

ZONING BOARD OF APPEALS SPECIAL MEETING

Monday, Dec. 3, 2015 at 7:00 PM @ City Hall Auditorium

62 Friend Street, Amesbury

Present: Donna Collins, David Haraske, Bill Lavoie, Matt Sherrill, Bob Orem, Matt Vincent.

Absent: Sharon McDermot

Also Present: Denis Nadeau, Building inspector and ZBA Compliance Officer; Paul Bibaud, Recording Secretary.

Minutes: Oct. 22, 2015: Not addressed tonight.

ADMINISTRATIVE : NONE.

PUBLIC HEARINGS:

24 POND VIEW. 0 SUMMIT AVENUE, VILLAGE AT BAILEYS POND.

APPEAL TO ZBA from decision of Building Compliance / Zoning Enforcement Officer dated Sept. 3, 2015. (Fafard Real Estate and Development Group)

John Goldrosen, City Counsel, firm of Kopelman and Paige: The Village At Baileys Pond received a site plan approval, with conditions, from the Planning Board, back in Nov. of 2013. The applicant objected to a number of those conditions, and felt that they couldn't construct the project as they wanted with those conditions. So they sought to appeal it. Now, when we are talking about a special permit or a variance decision, the state zoning act lays out in detail how one goes about appealing that decision, as far as which court you go to, how many days you have to do it, how you file a com-plaint, who you send it to, etc. But in the case of site plan decisions, there is nothing in the state's zoning act that explains what you do and first of all, whether you go to court from that Planning Board decision or whether you do something else. So the applicant appealed to the land court, as they would have as a special permit or variance decision. Ultimately, the land court decided, based on a number of cases which have kind of gone both ways in this, that it was premature to go directly to court from the Planning Board decision. The procedure to follow was to apply for a building permit, apply to the building inspector for that, and if that building permit was turned down, then to appeal to the ZBA just as somebody else who applies for a building permit and gets turned down, appeals to the ZBA. That is why they are here before you. They went through that process,, building inspector denied the application for a building permit in September and they filed the appeal with you. This is a little unusual because in those cases where you've had an appeal from the building inspector's decision, and you're doing that tonight, but indirectly, you are looking at the Planning Board decision, by the nature of the appeal. Now, if you overturn the building inspector's decision, you tell him to issue the building permit for the project that was before the Planning Board in 2013, then that's what happens. If you deny the appeal and uphold the building inspector's decision, then they have the right to appeal that decision to court, just as a decision on a variance or special permit would be handled. Separately, while all this has been going on through the court, the applicant did develop a new revised proposal and they submitted that to Planning Board for a new site plan approval and an initial hearing was held last Monday, Nov. 23, and was continued to Jan. to have a consulting engineer take a look at the plans, etc. on that different plan. But that is a separate process. But before you tonight is the original proposal and what is has gone through along the

way. That's all I have to say, other than to note that as an appeal from the building inspector's decision, you have 100 days to act from the date that the appeal was filed, unless the applicant would agree to an extension of that time. I think that comes out to sometime in January 13 or so, give or take a day. So we might have to deal with that at the end of the night. I understand there was an article in the newspaper about this yesterday. I have not seen the article, but I understand some of the details may have been incorrect, so I'm just trying to set the record straight here.

Matt Sherrill: I'd like to call Mr. Roelofs to the podium next, but just before that, I would like to remind you that we are here for one reason, and that is because you are appealing a decision that the building inspector made regarding giving you a building permit. So if we can keep the focus to that, and not to new plans and stuff that we have no jurisdiction over, things like conditions that were set in the plan by the Planning Board, and I know there are probably people here that maybe want to get a history lesson, but I'm not interested in one. So if you could just stick to the facts, I'd be very grateful.

Jeff Roelofs, attorney for the applicant, Fafard: I respect and appreciate that. To clear up the procedural point you made about whether you have jurisdiction over the Planning Board decision and the conditions that we're challenging.

Matt Sherrill: I understand that. But I also understand that if we acted against those, then we are basically thumbing our nose at their decision and saying "well you guys don't know what you're talking about, and we do." I certainly don't feel comfortable with that, but I will listen to what you have to say.

