

Minutes Meeting of May 17, 2006 – Walker Appeal

Members Present: Stuart Schulman, Mark Mulligan, Jay Prager, Cindy Maxwell, Chase Duffy

The Chairman convened the hearing by reading the Legal Notice.

Atty. Fenton, present as attorney for Ryan Development, for Mill Run and Groton Gardens, submitted a large packet.

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The Chairman asked several times regarding whether the appeal was for Mill Run Plaza and Groton Gardens.

Atty. Fenton said that it is for Mill Run Plaza, because GRG is before the court now. He said that the ZBA only has jurisdiction over GRG and Basin #3, which is only attached to GRG. He said that there is no wetlands protection act here, or are any wetland areas attacked. He said that the State stormwater guidelines don't apply and as a point of clarification, the local Conservation Commission called DEP to come to the site to look at flooding. He said that a meeting was called with the PB, Con. Comm. and DEP because there is a wetlands on the corner of the property. He said that DEP said that the State stormwater guidelines don't apply to Mill Run, GRG or the basin. He said that he was surprised that the meeting was called because there was no issue with non-compliance and then DEP found no violation. He stressed that there are no State or local violations because there is no discharge into the wetlands. He said that this has been looked at by JNEI and FST and both say the system is functioning properly. He said that FST had issues with separation with the bottom of basin and seasonal high ground water.

The Chairman said that he wants clarification regarding the construction of the retention basin.

Atty. Fenton said that it is correct that the ZBA is in charge of that basin. He said that he thinks that the PB has run amok and is asking for the BI to revoke delay of issuing of permits. He said that he can't deal with many boards and only wants to deal with the ZBA.

The Chairman asked what is the crux of the case.

Atty. Fenton said that he is asking that the ZBA determine that: 1) State stormwater guidelines don't apply to the project or storm basin #3; 2) that the ZBA is the only board that has jurisdiction over Basin #3. He said that they have been called in front of the PB numerous times.

Mrs. Duffy said that Basin #3 is connected to #'s 1 and 2 and thus can't be separated when water from those basins goes into Basin #3.

Atty. Fenton said that there is no connection and no zoning violation.

The Chairman said that he interprets the paragraph differently, noting that it is not limited to State guidelines, but that the Board has some flexibility to interpret the by-law by interpreting different factors.

Atty. Fenton said that if it was applicable the no condition #27 would necessary and just compliance period. He said that it was only stated because State guidelines apply and said that the Board should go out there today and see that there is no flooding.

The Chairman noted that the water may be okay on GRG but it is like a river on Anthony Drive. He said that it looks like all the water is going onto Anthony Drive, because the site looks higher and the water is running off.

Atty. Fenton said that he has data from JNEI that two feet off of the road there will be ponding and noted that previous data shows that there was flooding on Anthony Drive prior to construction of GRG. He said that he doesn't think this project affects the water on Anthony Drive. He discussed the history, noting the need for town sewer or septic systems and the roof structure of houses which are dictated because such high ground water.

Mr. Prager asked about soil logs, etc.

Landtech/Fenton stressed that Anthony Drive has no additional flooding. The engineer noted that the culvert under the second access at the back of the project and is set so that there won't be ponding under nine inches, which is just the way it was before. He said that there is a slight increase in the berm at the end that won't let the culvert drain out properly.

Mr. Prager said that it sounds like the situation is worse.

Landtech said that it is worse only because the berm needs to be removed to allow water to flow off of Anthony Drive.

Atty. Fenton said that they looked at the culvert that was installed under the emergency access and noted that it could be done better. He said that he is sorry about the flooding that has always occurred, stressing that they want to be a good neighbor but that unfair standards should not be applied.

Mrs. Duffy said that JNEI/FST said that the system was designed to the minimum standards and if there is a big storm, then it will fail.

Atty. Fenton said many towns have major flooding and noted that on this site all storm water is contained on site.

The Chairman said that he is asking for feedback from neighbors.

Ms. Kneeland said that the catch basin by the emergency access was full and was flooding onto Anthony Drive. She said that much of the landscaping is running onto the abutting property, noting that she has a letter from the prior owner that he has never seen the flooding that bad.

Atty. Fenton said that it is not fair to have testimony from the prior owner who didn't disclose the flooding of 10 Anthony Drive.

