

Minutes Meeting of June 28, 2006 – Howley, Walker Appeal

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

The Chairman reconvened the Howley hearing, noting that there was a site walk on Saturday and then asked the applicant whether there is anything to add.

The applicant said that there was nothing to add and the only discussion with abutters occurred on Saturday when the Board was present.

The Chairman asked about where the line was drawn on the plan as submitted by the applicant.

The applicant said that the plan was prepared by Ross Assoc. and that it is 48 feet from the paper road.

The Chairman said that the distance is measured from the center line rather than from the pavement.

Mr. Schulman noted that that is why we are here.

Mrs. Duffy said that there is only one corner of the foundation with a 48 foot setback.

The applicant said that the rest of the foundation is four to six feet back and is conforming.

The Chairman got the sense from the Board that the impact of granting the variance would be minimal and that the Board would agree except that there is an abutter that has objected. Because of that, he said that he thinks that the Board must enforce the regulations, even though it would be a hardship to make the applicant move the foundation.

The concerned abutter said that his concerns wouldn't be addressed by moving the foundation one to two feet and thus he was withdrawing his objection. He noted his appreciation of the Boards willingness to listen and view the site.

Mrs. Duffy suggested to the applicant that he put in plantings to minimize the impact.

The Chairman said that he is okay with the project now because the abutters withdrew their concern.

Mr. Prager moved to grant a variance from setback to allow a 48 foot front setback. The motion was seconded and passed unanimously.

The Board moved to go into Executive Session, with yes votes by Stuart Schulman, Jay Prager,

Chase Duffy, Cindy Maxwell and Mark Mulligan.

Discussion ensued regarding the strategy that the Board will take tonight regarding Walker Appeal hearing.

Atty. Cutler gave a brief overview and suggested that the Board make two sets of findings.

The Board moved to adjourn the Ex. Session, with yes votes from Mark Mulligan, Chase Duffy, Stuart Schulman, Cindy Maxwell and Jay Prager.

The Chairman reconvened the Walker appeal.

Atty. Fenton submitted a draft decision into the record and noted that his consultant drew up plans and received comments last night from the Town's consultant. He said that there was no agreement and thus they are moving forward with the appeal, which is based on two factors: one, the applicability of stormwater regulations and, two, the authority of the PB over any part related to Basin #3. He suggested findings for the Board, stating that the drainage issue re: Basin #3 is not a zoning violation because the BI and PB don't have the authority to deny permits over Basin #3 because it is part of the Comprehensive Permit. He stressed that Basin #3, in his opinion, is only under the jurisdiction of the ZBA. He said that he is not here to argue whether storm water management guidelines apply, noting that he will argue that separately as related to the Comprehensive Permit. He said that any improvements made to the pond are the sole obligation of GRG, and that Mill Run Plaza is under no obligation. He said that this goes into the 40B question, whether improvements can be done in cost effective manner. He said that he wants to move forward in that way and can make resolution to the other matters before the Board. He said that the PB has taken a lot of jurisdiction over Basin #3 and the culvert that diverts water by 10 Anthony Drive and also noted a comment by FST that there is some mounding by 10 Anthony Drive. He stressed that he doesn't want to play the two masters: the PB and ZBA, nothing that he thinks that FST is looking at this entirely differently than just making the three improvements.

Mrs. Dufffy said that the three basins are connected and interlock and that Atty. Fenton has oversimplified the arrangement.

George Barringer, PB, said that he wants the Chairman to state the actual appeal.

The Chairman read the original legal notice.

Mr. Barringer asked whether it is an appeal specific to GRG.

Atty. Fenton said that it is not related to GRG, but only to Mill Run.

Mr. Degen, PB, noted that this case is before the HAC, and that from the PB perspective, he doesn't

want to interfere with the 40b decision. He stressed, however, that the developer chose to mix the drainage system, linking the system to a 40b development and a commercial project under PB Site Plan Review. He said that the PB asked the Zoning Enforcement Officer to enforce a clear zoning violation, further noting that it has been shown that Basin #3 falls under the jurisdiction of the PB. He stressed that the PB will not cede that jurisdiction to the ZBA and that he wants the ZBA to uphold the BI's decision to withhold building and occupancy permits.

Atty. Cutler said that she wants to clarify the case, which according to the ZBA application, in the letter of denial from the BI, the action in error refers to Exhibit B as to why the storm water provisions are not enforceable. She noted that the second reason (PB jurisdiction) was added later.