Matt Roelofs: Some boards do and some boards don't. I do need to go into history, and I'm not doing it just to take the opportunity just to lay it out. But I do think the history parts of it that I will cover are relevant to the conditions. One of the standards here is if the conditions imposed are reasonable. They are also relevant to the second issue before you, which is an issue about which zoning bylaw applies to the project. One part of that analysis is an equitable consideration, so given the history, whether or not it should be subjected to the new bylaw or the one that was frozen in 2005. I'll get into that. Topics were hit on by John, so that will be quick. The ZBA Appeal materials, these are the materials that were submitted to you. We'll go through the factual background. Planning Board site plan review authority, an issue I cover in my letter by I want to cover it again tonight. The zoning freeze issue, which is the second of the two cores of this appeal, the Planning Board decision itself and our objections, which are also outlined in the package, then the ZBA process. So first, getting to procedural posture, John Goldrosen has already explained why we are here and the issues that are before the ZBA. But the two issues that are before the board. The two issues are primarily reviewing the conditions within the site plan approval decision that we're challenging, and you need to decide whether or not you're going to affirm those decisions or strike or modify them, and then the zoning freeze issues. The issue is not before the board. I put it on here because the newspaper article did suggest that we were going to be talking tonight about the revised project that is currently before Planning Board. It is not a subject of tonight's hearing. This plan is the one that is subject to this hearing. This is the old plan. If you look at the plan sheets in your package, it is dated 2012. It is the subject of the Planning Boards 2013 decision. The ZBA materials that we've submitted are thick, and consist of a letter from me, which provides an overview and addresses a lot of the legal issues; attached to that cover letter is the appeal application form itself, the building inspector's decision, where he articulates the basis for his decision, and the abutter's information. Also included in the package were a full set of site plans for the project at issue here, the 2012 project. I included a copy of my letter to the building inspector, very similar to the one I wrote to this

board. Then there is a bound set of exhibits that you have, Exhibits 1 through 17. That is a lot of the important background information. Quickly running through this, partly so the public knows these documents are here, also, and obviously they are available for their review. Going through that, we've got the building permit application submitted to the building department, the letter of authorization from the mayor, authorizing Fafard to apply for whatever permits were necessary for his project, an area locust, an overall version of the site plan at issue, there is a one page zoning overview that I included there that I wrote, there is a project narrative and a procedural history, both of which were written by Sean Malone of Oak Consulting Group, who is with me here tonight, and then Exhibit 7 includes a lot of the background documents from the Planning Board process. By no means is it a complete set of the administrative record before the Planning Board, but it is a lot of the documents that I think were core to the issues here. So there are letters from our engineer, peer review letters from the consultants to the Planning Board are also included there. Exhibit 8 is the Planning Board's 2013 site plan decision, the one at issue here tonight. Exhibit 9 is our amended complaint which was filed in land court, Exhibit 10 is an 11 by 17 colored table that I prepared. What that table does is that it identifies each of the conditions in the Planning Board decision that we're objecting to, and it provides the contents of that condition and a short summary response as to why we think it is beyond the board's authority. Exhibit 11 is the docket entry from the land court. What the land court did, as attorney Goldrosen mentioned, was the court sent the site plan approval part of that case back to the town, to go to the building inspector and then to here, and what it retained is the zoning freeze issue. So the issue before you tonight is also still an active issue with the land court. We included in Exhibit 12 a MaDOT Access Permit that was secured after the Planning Board issued its decision. MaDOT has approved this project, and we have since extended that permit, so it is valid through some date I believe in next August. I included a copy of a Lowes Home Center land court decision. There are a lot of decisions cited in my cover letter, but I wanted to include this one because, in my mind, it provides a nice overview of what this board could do if it decided to conduct a real evaluation and scrutinize the different conditions in the Planning Board decision. What the land court did there, the ZBA there had initially reversed a lot of the Planning Board conditions. Then it went to the land court, who struck down annulled several more while affirming others. It did a condition by condition review of the site plan decision at issue there. Exhibit 14 is a statutory provision which is the basis for the zoning freeze issues. Exhibit 15 is excerpts from the city 2004 master plan. Exhibit 16 is a certificate of the town clerk, which certified the subdivision approval filed in 2005 had been constructively approved and had become final, because nobody appealed it. That is what prompted the zoning freeze. Exhibit 17 is a copy of the 2010 amended P+S agreement between Fafard and the city. These are all relevant background documents that the board now has. They are public documents that anyone can come in and review. I included an entire copy of the 2005 zoning bylaw. It varies a little bit from the current bylaw with respect to the site plan. The substance is essentially the same. The big difference between the two bylaws (2002 and current) is that the current one imposes a 15% affordable unit restriction on developments of certain sizes, which would include this project. With respect to the factual background: This is what the Baileys Pond site looked like in 1966 with the highway about to run through the area. In 2001, this property was zoned as an industrial property. In 2001, there was a massive planning effort undertaken, led by the Alliance for Amesbury. It was a process that folded into the city's master plan. The Terrasphere report is what came out of it. That report said that this parcel is a good parcel for dense, multi family development. They estimated that it would be suitable for 200 units of condos.. They did an