Landtech said that he has been monitoring the site and has made no observation of the catchbasin running over.

The Chairman said that the evidence from neighbors is credible and should be looked at.

Atty. Fenton said that they are only looking at Mill Run.

Landtech said that he is not saying that 100% of the water is being contained on site. He said that that is not the standard, but that runoff can't be increased post from pre. He stressed that there was runoff before development and that it is continuing but not happening at a faster rate.

Ms. Kneeland, 13 Anthony Drive, noted that she has lived there for ten years or so, and that Ruth Robinson, an elderly abutter has asked her to be a spokesperson. She said Ms. Robinson said that there was always water in back of her property but never pooling along the sides going up to Anthony Drive.

Landtech noted the need to work on the berms to reduce pooling, stressing that he is not disputing that. He said that a third party did acknowledge that there is pooling and that there is a berm needing to be removed.

Mr. Prager said that the issue here is not judging the analyses, but the need to look at credible evidence. He said that they can't ask the ZBA to judge only on analyses when real people have severe problems.

Atty. Fenton said he has nothing in writing, nor has Ms. Collette submitted anything related to previous problems on other sites.

The Chairman said that he wants to know how many occupancy permits are at issue here.

Atty. Fenton said Building #5 and all of GRG.

Someone for the applicant noted that only one occupancy permit is at issue for Mill Run Plaza.

The Chairman noted that there are many other issues other than drainage for GRG relating to the

withholding of occupancy permits..

The Building Inspector said that he is holding three building permits and three occupancy permits for Mill Run.

Mrs. Collette noted that Groton was lucky that the town avoided some of the major flooding that happened across the state, with a total of seven inches of rain. She noted that she is also entering a report from JNEI, among other things and listed all reports that noted the need to comply with storm water management guidelines. She said that as part of the MEPA filing, dated June 2003, the PB and engineers noted concern regarding the total impervious surface cover. She said that the site is flat and has no good drainage of soil. She stressed that the design needs to mitigate the impact on abutters. She noted that storm water management forms were applied for and it was always represented to the PB that storm water management would be complied with under State guidelines.

Atty. Fenton claimed that JNEI said that the stormwater system is adequate to handle both projects via Basin #3 and that they were told that it is functioning properly by both JNEI and FST, looking at the project during the last 60 days.

Mr. Prager asked what design that they were working toward.

The Chairman said that he wants the PB to answer to the hydrogeology study.

Mr. Clemens noted that they have an FST engineer present.

Mr. Beyer, of FST, noted interest in comments from Landtech. He said that the pipe size meet standards, more or less, but that the issue is whether it works and whether the soil was tested properly as to whether it would accept the water. He said that they could have huge depth and if the system doesn't work, it doesn't work.

Atty. Fenton objected to that.

Mr. Beyer said that the system seems not work, particularly given how it behaved over the Fall and into the winter. He said that there was standing water from October to March when the basin should drain in 72 hours.

The Board asked how much rain fell last October.

The Building Inspector said that seven inches fell.

Mr. Prager said that there is much information that the system doesn't work, from abutters.

Atty. Fenton said that he wants to respond, noting that FST didn't make a legal analysis as to whether State standards apply, but just stated that they did. He said that the stormwater system seems adequate, as according to engineers both at FST and JNEI.

The Chairman said that the next sentence said that the infiltration is problematic.

There was much discussion back and forth about what standards were used.

Chris Petroff, Landtech, said that there is more water than the basin was designed for because the sidewalks weren't completed. He said that it didn't function properly because the project is not completed.

The Chairman asked whether the project is completed now.

Mr. Petroff said that it was not.

The Chairman suggested continuing the hearing for at least 72 hours to see if the basin will empty.

Atty. Fenton said that he won't agree to that, noting that he is not here to see if the basin is dry or not dry. He said that he is here only to determine whether State stormwater guidelines need to apply.

Mr. Prager said that there is much to process here and asked about the DEP change.

Atty. Fenton said that he is talking about the corner of the site that has wetlands.

Mr. Prager noted that he is not sure that that is correct. He said that he has a problem with the discussion of design standards and asked what are they.

Mr. Petroff said that no increase in run off will be allowed.

Mr. Prager asked whether those standards are being met.