Atty. Fenton said that he wants to address the offensive statements made by Mr. Degen.

The Chairman said that he hears him and wants to move on.

Atty. Fenton noted that every department in Town gets to comment on a 40B application, which is why they can't have other boards adding to the process now.

Mr. Prager said that Atty. Fenton is arguing both sides of the coin. He said that if the system doesn't work, it doesn't work, and the two projects can't be separated.

Atty. Fenton said that the ZBA says one thing and the PB says something else.

Mr. Prager said that he can't say that the PB doesn't have jurisdiction because the drainage calculations are common to both projects. He noted that the PB has jurisdiction over Mill Run Plaza and the basin is shared by both projects.

Atty. Fenton said that if the PB has jurisdiction, then the Comp. Permit should have said that.

Mr. Prager said that it can't be separated and that Atty. Fenton's arguments would imply that the ZBA has control over the building permits/occupancy permits of Mill Run.

Atty. Fenton said that at this point, that is true and why they are appealing. He said that the PB has conditions to seed and loam Basin #3, which will cost \$16,000 and make the 40B unaffordable.

The Chairman said that he can't have it both ways.

Mr. Prager said that the GRG developer should negotiate with the Mill Run developer to fix the basin.

Mr. Walker said that he received a permit for the project and built Mill Run. He said that he sent more calculations to the town engineer to expand the basin and they were approved by JNEI, noting

that now GRG is in charge of expansion on the basin. He said that it is like building a road and having a new authority accept responsibility for said road.

Mr. Prager noted that both of these projects were built at essentially the same time.

Mr. Walker said that that is not so and that they were built separately and the new calculations were accepted by the town engineer.

Mr. Prager said that the issue is not the review of the design but review of the actual system, which doesn't work.

Mr. Walker said that we are not here to argue whether the system works, but whether the BI can withhold permits.

The Chairman said that the BI is acting because the drainage system doesn't work.

Mr. Walker said that there is no empirical data that the system doesn't work.

The Chairman said that that is not a viable argument.

Atty. Fenton said that we are here because they don't need to use stormwater management guidelines.

The Chairman read parts of the Landtech memo into the record, that the basin was designed to be two feet above groundwater.

Mr. Degan said that it all boils down to the issue that the drainage system was designed to be empty after 72 hours, no matter who the system is designed for. He said that JNEI reviews the information submitted by the applicant and if incorrect information is submitted, JNEI has to review the incorrect information.

Atty. Fenton said that they don't have to comply with State stormwater guidelines and that the two foot separation is policy only.

Mr. Prager noted that that is part of the Comprehensive Permit.

Atty. Fenton said that the two foot separation is not the issue.

Mr. Prager said that he is saying that the ZBA has jurisdiction and he is saying that one condition of the Comp. Perm. is that basin have two feet of separation.

Mr. Walker read the condition and said that it is for the infiltration system #3, which is located

under the parking lot.

Ms. Kneeland said that the Building Inspector said that soil logs weren't submitted in a timely fashion and that they weren't readable. Hydrogeologists have clearly stated that there is not a two foot separation in Basin #3.

Atty. Fenton said that he never opined that Basin #3 doesn't have two feet of separation. He said that there are no requirements, and no policy.

Ms. Kneeland said that even if there are not two feet in the basin system, the ground water is becoming surface water because there is no place for it to go.

Atty. Fenton said that that was never stated anywhere.

Ms. Kneeland said that there is unprecedented historical flooding of the entire neighborhood. She said that she has a letter from Mark McCarthy that six inches of water in the basement when he sold house was a high level and the new owners have nothing less than 24 inches since construction began.

Atty. Fenton said that there are no facts that stated that the ground water becomes surface water. He said that when the basin was pumped the groundwater didn't return because it was surface runoff.

Mr. Prager said that Mr. Beyer clearly stated in a prior meeting that the groundwater and surface water levels are interconnected and change in conjunction with each other.

Atty. Fenton said that Mr. Beyer can't say for fact that ground water and surface water connected.

Mr. Walker said he wants the Board to note that much rain has fallen since October 2005.

