

ZBA Minutes Meeting of May 27, 2009 – Mattbob

Members Present: Robert Cadle, Chase Duffy, Harris McWade, Alison Manugian, Cynthia Maxwell

Chairman Cadle reconvened the Mattbob/Oakridge modification request hearing.

Atty. Deschenes was representing the applicant, noting that it had been awhile since he has been before the Board. He said that he wants to address a couple of letters that were written by the Chairman and the Assistant about some open issues, noting that the first issue is the pickup of school children and with the removal of the age restriction, there might be more kids. He suggested that because they are two bedroom units there will not be a lot of kids, but the issue still needs addressing and that he met with the school department. He noted that Rt. 119 is busy but the school acknowledges that they need to pick up Groton residents all across town. He then read a letter from the school, noting that as long as the children reside in Groton, they will be picked up. He said that the bus currently drives into Littleton and turns around in Janes Drive but the school has asked for authorization to drive around the Oakridge “lollipop” and pick up children at the crux of the loop so they would not have to wait by Rt. 119. He said that the second issue is the traffic study, adding that it is interesting to note that the original traffic study (which was found acceptable by FST), was in reference to 44-age restricted town houses. He said that the IET doesn’t have or use age restricted information and that this was done for a non-age restricted development. He said that they were being ultra conservative and thus don’t need to do an additional traffic study, because the original study was based on 44 non-age restricted units and thus is a 20% overkill. He said that this was found to be acceptable by the ZBA and its consultant and should stand. He said that issue three is related to increased water uses, noting that he has worked with Mr. Orcott since the beginning of the project. He said that water was available and could be brought to the site, and the ZBA addressed this in the original decision, that all water mains and lines, both on and off site, will be approved by the Water Department. He noted that in the decision, condition #37 is still applicable and that they have to do all the work and pay for it. No changes are asked for in conditions 36 and 37. In addressing issue four, he does not believe that this request would trigger a MEPA or MESA review. He said that his client will do what needs to be done and would agree to an additional condition that all MEPA and MESA

requirements and studies will be satisfied. He said that they did work with Natural Heritage (related to MESA) and they had signed off on the original plan. He noted that now there is a reduced number of units and that he has not seen that a smaller project would trigger a review, but that his client would agree to any necessary modifications or additional filings under the law. He said that MEPA applications are typically not filed until after the permit has been received. He said that MESA is done both ways, and they went to MESA ahead of time. He said that the Board has the right to ask whether they have to file but that he has never seen a Board require filings and doesn't think this is under the ZBA's jurisdiction. He said that the fifth and last issue, which is the most difficult, is relating to the septic system. He noted that they have spent years on this, having received a permit from the ZBA and then been tied up for additional years in litigation due to an abutter. He said that there was a concern that the secondary system was not in the lollipop of the drive and it was conditioned and the system redesigned to fit in the lollipop. He noted that the Board gave only three waivers related to the reserve system and none for the primary system and they have not asked for a change in the peer review of the septic system as conditioned to be done by the Nashoba Boards of Health. He said that the final review will continue to be done by Nashoba. He said that maybe he should have read it earlier, but at the August hearing attended by Mr. Erickson of his office, a letter was submitted to the Board dated 8/14/08, which he read again into the record, about the scope requested of Nitsch Engineering. Discussion ensued regarding the scope of the Nitsch review, including wastewater treatment. He then read a letter from Melissa Robbins to Mr. Maher of Nitsch Engineering and Mr. Maher had issued a letter to the Board dated October 14th, 2008, with no comment on septic design. Atty. Deschenes said that he feels that has already been addressed, though, through mounding tests, etc., and stressed that the only change being asked for is the removal of the 55+ age restriction. He said that finally, he does not think any more peer reviews are necessary and thus putting more money into the 593 account is not necessary. He said, however, that if the Board will tell them what additional reviews are needed and how much they will cost, his client will pay into the 593 account. He said that there is a lot of protection worked into the project through the decision, and in summary, they have worked on this for many years, from 2002 to 2005, and the Board granted a permit. He said that there was then a lengthy appeal and when over, the world was very different because of the economy. He said that 55+ units aren't being built, banks aren't funding the projects, and it is common practice to ask the ZBA to remove this condition. He said that they are asking for a change to make the

project economic, as there is no evidence that 55+ projects are economically feasible.