analysis of the benefits to the city of promoting a development like this, and also did some planning for other parcels in the area, not just for this property. They mentioned the type of development they thought was appropriate for this project, which was 200 units that would lend itself to a mid range project of 150 to 225 units, not a high end townhome project. They mentioned as Fafard has been saying that these are units typically targeted to young professional / first time buyers. They were never contemplated to be the kind of units occupied primarily by families. The 2004 master plan, on one page within it, they basically adopted the Terrasphere conclusions and plan for the area. The current zoning map still identifies the Baileys Pond parcel as one of the few areas that are targeted for dense, multi family development. It's a planned unit district intended to be a property for dense, multi family housing is encouraged. It is where the city decided was a good place to expand housing in Amesbury and to do it in a way that was compatible with the surrounding areas. Based on the Terrasphere report, the city voted to designate the Baileys Pond parcel (city owned property) as surplus property. They wanted to put it out to bid and they were looking for somebody to come in to spearhead and take the lead in getting all this redevelopment work going. So they put a request for proposals out, Fafard submitted a proposal, which was the only proposal submitted on the project, which reflects the challenges and risks associated with this property. In Fafard's proposal, they explained that they were prepared to present a 200 unit development, they submitted copies of the architectural plans of the buildings that they had in mind. At the time, Fafard had built hundreds of these type units presented to the city. To date, Fafard has built thousands and they are still building these particular units that are the subject of the site plan we'll be looking at tonight. The town reviewed it, reviewed the credentials, decided to choose Fafard and to go ahead with the project. They didn't have to, that was an election made at the time. After getting chosen as the developer for the project, there were meetings with city representatives in connection with negotiating the deal and the P+S agreement. At that time, the city made it clear to Fafard that they had a big issue related to the sports park. There was an adult entertainment center, a strip club, that was being proposed down there. The city had a problem with this. They went to court, there was litigation, nobody wanted the strip club. So the city said to Fafard, if you can buy that property and kill that issue for us, that would be great. Fafard said that's no problem so they folded it into the P+S agreement as an obligation on Fafard. So when they signed a P+S agreement, among all the other things, Fafard agreed to buy this sports park parcel, and to restrict its use so it could never be used as a strip club. The town, in exchange, committed itself to cooperating with Fafard to expedite the permitting associated with the development plan, in accordance with the Terrasphere plan. Fafard went ahead, bought the sports park property and they restricted the use by renting out the property. Fafard began permitting in 2004, and until that point, everything seemed to be good on all ends, from what Fafard could tell. The city wanted them to build the project and were very comfortable with it. Fafard had been building these all over the state. Fafard went into permitting, and from then on, things turned sour. The first proposal to the Planning Board, the first submittal was actually just for 176 units, and immediately the Planning Board was not happy about that. Too many units, we don't like the buildings, we don't like the roadway, etc. It met with complete hostility. The neighbors, I don't know where they were during the master plan process, maybe it wasn't broadcast well enough, but they were shocked. They didn't like the project. No one liked it. So immediately into the permitting process, things weren't going well. So Fafard agreed to withdraw its application and to work with the city officials to see if they could work things out outside of the public hearing process, then would

submit it back to that process, but rather than burning everyone's time in a public hearing, they were going to try to make some progress informally.

Matt Vincent: When you say hostility, do you mean hostility or objections?

Jeff Roelofs: I don't want to characterize it. The neighbors probably felt hostile to the project. We felt like they really didn't like it, so when I say hostile, maybe that is an exaggeration. They objected to the project design.

Matt Vincent: I'm only concerned now about the Planning Board, not the neighbors. The Planning Board was hostile or just had objections in terms of your proposal?

