ZBA Minutes Meeting of July 8, 2009 – Mattbob

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

Members Present for the Reorganizational Meeting only: Mark Mulligan, Jay Prager, Megan Mahony

Bruce Easom was present as interested potential Board Member.

Also present: Mark Bobrowski, Michael Jacobs, Douglas Deschenes, Chris Lorraine and Matt Field.

Chairman Cadle convened the meeting for the purpose of reorganizing. Mr. Prager nominated Mr. Cadle as chairman and Mrs. Maxwell nominated Mr. Prager for clerk. Mr. Cadle was re-elected Chairman unanimously. Mr. Prager was re-elected Clerk unanimously.

Chairman Cadle reconvened the Oakridge hearing and explained the procedure relating directly to the modification request.

Atty. Deschenes noted that traffic has already been addressed because the study was done for 44 non-age restricted units and there are now 36 units. He said that there has been discussion regarding picking up school kids and a letter was submitted from the school that they want to pick kids up on-site rather than from Rt. 119. He said that regarding water, Mr. Orcott wants a size study to determine the size of pipe required, at the applicant's expense, but said that water is available. He said that regarding environmental impact, the change won't create any additional disturbance, noting that his clients have a valid order of conditions that has been extended. He said that the physical development hasn't changed, just the age of the residents would change. Mr. Maher has addressed that the septic won't impact the vernal pool in a letter. Atty. Deschenes said that economics around the project are the big issue, noting that it is a stagnant market and units aren't selling. He said that it is common to change the age restriction and banks aren't willing to finance age-restricted projects. He noted that if the project is built with the age restriction, there is a question whether units can sell. He said that it is truly economic in nature, and much better if the age restriction is lifted. He noted that Mr. Jacobs was here before but a lot of time has passed and the Board has additional questions regarding economics. He said that they

are secondarily, and reluctantly, here to discuss the septic system, noting that his client will be able to build the system within the confines of the original permit. He said that a revised plan has been sent over the course of the modification request, noting that the same information was on the revised plan as on the one originally submitted, showing the system location, grading, etc. Atty. Deschenes said that his client did this because he felt the project would continue to comply with the order of conditions. He stressed that the final system design will be reviewed and must be approved by Nashoba Boards of Health. He noted that nonetheless, the Board wanted Nitsch Engineering to opine, and there was some wrangling back and forth whether a total system design needs to occur at this time. He said that his client's position is that that is too costly at this point, noting that Mr. Lorraine presented additional information to Mr. Maher and that Mr. Maher opined that the system would comply with BOH regulations and will meet the conditions outlined in the original decision. He said that he is now deferring to both Mr. Jacob's and Mr. Maher's letters.

Mrs. Manugian said that there appears to be differing views on what is required regarding the scope of septic review at this point. She said that the Board has never asked for a full design, noting that the original application had basic calculations. The Board has asked several times for updated basic calculations because there would be a 50% increase in flow with the removal of the age restriction. She said that once the additional flow is added, there could be impacts to mounding, location, etc., but she feels that this has taken on a life of it's own and it should not be such a huge issue. She said that in the absence of that information, the Board would accept a peer review by Nitsch Engineering.

Atty. Deschenes said that this has been done, albeit at the last minute. He said that when the updated plan was submitted last year, it depicted the basic locations of the primary and secondary system, and it could be deduced from those plans that there is no real change to the septic location. He apologized that the data was not submitted fast enough, but when they went to Nitsch for a review that cost 3000 dollars last year, it was believed that this included a septic review. Mr. Maher said that he couldn't do a septic review without the final plan and Atty. Deschenes said that he thinks this is how a tugging match began that somehow got away from the requirement that they only provide "back of the envelope" calculations at this point in the process.

Mr. Lorraine, Landtech, said that Mr. Maher thought they were going to do a full septic review, but Mr. Maher has received what he needed for supporting calculations to answer the questions posed by the Board.

Mrs. Manugian asked whether the September plans showed with the septic design with the age restriction removed.

Mr. Bobrowski said that they did the original mounding calculation and asked why the developer could not submit mounding calculations for the age restriction removal.

Mr. Lorraine said that they submitted mounding calculations for 220 gallons per day for 44 units and the project is now 220/day for 36 units.

Chairman Cadle submitted the Maher letter dated 7/8/09 into the record, noting that it is too long to read but important to have in the record.

Chairman Cadle noted that Ms. Eliot, BOS, had asked about the driveway slope and whether the steepness could affect bus access and the ability of a bus to go around the driveway loop.