Chairman Cadle said that it is the burden of the client/applicant to show that this restriction is not economical. He said that he believes in Atty. Deschenes' experience but feels the evidence is only anecdotal.

Atty. Deschenes said that the Board has Mr. Jacob's study

Chairman Cadle said that there is no marketing study. Atty. Deschenes said that he thought this was in Mr. Jacob's report.

Chairman Cadle said that he don't know how involved Atty. Deschenes was in Mr. Jacob's bill issues, but noted that it is difficult to engage Mr. Jacobs in finding out what he did or did not receive without more 593 funding.

Atty. Deschenes noted that there were financial issues but that his clients have been hit very hard by the economy. He said that they feel that they have even paid for engineering reviews that didn't happen.

Chairman Cadle said that they are not talking about the past, but the future and stressed that the Board can't ask any questions of peer reviewers without money in the 593 account.

Atty. Deschenes said that he is asking the Board to rely on the existing Jacobs report and information that Atty. Deschenes presented at an earlier hearing.

Chairman Cadle noted that the Maher report doesn't mentioned septic and he doesn't know what plans he received, and without 593 money the Board can't find out. He said that he does not want to go through financial issues/bills not being paid again.

Atty. Deschenes said that he doesn't understand what is at issue with the septic, noting that nothing has changed about the final review process.

Chairman Cadle said that what has changed is that the application was originally for 44 units and now is at 36. He said that he doesn't think there was a lot of excess capacity in the system, with 36 units and the age

restriction, and now in taking the age restriction away, the system has to have a larger flow.

Atty. Deschenes said that he doesn't understand why Mr. Maher has to do a review when the system is required to meet both Title V and Nashoba Boards of Health approval. He said that the system has to meet those things and that Mr. Maher could say that the plans are feasible, but until he sees the final construction designs that are to be submitted to Nashoba he can't make a full determination. He said that this is a waste of money and stressed that the project is dead in the water if the septic doesn't meet Title V. He said that this is a risk they are willing to take.

Mrs. McEvoy said that she has a copy of the septic plan submitted after the close of the public hearing and it requires waivers for the primary system. She said that this plan shows a 13-foot retaining wall for both the primary and secondary systems. She said that the second issue she is concerned with is that the developer has never filed with Natural Heritage or MEPA.

Atty. Deschenes said that a requirement to file with MEPA hasn't been triggered. He said that they will file if necessary but noted that it is not a requirement that that be done prior to obtaining a permit. He said that they have had discussions with Natural Heritage and MESA and they felt that this was not a trigger. He said that if it is the case that his client needs to file with MESA, he will do whatever is required. He said that if the Board is concerned they can make a condition that evidence is shown of MESA filings. He said that it is not fair to keep reviewing permits that are not under ZBA jurisdiction.

Chris Korwin, former Conservation Commission member, noted that the plans originally filed with the Cons. Comm. didn't show how water would get to the site. She said that the water pipes will have to cross wetland, which will trigger a new review by the Cons. Comm., as well as a MESA review.

Chairman Cadle said that what is at issue here is not the validity of the original comprehensive permit, but issues only related to the modification request.

Mr. Schulman, BOS, said that typically the Board has Mr. Bobrowski present but because there is no money in the 593 account to pay him, he is

absent. He said that Town Counsel is here on the town's dime and wonders when this financial situation is going to be resolved. He said that he doesn't think the town should have to pay for the crafting of a decision.

Chairman Cadle said that he couldn't agree more with that.

Atty. Deschenes said that he wants Mr. Bobrowski to send a draft of what his services would cost and his client will fund the 593 account after reviewing the estimate.

Mr. Degen asked about a market analysis.

Atty. Deschenes said that Mr. Jacobs had done a market study. He said that in order to grant a waiver, the applicant must demonstrate to the Board that keeping the restriction would make the project less uneconomic. He said that the analysis must show both pros and cons in order for the Board to make a decision. He noted that Mr. Jacobs was asked to review the original pro forma and then a revised pro forma showing that the sales figures would be significantly lower. He said that Mr. Jacobs asked for background information as to where they got the revised figures, noting that they provided information that generally supported that the market itself had dropped off. He said that there was an increase in number of units unsold, and the number of unoccupied units rose. He said that even without being a real estate expert, he knew that prices were at all time highs in 2002 and 2003. He said that all real estate has dramatically dropped since then.