Mr. Petroff said that they were.

Several abutters said that they were not.

The Chairman asked for a point of order, noting that he wanted to give all a chance to speak.

Mr. Mulligan asked whether, with the exception of curbing, anything else has been done to the basin.

Mr. Petroff said that silt has been removed, but they are not reseeded because there is still soil testing going on. He noted that the recent rainfall has given them a chance to do further studies and testing. He said that approximately 15% of the runoff from Rt. 119 still getting into Mill Run by the dumpster and goes into catch basin #3, while another 15% is getting into the basin above Anthony Drive. He said that Pond #3 is not designed to take any runoff from Rt. 119 and suggested some slight modifications with paving to keep Rt. 119 drainage on Rt. 119. He said that the basin did not fail even though there was much rain during the past week and noted that they don't have to comply with State regulations and therefore don't have to use their numbers.

The Chairman said that he doesn't like that argument.

Mr. Petroff said that they are still getting water from basin #1 and #2.

Mr. Prager asked whether the basin will work, or better yet, how will the Board/Town know when it works.

Mr. Petroff said that the basin will work when done, and that it wasn't bad given the rains.

Mr. Prager asked when the Board will know when it is done.

Atty. Fenton said that State Storm Water guidelines don't apply.

Atty. Cutler, Town Counsel said that nothing waives the requirements of the PB Site Plan Review because the basin was designed originally to serve Mill Run Plaza. She stressed that the basin falls under the jurisdiction of both boards, noting that the PB accepted the redesign to accommodate GRG. She reiterated that there are two jurisdictional boards here. She said that the PB also reserved the right to review the plan and make further modifications. She said that this was done in March and is now in effect, with the stipulation that system be brought into compliance under the Groton Bylaw and State Stormwater Management Guidelines. He said that this could be moot if a new design had been presented.

Atty. Fenton said that under 40B this is a reciprocal argument because 40B subsumes all local by-laws.

The Chairman said that this is an unusual situation.

Atty. Fenton agreed, but noted that the PB is being very aggressive regarding this.

The Chairman said that he would explain why, if necessary.

Atty. Fenton said that two years after the permit approval the PB/ZBA can't make them be held to a higher standard.

Mrs. Duffy said that she feels that the system was designed never to work adequately.

Atty. Fenton said that he doesn't disagree with the PB that there was water in the basin in October, 2005. He said that the silt needs to be cleaned out, per JNEI.

The Chairman asked how often the basin is cleaned.

Mr. Petroff said usually once every ten years, but the project is still under construction and the basin will be cleaned every two weeks if necessary.

The Chairman said that they have put the ZBA in a bad position because although the basin doesn't work now, the Board should believe that it will work eventually.

Atty. Fenton disagreed, noting that the basin worked in early May. He said that this storm event had seven inches of rain and the system didn't top over. He said that the other storms dropped ten inches in the past, earlier in construction.

George Barringer, PB, raised a point of order, noting that the hydrogeologist had the floor and didn't finish.

The Chairman asked Mr. Beyer to go continue.

Mr. Beyer said that if a builder is working in a buffer zone or wetlands, an order of conditions is required and they need to work with storm water management conditions. He said that if the work is not done in wetlands, then a stormwater management permit doesn't need to be applied for but the developer is supposed to work with Con. Comm. and deal with storm water management, for one stop shopping. He said that he needs legal clarification and feels that some guidelines apply. He reiterated what FST said to the PB, that the pipes and size of the basin are adequate, but FST did not say that the system works. He said that he did test pits and found that the secondary basin was only 1.5 feet from the estimated high ground water and then noted the effects on 10 Anthony Drive. He said that in looking at the water level in March in Retention Basin 3, the water in the basin and in 10 Anthony Drive's crawlspace was the same. He said that they are bringing a lot more water into the area with the basin, stressing that the groundwater level is directly affected by retention basin #3. He said that there is a direct correlation between the water in the basement and the water in the basin. He said that to make a statement that the basin works despite the standing water is unreasonable, noting that there is communication between the water level in the basin and the abutting properties. FST never said that the system worked, but only that the pipes and basin were sized properly.

Att. Fenton said this not a legal interpretation whether storm water guidelines apply but that DEP said that they don't apply. He said that Mrs. Collette was there at the meeting, along with the Con.