Mr. Lorraine said he doesn't recall the slopes off hand but thinks that they are somewhere around 7%.

Atty. Deschenes said that they did not have to ask for waivers for road construction.

Mrs. Manugian said that she recalled the Board requesting a letter from the school engineer regarding the ability of a bus to navigate the drive.

Mr. Lorraine said that the maximum slope is just over 7% and well within the requirements for town road so it should be fine for a school bus. He said that if a ladder truck can navigate it, then a school bus should be fine.

Mrs. Duffy asked how wide the pavement is, parking vs. passing area.

Mr. Lorraine said that it is a 24-foot minimum pavement.

Mrs. Duffy asked whether a school bus could get around if cars were parked at the side of the road.

Mr. Lorraine said that a bus should get around, but because it is a private road there shouldn't be a lot of traffic and/or parking. He said that 24 feet is a typical road width for a new subdivision.

Mr. Easom asked about the letter from the school.

Atty. Deschenes said that it is dated November 2008 and read the letter into the record.

Further discussion ensued regarding how to ensure that permisstion for the school bus turn around will not be rescinded in the future.

Mr. Easom asked what happens if the school committee determines that a bus can't be turned around in the subdivision.

Atty. Bobrowski said that if the school committee determines that, than it needs to be revisited by the ZBA.

Mr. Easom said that if the school decides that a bus shelter is needed, there may be a need for additional waivers due to the proximity to wetlands.

Chairman Cadle said that that is a good question but can't be answered now.

Mrs. Manugian said that the Board does not have anything from any engineer for the school stating that the road is navitigable by a bus.

Atty. Deschenes said that it is a standard road size which the town follows in all subdivisions. He said that the PB uses these standards. Mrs. Manugian asked whether the PB would be involved.

Atty. Bobrowski said that if the Board goes toward approval, the building permit could be withheld until it was shown that a school bus, or any other safety vehicle, could turn around in the loop. He said that there is no PB involvement at this point.

Mr. Easom said that they created the obligation that a bus must turn around in the subdivision so they may need to address the bus shelter issue later.

Mrs. Duffy said that it is safer to have kids picked up away from Rt. 119.

Discussion ensued regarding how to ensure to keep kids safe if the school decides not to use the site to turn around.

Atty. Bobrowski said that any changes have to come back to the ZBA.

Mr. Lorraine said that any bus shelter would be a minimum of 50 feet away from the wetlands.

Discussion ensued regarding the date of the plan submitted, 9/15/09.

Chairman Cadle said that in a worse case scenario, there would be no bus turn around in the loop, and no bus shelter due to wetlands.

Atty. Bobrowski asked whether it would be a state or local bylaw that might need a waiver. Mr. Easom said that it would be a local. Atty. Bobrowski said that the Board has the option to determine whether a local waiver can be granted and there is no time limit, such that a change 20 years later would require ZBA action.

Mr. Easom said that he is hearing that if the Board grants this modification, another waiver may be necessary.

Atty. Deschenes said that this is going down another avenue, reiterating that the road is being built to town standards. He said that in saying that if the school decides to go to a less safe situation, they may have to build a bus shelter, which may need to intrude on the100 foot setback from wetlands. He said that they may need to intrude by five to ten feet, but the shelter may be able to be built outside of any wetlands buffer. He said that there may be space on the opposite side of the driveway to build a shelter outside of the 100 foot buffer. He said that this all falls into the realm of may and if all the mays fall into place, they still have to see the ZBA.

Atty. Bobrowski said that it is good to have a contingency plugged in and Mr. Easom reminded the lawyers that they need to have such in place.

Ms. McWade noted that in the letter from the BOS, many of the original forces behind the grant of original permit were related to the age restriction. She said that the vernal pool needs some mitigation around the play area for kids.

Atty. Deschenes said that if this goes to a non-age restrictive project, one could ask whether the additional possible kids could have a negative impact on the vernal pool. He said that there may be a few additional kids on site to collect turtles, etc. and asked how this would be weighed against grandchildren visiting grandparents and wandering off. He said that they would be willing to have a clause that addresses the sensitive area and care with kids, which could be in the sales literature, and condominium documents, as well as posted signs regarding the wetlands. He said that reasonable measures can be taken.

Ms. McWade said that because of the sensitive nature of the area, this is a good idea to address.

Chairman Cadle asked about adding a play area.