Mrs. McEvoy said that she wants to know where this is documented, noting that in Hudson, the ZBA asked a developer to provide a market analysis, which was provided. She said that the town hired a marketing firm under 593 and found that all units aren't selling, not just age restricted condos. She said she would suggest asking for documentation of a marketing analysis and having a further review by Mr. Jacobs.

Atty. Deschenes said that Mr. Jacobs noted in his review that the septic system is more expensive to construct for no age restriction projects. He said that Mr. Jacobs noted that age restricted units were on the market far longer and sold for less money. He then read further from Mr. Jacob's report, noting that he feels it is adequate for the Board's decision.

Chairman Cadle said that he is not worried about Mr. Jacob's expertise, but just wants to know where the information he used came from

Ebrahim Masalehdan noted that he is the biggest abutter to Mr. Field's property. He said that Atty. Deschenes is trying to argue that Mr. Field suffered financial problems, but he said that he most likely lost more than they. He said that he wants to reopen the project, noting that it should have been built six years ago but it was not because the applicants started litigation. He then asked about the water situation.

Chairman Cadle said that the permit has already been granted and that cannot be taken away. He said that the Board is just dealing with the modification request.

Mr. Field asked about the memo from Mr. Orcott of the Water Department.

Chairman Cadle read the memo from Mr. Orcott into the record.

Mr. Degen said that he thinks Mr. Jacob's review should be disallowed because there was no formal vote by the board to hire him and the developer was forcing a speedy review of the pro forma.

Mrs. McEvoy asked to put into the record that she would like the Board to require a full septic review and landscaping plan review, and then submitted a letter into the record.

Mr. Schulman asked how the septic system could accommodate more usage when the original plan was barely adequate.

Atty. Deschenes read the BOH memo into the record, acknowledging that the septic design will change but all Title V requirements need to be met. He said that he feels this has already been covered.

Mr. Schulman said that his comment is not asking them to do a review now, but he recollected that they had to chop units off to make the septic system work. He said that he wonders how it will work, and that it seems like magic.

Atty. Deschenes reiterated that Title V requirements need to be met.

Mrs. McEvoy said that so many conditions have been left to the post permitting process. She said that the new septic plan has so many waivers that it doesn't match the original permit.

Chairman Cadle said that she is holding up something that is like water, that the plan will change.

Mrs. McEvoy said that she wants to see a final plan now.

The Board noted that the system has to comply with Title V.

Mrs. McEvoy said that other towns don't allow so many post permitting conditions. She said that the developer just wants to make the permit as easy as possible and sell it, that that is the game and they are doing it very well.

Chairman Cadle asked her to stop.

Mrs. Sartini asked about the difference between a marketing analysis and the requested pro forma review, and whether the board will ask for an independent analysis.

Chairman Cadle said that he is leaning in that direction, for an independent market analysis.

Mrs. McEvoy said that the Board can't pay for an independent analysis under 593. She said that the developer has to supply the information and then the Board gets a peer review.

Atty. Deschenes said that Mr. Jacobs relies on his experience and expertise, as well as on the market data available. He said that part of that analysis is a market comparison of market costs, sales figures, etc., and part of that is to determine whether they have over estimated or underestimated market prices. He said that earlier reports go through this too and that Mr. Jacobs had to do same thing with an amended pro forma. He said that Mr. Jacobs used the same process that he has always used, noting that a pro forma review provides a market analysis. He said that Mr. Jacobs had some questions about carrying costs and prices and they went onto the MLS and shipped the information to Mr. Jacobs. He said that market prices, etc., are all figured in and is never a separate process.

Mr. Schulman noted that Mr. Degen has brought up procedural issues and Atty. Deschenes has rebutted. He said that it would be very helpful if Mr. Jacobs were here as this is ultimately the only way to resolve because there are two different points of view.

Atty. Deschenes said that his client thinks the Board has all the peer review that it needs and Mr. Jacobs' report stands as is. He said that they will fund the 593 for Mr. Bobrowski.

