instead of 20 feet from the property line. He said that if the system is moved, they would lose units and violate DEP and storm water management guidelines. Mr. Slager said that he wouldn't remove the retaining wall because they can't meet the 3:1 requirement without it. He said that 150% is a bigger leach field than required by Title V, and that also affects the reserve. He said that on average the land tests at less than 14 minutes per inch but they had one test of 20 minutes per inch. He said that they want to use the Nashoba boards of health for review, since they do most of the review for projects in town. He said that they have submitted an 80% design for septic but needs to know the board's decision and the scope of the project before they design a 100% final plan. He said that the general process doesn't require that and stressed that they have done well to provide an 80% plan. He said that it is not unusual or unreasonable to know what the ZBA is going to do.

Dr. Horowitz introduced Jay Talerman of Kopelman and Paige, who felt that the applicant has not shown any reason to grant the requested BOH waivers. He said that they have to show physical reasons. He said that they haven't shown why they cannot move the septic system without breaking the bank. He said that the applicant hasn't done any testing in Littleton and suggested that they could lose some units and open up the area. He said that regarding the setback waiver, the ground water is affected and spreads to other properties. He said that it is unfair to make the neighbors look at a retaining wall and noted that it is not relevant whether a septic split is economic or not for homeowners. He said that that is only relevant to the developer. He said that if a single area fails, they have nothing. He said that Title V is used as a last resort for projects and that generally DEP doesn't like it. He stressed that the applicant needs to present more.

Dr. Horowitz noted concern regarding having one big unit and the ramification in the event of a catastrophic failure during winter. She said that system can't be repaired and thus a tight tank would be necessary.

Atty. Deschenes said that he can't understand how if a tank can't be fixed during winter, how could another tight tank be constructed.

Discussion ensued regarding what happens during septic failure during winter and repair ramifications.

Dr. Horowitz said that the proximity to property lines would put abutters at risk if wells needed to be replaced or if irrigation wells are put in.

The Chairman asked whether water could be run outside of the project.

The BOH said that it could be. Dr. Horowitz said that there may be pressure problems with the water that could affect the septic system and noted that this is intertwined with the water department. She said that if the system is raised they will need swales so that abutters don't have pooling on their property. She said that a water consultant is needed because the water table is being affected and there is a need to determine the impact on abutters and the vernal pool. She said Nashoba BOH will put this in writing. She asked why they couldn't use the Littleton property for the septic system because this would alleviate the potential affect on abutters and the vernal pool. She said that even if the density is reduced and the system is moved forward it helps the neighborhood.

Mr. Sullivan said that the McEvoy's financial analysis says that the model for groundwater is wrong.

Mr. Field said that they had holes with no water so they used a model. He said that it was done in season, in April of 2002.

Dr. Horowitz brought to the Board's attention that the developer had a septic system that failed twice on another 40B and noted that both the PB and the BOH want a hydrological study.

The Chairman read the PB memo into the record.

Mr. Degen said that he asked what standard the road would be built to and was told that it would be to subdivision regs.

The Chairman said that he was not sure about that.

Mrs. Collette said that under the multi-family by-law, among others, the road must be constructed to subdivision standards. She said that except for the length of the dead end, the road should otherwise be to subdivision standards, as was represented by the applicant.

Dr. Horowitz said that not enough perk testing has been done on the site. She asked about blasting and how it could effect other properties, wells, septic, etc.

Mr. Degen said the he wants an economic explanation why no site plan review by the PB is needed.

Atty. Deschenes said that he erred in not listing that as a waiver request because by virtue of the 40B process, the ZBA does site plan review.

Atty. Talerma said that no waiver from site plan review is required and noted that some aspects are not waived but the ZBA sits in the shoes of the PB.

Anna Eliot, PB, noted some concerns that the PB had that would be addressed with site plan review that won't be reviewed unless site plan review was a condition of the permit.

Atty. Bobrowski said that the answer lies somewhere in the middle. He said that many conditions will be listed and said that he thinks it is relevant for the ZBA to submit the final plan to the PB before a building permit is issued.

Atty. Deschenes said that he has provided all information for the record and said that he wants the public hearing closed.

Ms. McEvoy said that she wants the decision reviewed by all boards before the public hearing is closed.

The Chairman said that he doesn't want to do it that way. He said that all boards are asked for advice and the information is taken into consideration.

Mr. Clemens suggested a plan circulated with fewer units.

Mrs. Perkins asked whether the ZBA can ask for less units.

Atty. Bobrowski said that the Board can both ask for less units and not grant waivers. He said that the PB gets to review the definitive plan and comment on it.

Dick Heaton, financial reviewer, said that 66% of the time a Board can reach an agreement with the developer and said if appealed, it can be renegotiated.

Atty. Talerman said that the ZBA can always ask for more information and suggested that the Board needs to get more information re: why the BOH waivers can't be met. He said that if the Board has the info it can make the necessary conditions/decision as how it relates to an appeal. He said that they should hold the hearing open so the Board can make a more developed case.