Atty. Deschenes said that his only hesitation with that is the possible disturbing of new areas, which could impact the argument that they are not disturbing additional wetlands.

Ms. McWade asked about a play area in the loop.

Atty. Deschenes said that there are a couple of options, the first being on the primary septic system, which is a flat, grassy, open fielded area that is maintained and cut. He said that it is substantial in size and noted that soccer fields are built over septic systems in Westford. He said that the second option would be on the secondary system, but they were planning to leave trees there. He said that they could cut some of those trees early and provide an area. He said that both sites would be outside of the wetlands.

Chairman Cadle asked about the size of the flat grassy area over the primary system.

Atty. Bobrowski said that it sounds like there is a suitable play area available, noting that it is better to have a suitable area in the final plans to be approved by the Board. He said that 36 two-bedroom units are more likely to have to focus on tot lots rather than fields.

Atty. Deschenes said that they could easily have a space for a tot lot, noting that his client is willing to commit to having a suitable place for children to play, for the board to review. He said that this is good for unit showing.

Chairman Cadle asked for the financial review.

Mr. Jacobs, financial reviewer, noted that this is a unique project, with this being the fourth report, the first being five years ago. He said that he was asked to do his review with no updated pro forma provided by the developer, providing difficulty because the numbers should have changed over time. He said that what he has tried to do is to take the applicant's base pro forma and comment on individual line items and make an adjusted pro forma. He said that the Board is asking what the differences are in removing the age restriction, and he used the last pro forma as a base and made adjustments as to what should be the difference between having an age restriction and not. He noted that one area removed is septic, which has been addressed for 44 units at 220 gals/day and the project is smaller at 36 units at 220 gals/day. He said that he looked at the difference between the cost of age restricted vs. non-age restricted and got data from a multiple listing service, comparing the sales data of age vs. non age restricted projects. He said that he used median and average prices and looked at five different communities, noting that not many age restricted sales are happening. He said that there is a big difference in the numbers, and described how he used the figures. He said that he did not have enough data but used the same analysis for both age and non-age restricted projects, noting that he could not conclude with any reasonable confidence that a premium can be attached for the age restricted units. He said that at first, the applicant said there was a 60,000 dollar premium, and now there is no premium. Mr. Jacobs noted that what is more relevant is how long units are on the market, which is 159 vs. 172 days, noting that actual sales were 229 days on the market for unrestricted and over one year for age restricted. He said that he used a small sample but it tells something about what is going on in the market, noting that the market analysis took the market absorption rate for a non-age restricted at one unit per month and age restricted at one unit every other month. He noted that because it takes twice as long to sell an age-restricted unit there is an impact on construction costs, interest, taxes, etc, adding that there is a 12% profit on age restricted and 16.5% on non-age restricted projects and the threshold for 40B is a 15% standard. He said that given the roughness of the numbers, the Board should focus on the differential rather that actual numbers. He said

that age restriction is less economic than non-age restriction due to market absorption, and particularly due to constructions costs.

Atty. Bobrowski asked whether there were any differences between towns.

Mr. Jacobs said that Ayer, Westford, Tyngsboro, Littleton and Groton were the towns he used.

Atty. Bobrowski asked whether Ayer had different absorption rates than Westford.

Discussion ensued regarding the different towns and how long it took units to sell. Of note, price had an impact.

Mr. Jacobs said that he was not sure that Mattbob's original market prices would actually be achieved but he used those in his calculations, noting that another question was on land value. He then asked whether Mattbob had had an appraisal.

Mr. Field said that the Town of Groton has two appraisals and that he did not know what the figures are.

Mr. Easom said that he can speak to that, noting that the first appraisal came in at about one million dollars. He said that whether it was based on a 40B or four large premium lots, that it didn't matter.

Mr. Jacobs said that the original appraisal was done for a letter of eligibility, noting that a new appraisal will need to be done for the final review.

Atty. Deschenes said that he thinks the data is reflective of what is out there, adding that there is not a lot out there because not a lot is being built due to fear of not selling. He noted that one of the comps is in Westford and the 55+ age restricted units not selling. He said that the ZBA was asked to remove the restriction to keep the project afloat, and the ZBA did. He said that because units are not selling, the costs need to be lowered due to the expense of carrying projects.

Chairman Cadle said that that may well be true but not it is only anecdotal to say so. He suggested that the Board may need a market analysis to make this determination.