Town Counsel said that it is reasonable to request that Mr. Jacobs be available to answer questions about the data that he used to make his report. He said that the Board should also question what Nitsch Engineering did related to a septic review, which may be clarified by a letter of explanation from Mr. Maher. He said that he recommends that the Board inquire what was done by Nitsch.

Atty. Deschenes suggested that the Board could formulate questions to ask of Mr. Jacobs regarding how he obtained his data, etc., but that he wants an estimate from him of cost for time. He said that his client will pre-fund the account. He said that he does not see a need for a long drawn out process and Mr. Jacob's attendance at a hearing. He said that he, also, would like to get questions from Mr. Maher answered.

Mrs. Duffy noted that this is an entirely new board except for herself, from the original permit. She said that her feeling is that it would be a worthwhile investment to let the Board get Mr. Jacobs here to explain his pro forma review.

Atty. Deschenes said that he wants a cost estimate from Mr. Jacobs about that.

Mr. Masalehdan said that it would be a wise idea for the Board to get an independent study.

Chairman Cadle said that that is what has been discussed.

Atty. Deschenes said that the process is done by the developer supplying the information to the Board's consultant, that that is how peer review is done. He said that Mr. Jacobs wanted supporting data as to how they came up with the numbers they had.

Mrs. McEvoy noted that Mr. Jacobs said he couldn't do the review without architectural plans.

Atty. Deschenes said that he submitted them.

Mrs. McEvoy said that this should have been done through the ZBA.

Atty. Deschenes said that Mrs. McEvoy is holding them to a higher standard.

Mrs. Duffy said that she wants to hear what Mr. Jacobs has to say and to be able to review the data he used. She said that she wants to be able to check on septic size, etc. and have verification that the removal of the age restriction can be handled by the system. She said that she is concerned about more children in the school system and the ability of the school bus to turn around in the driveway.

Anna Eliot, BOS, said that she wants to know if the school was provided with a topographical map so that they are aware of how steep the road is going to be.

Atty. Deschenes said that he doesn't know if the school has gotten a topographical map but knows the road doesn't have any dramatic slopes. He said that it is at 4% or less, which is not steep.

Ms. McWade said that she needs clarification from Mr. Jacobs, and that some clarification regarding the septic system would be helpful as well. She said that the bus pickup solution is good.

Mrs. Maxwell said that she agreed with the rest of the Board, that Mr. Jacob's report is at the crux and that he should be present.

Mrs. Manugian said that she would like to go over the pro form with Mr. Jacobs here and also asked whether the ground water mounding calculations be changed by any changes to the septic system with the age restriction removal.

Atty. Deschenes said that it is his understanding that the original ground water mounding was based on the 44 unit project and that he would have to

ask the engineer if the 20% reduction in project size would offset those calculations.

Chairman Cadle said that he thought the septic was designed for 36 units.

Atty. Deschenes suggested having the engineer and septic designer here.

Mr. Schulman said that he thought the septic wouldn't fit with 44 units.

Mr. Field said that the project is 36 units because that is what the Board negotiated.

Mrs. Manugian asked whether the traffic report author had analyzed the roadway conditions when considering a school bus turn around.

Atty. Deschenes said that they had to meet a safe turning radius with a ladder truck for the fire department and that is much bigger than a school bus, but noted that he will get that answer.

Of note: contact Mr. Bobrowski, Mr. Jacobs and Mr. Maher for cost estimates and available dates.

Mrs. Sartini asked about Ms. Korwin's suggestion that the water installation might need additional Cons. Comm./MESA review.

Chairman Cadle read a memo from the Cons. Comm. into the record.

Atty. Doneski suggested a set time for submission of questions to Mr. Jacobs.

Mrs. Manugian asked how the list of questions for Mr. Jacobs should be collected.

Atty. Doneski said that the Board should send the list to the chairman and also provide the list to the applicant.

Chairman Cadle said that he wants time to get things together.

Atty. Deschenes asked for a June 10th hearing date and if Mr. Jacobs can't make it, or Mr. Bobrowski, the board can decide on the 10th when the next hearing will be.

The Board moved to continue the hearing to 6/10/09 at 8 pm. The motion was seconded and passed unanimously.

The meeting adjourned at 9:45 pm.