Jeff Roelofs: I'll characterize it this way: the Planning Board, or at least some of the members including the planning staff, did not like this project and they were very clear about that. They didn't send any messages that they were going to approve anything close to the type of project that was being presented. I think if you asked Howard Fafard how they reacted, I believe hostility would be the word he would choose. I wasn't there. I'm not saying they were mean to us during the process, but they didn't like the project and were very clear about that. They wanted something completely different. In 2005, I think in direct reaction to this project, the planning staff moved forward with an affordable housing bylaw, which would basically require this project and other large projects to set aside 15% of the units as affordable units. In order to freeze the deal that Fafard had struck with the city, they had to freeze the zoning. To do that, they had to go through a subdivision process, which they never anticipated having to do for this property, but the way you freeze zoning under state law is you submit a preliminary subdivision plan, then you submit a definitive plan. The Planning Board wasn't very happy about this either, but ultimately, it was constructably approved because no timely decision was issued by Planning Board. So we went through the process of getting the town clerk certificate (in your packet exhibits). The way the zoning freeze works, what it did was freeze the zoning that was in place when Fafard filed the preliminary subdivision plan, which was June, 2005. Then when the town clerk issued her certificate of approval, that started an 8 year zoning freeze. That goes to April, 2016. So the default 8 year period would have run to sometime in 2014. We'll get back to that. Fafard had to go through that process just to hang on to the deal he thought he had with the city, and to try to retain the benefit of the development project. Some of the city councilors, I think some of the neighbors, again were not happy with the project. They were looking for ways to derail it. One thing they did was to go to the state inspector generals office, asking them to take a look at this deal, it doesn't look good to us. Inspector general issued a report that raised a lot of questions about the way the Purchase and Sales agreement was structured. There was a big debate between the city and Fafard, the IG's office, whose fault is it, are these issues real, how do we address these issues? The permitting was completely taken off track, and I think the city set up a special process of its own to review all of these issues and hired separate counsel to review them. There was a couple years taken to understand what the issues mean, are they issues we should can deal with, do we have to deal with them since we signed a deal? Lots of legal stuff was going on. For 5 years, we were focused on renegotiating the Purchase and Sales agreement. There was no permitting activity at all taking place during that period. We'd also been before the Conservation Commission and had withdrawn all those applications. Ultimately in 2010, the Purchase and Sales agreement was completely rewritten, pieces of it were dropped, pieces of it were modified, Fafard had already bought the sports park parcel, but there was a commitment to record the restrictions, in case they sold it, it would be binding for future owners. Lots of changes made, everything was resolved, city council unanimously accepted the amended Purchase and Sales, and we were back on track. The new Purchase and Sales, what it didn't do is sort of push

the development project one way or another. It kept references to the Terrasphere plan, and city officials at that time were saying, “they weren’t promising you can do what was being presented, we’ll leave that to our permitting boards. But permitting was then recommenced in 2010.

Matt Vincent: Can you add something to your timeline? When was 40 R and 40 S passed?

Jeff Roelofs: I don’t know.

Matt Vincent: 2005. 40B goes back a long ways, but all of the economic incentives the state imposed through 40R and 40S came in 2005. I only ask because when I first read your letter, I looked at this issue and thought “wow, this is strange that the city changed its bylaws.” As you said, it seemed directed at this project. The reason I’m asking that now is, I’m also wondering was the change in the bylaw really a consequence of your project, or is it a consequence of new state laws that are incentivizing communities to deal with affordable housing?

Jeff Roelofs: Fair question. I can tell you that my client’s read of the situation was it was a direct attack on this project.

Matt Vincent: That’s how I read your letter. I thought, let’s look at the time line.

Jeff Roelofs: Yes, and that is why I wrote it that way, because that is my client’s perspective. I think if Nipun were here, I’m sure he would disagree with that vehemently, and he probably would say I’ve been thinking about affordable housing for a while, it was just that things came together, these issues were top of mind, I don’t know. Our perspective though, based on conversations that were happening in Planning Board process, was that they wanted to squeeze the project.

Matt Vincent: Do you have a copy of the report issued by the inspector general?

Jeff Roelofs: I think the way it worked out was when the parties were renegotiating the P+S agreement, or at the end of that process, counsel for the town and counsel for Fafard, that’s me, we both were reviewing the issues and agreed ourselves that the issues identified had been addressed. I think, though, and this is a few years ago, I’m pretty sure that we sent something to the inspector general’s office and got them to confirm that the issues they raised had been addressed through the renegotiated amended P+S agreement. I’m not positive. I will say, nobody since that was executed has raised any question about the validity of the P+S agreement, none of the issues that were previously identified have resurfaced after it was signed. So we’re back into permitting, 2010. I articulate a lot of details in your packets. Generally, the Planning Board and the neighbors still didn’t like the project. Coming into this round, the unit count started at 148. During the course of the process, it was tailored back to 136. That sounded big to the neighbors, but for a developer who builds thousands of these things, and who was under the impression that they were going to be allowed to build 200 or close to that, 136 was feeling like a big squeeze. But that is where it ended up, as a result of the 2010 to 2013 Planning Board process. In your materials, there’s more details about the process. We do articulate the point that my client thinks that there were delays during the process that could easily have been avoided, might have been intentional because of the zoning freeze issues, we don’t need to debate that, it is not pertinent really. Sean Malone is here in case you want to get into the details of the project. I just wanted to show everyone what project we’re talking about. This is not the new proposal, this is the one that was the subject of the Planning Boards previous decision. Now going to the Planning Board site plan review authority, attorney Goldrosen mentioned this a little bit. Site plan review causes a lot of confusion in the land use world, because it doesn’t come from state law. It comes from local communities wanting some sort of design review before a building permit application is acted upon, in some cases. In some towns, a site plan review process is basically a Special Permit process, but they don’t call it that. Trying