Atty. Deschenes said that when Mattbob first applied, Mr. Jacobs did a lot of analyzing of data. He noted that the process was done, and the report was provided in November of 2008. He said that there are some outstanding questions but it was not until some months later that the data was questioned. He said that he realized that the process was not done smoothly, but it was done, noting that this is a secondary review meant to focus on the market situation and conditions. He said that he thinks Mr. Jacobs has accomplished this and the current condition of the market is such that there are additional costs leading to the conclusion that a 55+ restriction is uneconomic. He said he thinks that the Board has everything it needs and should close the public hearing.

Mr. Jacobs said that he never got anything from the client in writing, that all information was related verbally and there was a lack of cooperation from the client. He said that part of his cost was in trying to get information, noting that he couldn't do a full blown market study based on the limited information provided by the applicant, but is providing market comparables based on that limited information.. He said that it would have been helpful to have been able to give a peer review detailed explanation as opposed to having to create a pro forma for the Board.

Chairman Cadle asked whether Mr. Jacobs worked on same pro forma as originally worked on.

Mr. Jacobs said that in November 2008 he was using the original pro forma with adjustments on his part. He said that the most meaningful thing would be to focus on the difference between the two, given how shaky the data he had to use was, noting that the fundamental question for the Board is what does an age restriction do to the project. He said that he had to focus on absorption and carrying cost, noting that the analysis does have meaning and would stand by the statement that a senior project is less economic.

Atty. Bobrowski said that it is not a question of whether the age restriction is less economic, but rather uneconomic.

Mr. Jacobs said that he adjusted costs but without having detailed plans and he wasn't provided with proposed loan sizes, etc., noting that this is not how he likes doing business.

Mr. Easom said that he is trying to tease out a statistical difference/significance, which is difficult to quantify. He said that he would have done two statistical analyses, because it is not good to make a judgment with just using "noise" for data.

Atty. Bobrowski said that Mr. Easom is correct, but that it is not Mr. Jacobs' job to provide, but the developer. He said that it is Mr. Jacobs' job to review what he is given.

Mr. Jacobs said that he thought he made it clear to the Board that this is a small, but good, data sample. He said that he thinks the data is here and has looked at broader issues for other projects, noting that this situation is not unique to Groton, but is statewide. He said this project is not need driven.

Mr. Schulman said that Atty. Bobrowski was careful on how to word uneconomic vs. less economic and asked about the consequence if both age and non-age restricted were found to be uneconomic.

Atty. Bobrowski noted that he and Mr. Jacobs did the lead case in Cohasset.

Mr. Schulman noted that there is another 40B in town and most of market rate units have not sold and the project is not age restricted.

Atty. Bobrowski said that the standard is whether this project is uneconomic and the burden of proof is not on the Board.

Mr. Schulman said that if units aren't selling no matter what, it doesn't matter if the project is age restricted.

Mr. Jacobs said that he is not doing a full blown market study but he still can't compare Groton Gardens to this project because it is of a different quality and price range.

Mrs. Manugian questioned whether Mr. Jacobs has been given the data to make the figures work and thinks it is not a fair position to put Mr. Jacobs in.

Atty. Bobrowski said that it is not fair to the Board either.

Atty. Deschenes said that he takes exception to that statement. He said that Mr. Jacobs has identified some additional information, but he doesn't agree with the statement that Mr. Jacobs was never given the information to do the job. He said he had a letter from the office that the information was submitted and that is not fair to say that they never provided Mr. Jacobs with the information. He stressed that just because only five units were for sale, it is not his clients' fault.

Mr. Jacobs said that he should have been provided with an updated pro forma, and because he was not, he had to create an absorption schedule when he should have been reviewing two pro formas and an absorption schedule provided by Mattbob.

Atty. Deschenes said that his client provided a modified pro forma which is the basis for the statement that the project is uneconomic, noting that the cost of units is not a wild assumption. He said that age restricted units are not selling and that he doesn't want to debate what information has or has not been provided. He said that it is not fair for the Board to think Mr. Jacobs didn't have any information/data, noting that he is comfortable with using the absorption rate and carrying costs. He said that the Board can't ignore the fact that no banks are lending money, there is no building, and most of the 55+ 40Bs are either not being built or the developer is asking for the age restriction to be removed.

Mrs. Duffy noted that other 40B projects are not being built either.

Mr. Jacobs said that for sale projects are not getting loans.

Mrs. Duffy questioned why this project should be built when the Town has a glut of unsold units.