Atty. Deschenes said that he stands behind what he said, and noted that Atty. Talleraud hasn't been here for the last 20 months. He said that if the Board needs more information that can be reflected in the decision and stressed that he is ready to take that risk. He said that he is not going to agree to continue and said that the Board can choose as it likes.

Mrs. Sartini asked if there are density adjustments made after the close of the public hearing whether there is a re-review by other boards.

Atty. Bobrowski said that 40b allows for changes in a proposal after the close of the public hearing, after the grant of a permit and after the HAC has acted. He said that this is a normal part of the process because plans do change and there is a mechanism to allow for that.

Mr. Sullivan said that there could be testing in Littleton that could change much of the dynamics of project and stressed that that shouldn't be left unexplored.

Atty. Deschenes said that wants to go the route of closing the public hearing.

Ms. Eliot, PB, said that there has been a discussion about a workshop with the consultants and this could use as a vehicle for discussion.

Mr. Degen asked if the public hearing is closed whether no new information can be gotten.

Atty. Bobrowski said that the Board can't get any new information if the public hearing is closed but the Board can receive information related to changes in the plan, but noted that that is not considered new information.

Mr. Degen said that the public safety officials want information in writing.

Discussion ensued regarding how to handle the closing of the public hearing and how new information can be obtained. Atty. Tallerand noted that there are shades of gray regarding how to close the hearing and grant the permit if that's what the applicant wants. He said that if the Board wants more information another hearing can be scheduled 30 days out and a decision made in 40 days. He said that there is no risk if the hearing isn't closed today, noting that the Board has time to act. He said that it is a policy decision to make regarding closing public hearing.

Mr. Heaton said that there is still information that other boards in town want to give. He said that the Board may find that some inputs will be modified or even go away and suggested that the Board could issue a draft decision for review with the hearing still open.

The Chairman said that the Board got advice last time from boards with the hearing closed.

Atty. Bobrowski said that the project will only be smaller, so other board input is all inclusive. He said that the outcome is predicted if there is a pre-draft decision.

Mr. Heaton said that Board wants to get as much info as possible.

The Chairman questioned what other evidence is needed.

Atty. Bobrowski said that it is not evidence.

Discussion ensued regarding closing the public hearing vs. issuing a draft.

Mrs. Perkins asked whether clarification can be gotten with a draft.

Atty. Bobrowski said that other Boards can comment on a draft. He said that the project will only get smaller and circulating the draft is redistributing evidence.

Mr. Degen asked whether a smaller number of units is a denial or a conditional approval.

Discussion ensued regarding the HAC process, etc.

Scott Wilson asked what the threshold is for what is economic.

Discussion ensued regarding how to figure the return on an investment, etc. Atty. Talerman said that how to figure this has gained some controversy and noted that a larger project can have a lower profit.

Atty. Bobrowski said that if that part gets appealed then it wasn't figured right.

Atty. Talerman said that low acquisition costs can get more dollars for the town.

Ms. Eliot asked about the possibility of conditioning rental units.

Atty. Bobrowski said that the applicant would need a new letter from the State and it's up to applicant to proceed with that.

Mrs. Lathrop asked whether the pro forma is looked at differently if the developer and realtor are one and the same.

Attys. Bobrowski and Talerman agreed that it is.

Mr. Heaton said that any reason to keep a hearing open is to figure what is best for the profitability margin. He said that developers are happy earning much less than 20% and said that the Board needs to consider costs of each waiver.

The Board moved to close the public hearing. The motion was seconded and passed unanimously. The public hearing was closed.

The Chairman convened the Chabot hearing by reading the Legal Notice.

Mr. Chabot, contractor, was hired to raise the roof and change the pitch because the existing roof had a problem with snow, ice and water build up. He presented a picture of the existing house and noted that the new roof will be 29 feet instead of 23. He said that the new pitch improves the look of the house and makes it more in keeping with new houses in the neighborhood. He said that the

new will be an 8 pitch roof, which is safer. He said that they are here because it is a non-conforming lot.

Mrs. Collette was present to speak for the applicants, noting that they are enduring hardship because there is no roof and just a tarp and they are living there and it is cold. She noted that work was begun without a building permit.

Mr. Chabot said that he didn't realize he needed a special permit, although he is on the Pepperell Planning Board. He noted that the existing tarp/roof is watertight.

The Board went over special permit criteria.

The Board moved to grant a special permit because it makes sense to increase the pitch of roof and project is not detrimental to the character of the neighborhood and does not deter from the intent of the Zoning By-law.

The motion was seconded and passed unanimously.

The Board returned to the Oak Ridge meeting.

Atty. Bobrowski said that he handle the situation systematically and noted three possible denials: 1) a gut reaction denial, 2) failure to show compliance, 3) balancing test

Discussion ensued regarding possible denials.

The Board felt that an approval with conditions is in order.

The Board moved to instruct counsel to draft a denial.

The motion was not seconded.

Mrs. Duffy reviewed the list and the Board found that there were some deficiencies but not such that a denial was warranted.

The Board moved to instruct counsel to draft an approval with conditions and circulate to town boards for consultation.

The meeting was adjourned at 10:30 pm.