to figure out which of those two types of processes it is. is not always clear. Here, the land court has ruled that this site plan review process is tied to the building permit application. If you go to the site plan regulations, you'll see that. You don't get to the Planning Board...you start the process by actually filing a building permit application, that department says you need site plan approval, then you go the Planning Board. In the context of a use allowed by rights, so in the PUD, under the zoning bylaw, multi family housing is a use allowed by right. Not only that, until a year ago, you couldn't build single family homes in that district. You were not allowed to. It was intended to be districts where they were encouraging dense, multi family developments, planned unit developments. So for uses allowed by rights, what the case law says, and I cite it in my letter, the Planning Board is constrained. It is not like a discretionary special permit process where the question is, should we allow this use? In the site plan review process, the use is allowed by right. The bylaw already says that. So it is design review, its details. This site plan review process and the criteria related to it are spelled out in the bylaw in a pretty lengthy section of the bylaw. Then the court cases that put the overland top of that basically say that you can't prevent uses, you can't fundamentally undermine a use allowed by right, you can regulate it. You can impose conditions and terms on the project, but they have to be reasonable. So, what is reasonable? Is it appropriate to impose a particular condition? You have to take into account the context, the criteria (is it rooted in a site plan review criteria?), or is it rooted in someone's subjective opinion about something? Does the condition correlate with the overall zoning bylaw? The Lowes case shows you how judges deal with that. They go through it condition by condition. Each condition, the court looks at it, spells out what it is, talks about whether it ties into something in the ordinance, and then talks about whether it is reasonable. If it is not, the court struck it. If it is, the court affirmed it. That is the fundamental question. Now, getting to the zoning freeze issue, I started to explain how that was initiated, and that was through the subdivision process. The issue we have now isn't whether or not the zoning was frozen. Everyone agrees that for 8 years, this project was subject to the 2005 zoning bylaw. No debate on that. The debate currently is, now that it has taken so long to get through permitting, and we're past the 2014 end point of that 8 year period, is the project now subject to the new bylaw or is it still subject to the old bylaw? The way courts talk about this issue is in different ways. Some courts talk about things that might extend the 8 year period. Most courts talk about it in the sense of toaling. In other words, what they say is, if you get into permitting for a project, and you're trying to get your permits within the 8 year period, and you're being held up by litigation, or you're making good faith attempts to get your permits and you just can't get them, for whatever reason. There's different basis for what they call toaling the 8 year period. So during those activities, the 8 years isn't running. So our argument in land court and here is, we've been in permitting since 2010, which is 4 years into the freeze period, that 8 years stopped running, because we were working on getting our permits. We were working in good faith with Planning Board. The process took longer than we thought it should, we were making revisions to the project, working with peer review consultants, the peer review consultant at one point took about 8 months to get a report back. I'm sure if Nipun (city planner) was here, he'd say yes, but you took six months to get plans. There was a lot of delay in the process. I don't think fault has to be assigned. The conclusion is the same. Efforts were being made to secure these permits, the project was being reviewed forever under the 2005 zoning bylaw. In the Planning Board decision, issued during the freeze period, they attempted to impose the affordable percentage requirement on the project, even though the 8 years had not expired yet, because that decision was issued in 2013, the 8 years ended in 2014. So that is the issue. It's an issue that I give you a

string of cases in the brief that I submitted with my package. I'm happy to explore it, give you copies of decisions, if you want to get into it deeper, but this project has been the subject of 2005 zoning bylaw right from the beginning, and it still is. Basically, the big difference between the two bylaws is the 15% affordable housing issue. So going to the Planning Board decision and our objections to the decision: You have the plans and all the peer review reports, I'll skim past all that. This is the north pod, this is closest to the neighborhood up there, there are steep banks here which was a big issue with Planning Board and neighbors, then down here in the lower pod, there are a lot of changes made to the project. The biggest issue down there or my perception of it wasn't so much the density. Everybody seemed to be ok with that. There is one building here within the riverfront area that wasn't an issue for Planning Board as much as it was for Conservation Commission. That issue went to DEP and is all under appeal right now. But Conservation Commission issues were pretty much all addressed with the exception of this one building. If we go forward with the project, we'd probably drop that building and go back to Conservation Commission with that amendment made to the plan to resolve the wetlands issues. The big issue for the Planning Board was the architectural style of the buildings. They never liked them in the beginning or at the end. The Planning Board decision that they issued, they basically said you've got to submit new building designs for our review, because we don't like the one you had.