Mr. Capes noted that he has lived at 10 Anthony Drive since 2004 and thus can't attest to historical drainage. He said that he does acknowledge that one rear corner has a history of drainage problems and that he witnessed standing water in the corner when snow melted in 2004. He said that he didn't have any other standing water until the basin overflowed after the construction of GRG. He said that it can't be argued that conditions are not worse because he has kept logs and the standing water has been present for over 50 days, as opposed to five days last year. He said that he has done research regarding rain fall totals, and that the cumulative total rainfall between January and June of 2006 has been less than the amount during the same period last year (23.7 inches between January and June of 2006 vs 24 inches during the same period in 2005). He said that he has a month and one half of data and there is a correlation to how the water in the yard moves to how water moves in the basin. He said that he can prove that conditions are worse and can bring anecdotal evidence that they are worse and not caused by rainfall alone. He said that the reality is that even if the

project were built to spec, his yard is less usable and property values are affected.

Mr. Walker said that his property values are being affected also because of irresponsibility on the part of the BI.

Atty. Fenton said that he is not disputing that they will fix the culvert but he wants to get back to why we are here tonight: stormwater applicability and PB jurisdiction. He stressed that the ZBA has exclusive jurisdiction, noting that he will look at the culvert by 10 Anthony Drive.

Anna Eliot noted that a memo sent by the PB to the ZBA on May 17th should be incorporated into the decision.

The Chairman said that this part of the record and will be looked at.

Ms. Eliot said that it is part of creating the record that will be the basis of the decision.

Ms. Kneeland asked where it states that there only needs to be test soil logs done at the infiltration basin vs. the retention basin, and asked how far apart they are.

Mr. Walker said that the two basins are 200 feet apart, and the Comp. Perm. condition states that as well.

Ms. Kneeland said that 200 feet is big distance, particularly going down hill.

Mr. Walker felt that she was arguing that that is the lowest point.

Mr. Degen wanted clarification about who has jurisdiction over Basin #3 from Town Counsel.

Atty. Cutler said that both the PB and ZBA have jurisdiction because Basin #3 was during the first part of the project exclusively part of Mill Run Plaza, until the developer went to the PB to get a modification of the site plan to enlarge the Basin to include GRG. She stressed that there is nothing in the Comprehensive Permit asking for a waiver from PB conditions for Mill Run Site Plan Review. She noted that the ZBA doesn't have the authority to grant waivers for separate commercial projects, and that there is no basis for the ZBA to take the jurisdiction to relieve the developer of previously promulgated conditions. She stressed that Mill Run Plaza needs Basin #3 to function.

Atty. Fenton said that Mill Run Plaza was essentially completed prior to GRG and that Basin #3 was enlarged in relation to the Mill Street relocation.

Ms. Eliot said that that is not true.

Mr. Walker disagreed.

Atty. Fenton said that prior to GRG permits being issued, permits for Mill Run were issued and dealt with.

Ms. Kneeland said that it was her understanding that soil logs were not submitted at the time of building permit issuance, nor were they submitted a year later, and only recently were they submitted after FST did some soil testing.

Mr. Barringer noted that on 10/18/04, the PB approved a modification relating to the enlargement of the Retention Basin #3, for Mill Run Plaza and not for the Mill Street relocation.

Atty. Cutler said that that is even more reason that the PB has jurisdiction.

Mr. Walker and Atty. Fenton both said that that was not true.

Mr. Degen said that Mrs. Collette is getting a copy of the plan to enter into the record, as referenced by Mr. Barringer.

Of note: the Zoning Enforcement Officer was not present.

Mr. Degen said that the developer submitted a plan that was stamped by Mr. Slager at Landtech.

Atty. Cutler felt that there needed to be clarification regarding whether the Basin #3 as shown on the Mill Run plan is the same as submitted on the GRG plan.

Atty. Fenton said that she is trying to throw a gap in.

Atty. Cutler reiterated that all she is asking is whether it is the same Basin as submitted and approved for GRG.

Atty. Cutler noted again that she is trying to get into the record that the Basin #3 as approved by the PB in 2004 is the same Basin #3 that is being discussed today.

The Chairman said that an engineer will need to be consulted.

Mrs. Collette noted that that is the only copy of the plan she has and that she will have the plan reproduced for the ZBA records. She also noted that of the chronology is checked, the Comp. Permit was issued around the same date as the Mill Run site plan was modified, noting that the plan shows Basin #3 and the proposed structures for GRG.

Anna Eliot, PB, asked the ZBA to uphold the BI.

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

The Board moved to continue the matter until July 5 at 8:00 pm and executive session at 7:30 pm. The motion was seconded and passed unanimously.

The meeting adjourned at 9:30 pm.