Comm., the PB and DEP. He said that he read from JNEI that Mill Run and GRG didn't affect 10 Anthony Drive in the past.

Mr. Petroff said that FST said that 10 Anthony Drive didn't feed into the catchbasin and when the basement was pumped out by the fire department, it didn't refill.

Mr. Beyer stressed that he never said that the ponded water doesn't affect the system, noting that the water trapped in the basin and the crawl space can't flow out as it could before. He said that the project raised the ground water level so it would affect the flow.

The Chairman asked whether the water returned after the basement was pumped out.

Mrs. Collette said that the fire department pumped out the back yard and not the basement of 10 Anthony Drive, noting that there have been many misstatements that she wants to clarify. She said that a 48 to 72 hour drainage of the basin was represented to the PB on numerous occasions. She said that this was originally going to be a supermarket, restaurant and day care center and that MEPA was told that all storm water management guidelines would be met. She said that part of the Mill Street relocation such that water is moving into the swale differently than it should.

Mr. Degen noted that JNEI initially reviewed data submitted by the applicant for stormwater management, and Mr. Slager said that they would meet all regulations. He said that JNEI has been asking for soil logs for about two years and they hadn't been supplied for that period. He said that Town Counsel said that the BP still has jurisdiction over Basin #3. He said that Atty. Fenton has supplied enough paper work to last a lifetime but Catch Basin #3 is supposed to get runoff from #1, #2 and a swale along Mill Street. He said that the water going into Basin #3 is a self created hardship, as well as the landscaping that was planted too soon before project completion. He said that the purpose of the basins is to hold water, not to infiltrate water. He noted that maybe construction should not have occurred because there needed to be more separation between the ground water and the bottom of the basin. He also said that the asphalt was supposed to be planed by the right side of Mill Street so that drainage is the different into basin #3. He said that these things haven't been done and thus why there is a zoning violation.

The Chairman and Mr. Prager both said that they see a zoning violation.

Atty. Fenton disagreed, saying that there is no need to meet storm water guidelines.

The Chairman noted that the engineers said that it would meet guidelines.

Discussion broke down.

Mr. Prager said that the applicant represented that the project would meet storm water guidelines and now he is saying that it won't.

Atty. Fenton said that no one can rule on anything unless it can be seen.

The Board said that it can't rule on anything unless there is time to review it.

Tom Delaney said that we all want the system to work and asked what happens if it doesn't work in the future and whether there will be a bond put into place if the system fails in the future.

Atty. Fenton said that the PB doesn't have jurisdiction and if the Town wants to have a ZBA review, then that is okay. He said that he is scared to death of PB actions and said that he sees smirking in the back of the room. He stressed that he wants to work with one board, noting that GRG is before the HAC now.

Mr. Prager asked about the proposal to hook up to the State's overflow basin.

Atty. Fenton said that they were in agreement last October but things were spun out of control by the PB.

The chairman said that it is not fair that the applicant seemed that okay with the modifications and then suddenly spun the issue out of control.

Atty. Fenton said that the PB made things spin out of control.

The Chairman said that he didn't ever hear anything about the PB throwing a wrench into the works.

Atty. Fenton said that there are too many cooks in the kitchen.

Mr. Prager said that Atty. Fenton is on on both sides of his own argument.

Atty. Cutler said that the town has been asking for a proposal for months.

The Chairman suggested making the Town a proposal and then we can decide if we agree.

Atty. Fenton said that they will tie in the runoff to the State, raise up the berm, and work on the culvert under the emergency access.

Mr. Prager said that he wants to hear what standards they are going to use to hold themselves to, noting that it is up to the developer to make it work.

Atty. Fenton said that what the ZBA has asked for in the past has nothing to do with storm water management guidelines needing to be met.

Mr. Prager said that he wants to see the basin being worked and a long term agreement as to how to manage the system. He noted that he doesn't think the system will meet the standards.

Atty. Fenton said that the PB made changes.

The Chairman said that he sees it the other way around, that Mr. Walker wouldn't play by the rules and then the PB became involved, which is totally appropriate.

Atty. Cutler said that the response that came back that Mr. Walker would not agree to the changes because both JNEI and the PB said that the project was okay and thus nothing needed to be done.