Matt Vincent: In your appendix 10, where you go through all of the conditions, there are a number of ones where you say it would require a complete redesign. Can you point those out to us? There were some about retaining walls being made from natural material, I think I understand that. But there were issued about parking, etc. It'd be nice to be able to visualize what you see as the ones which you feel require complete redesign.

Jeff Roelofs: The building architecture is the biggest. So if you go to that condition, what you'll see if that they say we need to submit four new building designs for our review, and they gave you a long list of features that they want on those buildings. So one reaction to that is, we think these buildings are consistent with the zoning bylaw, with the site plan criteria, they are consistent with the surrounding area. I know neighbors are not going to agree with that. It is not consistent with pieces of the surrounding area, because there are some really nice single family homes up there. But the larger context is, you have a highway bordering one side of this development. You have Route 150 on the other side, then there is buffering between these other neighborhoods. Our view is that the Planning Board was overstepping its boundaries by flatly rejecting these architectural designs. These are being sold. People like these. So it was a Certificate of Approval, but it did not approve our buildings. That's one huge piece of our dispute. The parking, they included a provision that required us to provide new parking configurations. They were complaining about the fact that there were tandem parking lots where people were going to have to back out of their driveways. Our view of it was, what the zoning bylaw requires per unit is 1½ parking spots. Each of these units have 3-4 spots. The fact that for some units, they were front and back, there is nothing in the bylaw that prohibits that. By requiring something different, it is not driven by parking concerns. I guess it was to some extent, but we just think they are overstepping their boundaries. It was going to require a complete redesign of the buildings again. The issue of offsite sidewalks came out of nowhere because we thought that wasn't an issue, then in their approval decision they required us to build a sidewalk along Summit Avenue and Route 150. MaDOT has not required that. Again, building design is a big one. Some of these are smaller, like the signage requirements. Those are things that I think you would just work out. Engineered slope in the northern pod is a big one. There were lots of

different designs for this, primarily this area of the development here. There are some retaining walls. These are steep slopes currently. They are somewhat vegetated in these areas, heavily vegetated in other areas. Some areas are just sandy. This project was going to require cutting into the slopes, then use retaining walls to stabilize the area. Partly the way the Planning Board decision reads is a misinterpretation of the final design, because at one point, they had proposed really high retaining walls, and the Planning Board didn't like that. The –project was redesigned through the 2012 plans to use a tiered system, 6 feet, land 6 feet, land.. But there was quite a bit of it, because of the extent of cutting into the hill. The Planning Board was concerned. There was a question as to whether or not the engineering details of that wall had to be provided during the Planning Board review process. Very typically, and the board's peer review consultant acknowledged this, typically those structural designs are designed and reviewed later. So before the walls are actually built, there is going to be internal review with the building office, DPW, a structural engineer that is hired. Our response at the time was, that is going to be worked on by a structural engineer when we get to that phase of the project. We are not building anything until you see those details and you stamp them as approved. It is going to be reviewed by DPW, the building inspector, and the condition could include peer review consultant review, as well. The peer review consultant acknowledged that as an appropriate way to do things. It is commonly done. The Planning Board didn't like it. They didn't like not knowing those engineering details. The neighbors were concerned, and I get that. So that was an issue that carried forward into their decision. There were phasing deadlines and completion deadlines. There were things in here that the Planning Board required to be done, for example, before any building permit application could be built. This is a big one for my client. This is a huge project. My client would not propose to build all the infrastructure for this entire project prior to building one building. Its just not done that way. It's not economically feasible. So it would phase the development, the big separation would be building one phase first down at the bottom, then building the second phase. This phase could be built out and the other pod untouched for a number of years. Even within this phase, there would be initially some major site work done, stabilization, getting in all the drainage control in place to manage the storm water work associated with construction activities, utilities, the road base would be put in, foundations would be poured in some areas, and before the foundations are put in, you've got to go to the building inspector to get a building permit. So the conditions the way they were written, we couldn't even go to the building inspector until all the infrastructure for the entire project was built. These are the requirements that they have in their decision as being imposed prior to even applying for your first building permit. These are big issues for my client. I think they are also issues that we could work out with the Planning Board. These conditions were written at a time when the board had bigger issues. This wasn't a topic of conversation, really with the Planning Board. They knew they didn't like these buildings. They were going to deny this project for these other reasons. Then when they issued their decision, they just incorporated these into the decision. I think if we were in a productive conversation with them, the phasing and all that could be worked out. I'm confident it will be worked out if we make progress on some of these other issues. Even though they are big issues in the appeal, I think they go way beyond what the Planning Board can do, in terms of site plan review. There are also issues that can be worked out, if they were instructed to do that.