Mr. Jacobs noted that Mass Housing has been out of business for over a year, noting that it is not just age restricted projects receiving no loans. He said that most 40's are just for sale projects and a lot of for sale 40Bs are not being built and that that is real. He said that an age restricted project is less economic.

Atty. Deschenes questioned whether the State is even approving age restricted projects.

Atty. Bobrowski said that there are no approvals for for sale projects, but just for rentals.

Mrs. Duffy asked what were the redeeming qualities of the original age restricted permit.

Chairman Cadle suggested a break and suggested that the Board consider whether the public hearing should be closed.

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

Atty. Bobrowski said that the Board had 40 days to craft decision, noting that it is possible to come back if the Board is not ready to make a decision whether an approval or denial should be drafted. He said that it should be a short meeting and he will put everything "under the kitchen sink" in the draft, noting that the Board needs to give him a gut yes or no.

Of note: the next meeting is on 7/22/09 at 6:30 pm.

Chairman Cadle said that the big issue is finances.

Mrs. Duffy said that there does not seem to be an appreciable difference but with so few statistics there is a lack of information.

Mrs. Manugian said that the Board is weighing the more uneconomic with age restriction vs. not enough information.

Discussion ensued regarding whether the lack of information is crucial to making this decision.

Chairman Cadle thinks the developer has proved the economics and thus suggested that the Board should move to address local concerns.

Mrs. Manugian expressed concern as to whether the information provided was sufficient.

Mrs. Maxwell said that her instinct says that an age-restriction would be less economic but wondered whether that should that be basis the Board used.

Mrs. Manugian noted that Mr. Jacob's first report was eight months ago with questions and the need for more information. She said that she has not decided whether that matters in the over all decision.

Atty. Bobrowski said that the standard is not whether they can make more money, but rather whether they can make a reasonable profit under the EOCD guidelines of 15%. He said that policy is policy and that if the case was taken to the HAC, the developer would win if the profit is under the 15% guideline.

Discussion ensued regarding whether the Board has enough information to make a decision, with Atty. Bobrowski commenting that they do.

Chairman Cadle suggested that the Board should not put too much weight on actual numbers.

Mrs. Manugian said that she is not sure she is comfortable using holding numbers only to make a decision.

Atty. Bobrowski said that small numbers in the pro forma aren't going to move the direction of it a lot, noting that it is the same architectural plan whether age restricted or not.

Discussion ensued regarding size of the budget and what figures actually affect it.

Atty. Bobrowski said that there is a difference between a 2003 build out and a 2009 build out. He said that the 2003 costs are old news, because it is a new world out there and the figures would be different. He said that the legal standard to use is whether the age restriction is uneconomic, noting that if both are uneconomic, then is the age restriction more uneconomic.

Chairman Cadle noted that the BOS raised the issue of a need for age restricted housing and that was what was sold in the beginning. He said that he doesn't know if there is still a need for that type of housing but thinks the demographics are independent of that. He asked whether this should be considered.

Atty. Bobrowski said that if the Board denied the modification request and has to defend it at HAC, then it would be an issue, but it is not here and would not be if the request is granted.

Discussion ensued regarding layout and whether there is a bedroom on the first floor and thus appropriate for a senior citizen.

Atty. Bobrowski said that the Board could also consider whether the applicant made promises that were intended to be removed, although he said that he doesn't think that that is what happened here. He said that the Board can make covenants that run with the land and can't be removed by the HAC.

Mrs. Duffy said that she thinks the only difference between non-age and age restricted is time on the market.

Chairman Cadle said he thinks the board should table discussions for the evening and think about how it wants to decide the request for modification.

The Board moved to continue the hearing to 7/22/09 at 6:30 pm. The motion was seconded and passed unanimously.

Mr. Bruce Easom noted his interest in being on the ZBA .

Discussion ensued regarding any potential conflict due his membership on the Conservation Commission.

Mrs. Manugian said that she thinks Mr. Easom would be an asset to the ZBA.

The Board moved to issue a statement to the BOS recommending the appointment of Bruce Easom to the ZBA. The motion was seconded and passed unanimously.

Of note, send Mr. Easom links to the Groton By-laws and codes at beasom@concentric.net.

The Board moved to approve 5/6/09 minutes. The motion was seconded and passed unanimously. The Board moved to amend to approve the minutes

with minor typographical changes. The motion was seconded and approved unanimously.

The Board moved to approve 5/27/09 minutes with minor typographical changes. The motion was seconded and passed unanimously.

The Board moved to adjourn the meeting at 10:25 pm. The motion was seconded and passed unanimously.