The Chairman said that it seemed like Atty. Fenton's appearance came after Mr. Walker refused to cooperate.

Atty. Fenton said that he wants to keep the case open so that we can work together in the spirit of cooperation.

Mr. Degen said that we are here tonight because we are hearing the appeal of the Building Inspector's determination that there is a zoning violation. He said that the Board doesn't need to keep continuing the hearing to find a resolution. He said that we need to determine whether there is a zoning violation, pure and simple.

Atty. Fenton said that we are here to determine whether there is a zoning violation under State storm water guidelines.

Mrs. Sartini suggested that if the hearing is continued, a proper mode of behavior should be established. She said that Atty. Fenton repeatedly refers to a Town official by only her last name and accused a town consultant of speaking gibberish.

The Chairman also noted that the applicant shouldn't be blasted.

Mrs. Sartini then asked Atty. Fenton whether it shouldn't be his responsibility to make sure that the project is acceptable for people to live and work in.

Atty. Fenton said that he wouldn't address this.

Cutler- if basin #3 isn't completed, no building permits or occupancy permits should be issued until they all work and are completed according to plans. That is a requirement per Mill Run Plaza.

Atty. Fenton said that it is pretty complete.

Carrie kneeland- question for hydrogeologist- if problem is groundwater, if raise berm doesn't help. If there is not two foot difference between base of basin and high groundwater, and it is one foot or less, what happens to all neighboring properties.

Bayer- ground needs to be able to move it away. Not a firm formula but if narrow distance, mound starts to intersect with groundwater and groundwater becomes surface water. When yard of 10 anthony drive was drained, the catchbasin #3 level went down.

Fenton- if add enough to separation to make 2 feet, is it done?

Atty. Cutler said that that part of fixing the problem is done.

The Chairman said that he is trying to be fair and he wants to get it done, stressing that the system needs to work.

Atty. Fenton asked what gets it done.

Mr. Prager said that if he agrees to hook up to the drainage system of the State, and our engineers agree, it will get done.

Atty. Fenton said that he doesn't see how hooking into the State runoff system will fix the problem.

The Chairman said that he wants to continue the hearing so the Board can review all input.

Atty. Fenton said that he wants the Board to say that storm water regulations don't apply so the project can go forward.

The Building Inspector noted that in making this decision, the storm water management regulations may not apply, but what the Groton By-law is telling him is that those regulations are used as a model and there should be a two foot separation between high ground water and the bottom of the basin. He said that it has always been his opinion that there is a ground water problem there and noted that on several inspection trips he has asked for soil logs. He noted that he got them six months after they were requested and they are illegible and he thinks there is a serious problem.

Ms. Kneeland said that if they tie in with Mass Highway then less water will flow into #3 and the water level won't be as high.

Tom Delaney said that the State probably won't let #2 tie in and will only allow an overflow.

Mrs. Collette asked whether, if a tie in to Mass Highway is still on the table, the applicant needs to get permission to tie in demonstrated on State stormwater management compliance.

Mr. Mulligan said that he wants determination from Town Counsel as to whether storm water regulations apply.

Mr. Prager said that he wants to know whether the applicant represented that the project would comply with storm water management regulations.

Atty. Cutler said that they did say that they would comply.

Discussion ensued further regarding how to resolve the issue. Atty. Fenton asked for most building/occupancy permits.

Mrs. Duffy said that the applicant cried wolf too often and that is why they are here in the first place.

Discussion ensued regarding what to do to move forward.

Atty. Fenton said that he expects cooperation.

The Chairman noted that the Town hasn't had any cooperation since November 2005.

Atty. Cutler said that the global fix was that the system be designed to work and comply with storm water runoff.

Mr. Clemens, chair of the PB, asked what the ZBA needs to uphold or deny the Building Inspector.

The Chairman said advice from Town Counsel would be helpful.

Mr. Clemens asked Town Counsel whether she would that advice give tonight.

Atty. Cutler said no but that she would do it in writing soon.

Atty. Fenton said that the central issue is whether the storm water runoff regulations apply. He said that anything that his client agreed to is a separate issue.

Mr. Prager asked why we should pay the Town's attorney to make a decision that has no value.

Atty. Fenton said that the permit was denied on a single issue.