Matt Vincent: You have under the building design, which you said required a completely new design, there are pieces in here relating to building material, like exterior, no vinyl or aluminum or steel siding. Are those truly required redesigned issues??

Jeff Roelofs: No. There are a lot of details in here that we have no problem with. The condition as a whole is a complete redesign. Some of the pieces in it are reasonable. Some are fine, some are not. Generally speaking, some of the features that they want take this project out of its sort of mid range target audience and try to put it into a higher end category that makes it a different project. The bigger issue though is, they don't like these four-plexes, with the units in the corners, they don't like the height, they just didn't like the building at all. So what we are presenting now is a completely different building. The list is more detailed than that. That is the decision. The contested findings and conditions to the ZBA process here, I leave it to your attorney to give you the guidance on it. My view of it is, you're authority is to review this to the same extent as a quote would review it. If you look at the Loews decision, you could get into a review that is so extensive. Of course, if you're view was, "we're not going to trump the Planning Board, that is their job" then this is going to be a pretty simple process. If the board wants to really get into the conditions, then it is going to have to really understand the project. The details before you, if you really got into all of them, the process involves a condition by condition analysis, understanding where it fits into the puzzle, and then rendering a decision on a condition by condition basis. Not something I'd ever expect you to do tonight. If the Planning Board is inclined to go down that path, we would expect this process to play out over some time. That is up to you and your attorney to discuss how you want to proceed with that.

Matt Vincent: Is it your view that we'd have the ability to red line particular provisions within conditions, or is it accept or reject as a whole?

Jeff Roelofs: Nope. I think that is my next slide, which is what the board can do here. I think the board has the authority, just like the court does and you see it in the Loews decision, we would be willing to work... if the Planning Board came to me and said "we think this particular condition goes a little too far, but we think it is something that could be worked out," I'd want to try to work that out with you as part of this process. This board has very broad authority in what it can do as an appellate board. So yes, you can modify conditions. You can strike them, you can affirm them, you can negotiate or modify conditions, just like the Planning Board could in the first instance. The land court would probably be really pleased if you were to do that, because it is going to narrow the issues, if any are left. The whole point of the court sending it back to the local boards, their hope is that there is going to be some meaningful additional local input, so if the court knew we were going to go to the building office and they were just going to say DENIED and go to ZBA and DENY, then we just lost a year for nothing. It is within your discretion and authority to do that.

Matt Vincent: This thing could be worked on in subcommittee, rather than take hours to do this. Does it have to be done in front of the whole board, all the negotiations, as opposed to a recommendation back from the subcommittee? OK, kill that idea.

Jeff Roelofs: This is just a reminder: there are two issues. One is the site plan decision. The second is the zoning freeze issue. If you agree with us that the 8 years has been told during the permitting and during all the litigation that's been happening, and that the project is subject to the 2005 zoning bylaw, that land court action that is pending now is moot, it's over. So you've got some real power here as far as where that issue goes. I think that's the end of it for me. We're here, our engineer is here, and I'm sure you're interested in hearing from others. Thank you.

Matt Sherrill: Any questions from the board for the applicant at this point. (none).

I'd like to invite attorney Goldrosen back to the podium. If you have any comments yourself, or any help or guidance that you may give this board as far as where we should be focusing our attention, I'd appreciate it.