Atty. Cutler said that the developer could come forth with some solutions.

Atty. Fenton asked whether he could work with Atty. Cutler to reach some sort of agreement.

Mr. Prager said that they are putting the Board in unusual situation because they said that they would conform to storm water regs. He asked how the Building Inspector could refuse to issue permits if Town Counsel says that the regs. are not applicable and they don't apply.

Atty. Fenton said that if they aren't applicable, Town Counsel would agree.

Mr. Prager asked what happens when the client reneges on a promise. He said that there is no value in an abstract opinion.

Atty. Fenton said that if Mr. Walker made representations, they need to be looked at. He said that he wants to continue to next week.

Atty. Cutler said that she can't make it.

Atty. Fenton said that building up the berm is not going to work but improving the culvert by 10 Anthony Drive will. He said that he wants the okay to go ahead.

Mr. Degen noted for the record that when the PB modified the site plan, there were a number of conditions, one being that there are no more parking spaces and thus there are no more occupancy permits and building permits available.

Mrs. Duffy said that she is not willing to give Mr. Walker the benefit of the doubt without tangible evidence that the situation is going to improve.

The Chairman said that the Board won't make a decision tonight.

Atty. Cutler noted that she is not available the next two Wednesdays.

Discussion ensued regarding when to schedule the next hearing.

Mr. Prager suggested that the new plans be submitted before the meeting to the engineers to determine viability.

The Board noted that JNEI said that the figures were too liberal to be viable at the November 2005 meeting.

Mr. Prager said that he wants the engineers to meet to determine what can happen.

Mr. Degen said that Mr. Walker refuses to pay what is owed so the PB has no money for any more review.

Atty. Cutler asked what Atty. Fenton was going to present next week that will be acceptable.

Atty. Fenton said that he is not going to do that.

Mr. Prager said that money needs to be escrowed to pay for engineers.

Mr. Mulligan suggested that the Board could uphold the BI and it would fall back into the applicant's hands.

Atty. Fenton said that he would appeal to Superior Court if that happens.

Discussion ensued regard how to require action without a decision.

Mr. Mulligan said that he is leaning toward deferring to the Building Inspector's decision because the applicant said he would comply with the regulations and didn't.

Atty. Fenton said that he wants a chance to go back and review to submit some plans.

Atty. Cutler suggested that there are plans that should be almost done for the PB on the 30th and stressed that the Board/Town needs more than just until the 24th for a Town review.

Mr. Petroff said that he will agree to come up with a plan as long as the baseline is acceptable.

Of note: there is some question as to whether the baseline is acceptable.

Atty. Fenton said that his client won't just erase what is done and start over.

Mr. Prager said that his client probably did say that he will comply and they will have a problem if this is so.

Mr. Petroff said that he thinks the solution is pretty simple.

Mr. Prager said that he just wants to see the problem solved.

Mr. Petroff said that he doesn't want to start from scratch.

Mrs. Collette said that she wants to take a moment to clarify roles, noting that the PB works with consultants and that Town engineers aren't responsible for designing but only for peer review. She said that the applicant's engineer has a stamp and that the 4/30/06 date was suggested to the PB by Atty. Collins, who was representing Mr. Walker. She said that the information and payment wasn't submitted, as was requested by Mr. Walker's attorney.

Atty. Fenton said that it is unfair to pull out one line.

The Chairman noted that this is an argument with the Planning Board.

Mr. Degen said that the PB is at the ZBA's mercy to enforce zoning issues.

Mr. Clemens asked how the ZBA is going to resolve the issue if the Board is not going to uphold the BI and allow the release of occupancy permits.

The Chairman said that he wants some time to review the information presented and noted that permits will continue to be held.

Discussion ensued regarding who will pay for the review.

Atty. Fenton said that he wants a guarantee that the ZBA will act expediently and asked for a meeting in a week's time to present a solution.

Ray Case, 10 Anthony Drive, noted that the conditions weren't to correct the problem but to prevent an overflow. He said that it wasn't to correct the underflow problem.

Atty. Fenton said that he doesn't disagree.

The hearing was continued to 6/14/06 @ 8:15 pm. Of note: no Cindy Maxwell for the first two.

The meeting adjourned at 10:45 pm.