John Goldrosen, attorney for city: In terms of the scope of your review, I would agree that this is an appeal process, if you wish. I won't direct you on this. This is your decision. You could modify some of the conditions and leave other conditions in place that the Planning Board imposed on the project. I assisted the Planning Board at the very end of its process with drafting this decision, but I wasn't involved personally in the entire hearing process. I never attended any of the hearings, so if I were to try to explain to you why they did certain things, it'd be hearsay on my part, at least second hand. I think their decision indicates to the extent that they were requiring more information after the fact was because they weren't satisfied that they had gotten the information during the hearing process. Beyond that, I'm not sure I'm the right ... I think if you wished to go down that road of poking into the conditions, it'd probably be best to continue the hearing and ask the town planner or members of the Planning Board to explain what their view was of these conditions. Go through it piece by piece and get more input from the Planning Board or planning staff. I will comment on the zoning freeze issue. This is a piece of the zoning act, but it is not a piece that you normally deal with, because it has to do with subdivision approval. The idea is if an applicant is in the midst of subdivision planning process and the city changes the zoning on them, its going to take them a while to develop that process. They ought to have the right to operate under the conditions that prevailed when they started the process. So there is a provision, there is also provision in the zoning act for various length of freezes for building permits and special permits that have been issued. But for a subdivision approval, if you got your subdivision approval, you got 8 years from the date that the plan is endorsed, or in this case, it was constructively approved, you basically get an 8 year period to continue to operate under the previous zoning bylaw, which in this case, the big issuer is the affordable housing requirement. The argument the applicant is making that period should be extended. There is a provision in the zoning act that says if there is litigation, one extends it. But in this case, the only time that there's been litigation is since the Planning Board decision came out. That was appealed to court, so there is litigation there. But if you look at it, the really two big periods there, the 5 year delay while the process of redoing the RFP and the Purchase and Sales agreement process played out, then there was 3 years of permitting and in my opinion, neither one of those falls under these various exceptions or addendums that the court has carved out for special circumstances where that 8 year period should be extended, other than for litigation. The inspector general issue didn't have anything to do with the subdivision approval, and the permitting is taking time. They may say there was delay on the Planning Board part, the Planning Board would say there was delay on their part. In any event, even if it did take 3 years, that's not 8 years. There still would've been time to do the project, if that was the only issue.

Matt Vincent: Are you saying that the inspector general report is something that can happen concurrently?

John Goldrosen: I wasn't involved in it, but as attorney Roelofs said, this project, the planning for it or application for permitting for it basically came to a halt from 2005 to 2010, so that used up some of this 8 year time period. In my point of view, that doesn't create a basis for extending the 8 year period. There is nothing in the states statute that allows a zoning freeze that says, "well, if you're hung up on something else unrelated to the subdivision approval, that you get an additional period, other than directly litigation, and that wasn't litigation." I think the 8 year period expired in 2014, and that they are subject to the affordable housing part.

Matt Sherrill: So the inspector general's review was not a litigation, it was simply a review by the inspector general's office?

John Goldrosen: No, it questioned the basis for the Purchase and Sales agreement, but again, that didn't have anything to do with subdivision approval. The provision in the zoning act that says "extend the period", the idea of that is you get your subdivision approval and somebody appeals it, well you shouldn't lose time because you're fighting that appeal for a few years. But that is not what happened here. There was no appeal of subdivision approval.

Matt Vincent: But we had the inspector general looking at this because of a requirement the town put on the buyers, right?

John Goldrosen: I don't even know what the issues were. I'm giving you legal advice, but you could choose to decide otherwise.

Bob Orem: Is there anything that prohibited or precluded the hearing processes to go on while the inspector general was doing this thing for 5 years?

John Goldrosen: I don't know. I know nothing about this project.

Jeff Roelofs: I don't think there was anything that legally precluded it, but you can imagine the expense associated with the engineering time. The neighbors can tell you how much time they spent at these hearings. The process is not a cheap one to undertake. That inspector general process was initiated by the city. They went to the IG office and said some of the councilors said "we don't like this deal. Take a look at it. Let us know if there are any issues, because we'd love to terminate it." That is what happened. So where you've got somebody trying to terminate your deal, to go into permitting despite that is a very expensive endeavor that is a risky investment.

Bob Orem: Did they say they wanted to terminate the deal, or is that your opinion?

Jeff Roelofs: I don't know if they used those words, but our interpretation was, some city councilors and some neighbors wanted to terminate the deal.

Matt Vincent: But is it a matter of fact that the city filed this with the IG's office?

Jeff Roelofs: I believe it is, yes. I don't know how it was done, but they can't ... my understanding is the city contacted the IG's office. There are letters that identify, maybe four letters to understand what the issues were. And I think you'll see that those issues didn't arise from Fafard's proposal or things that Fafard was incorporating into the deal. It was that they weren't disclosures, some of them weren't even problems with the agreement, there were things that the IG identified as things that would have to be done before the sale actually took place. So it was a mixed bag of issues that, in the end, didn't give rise to a termination. It prompted people to sort of straighten out the issues and hold the deal together. It was still a deal. By then, both the city and Fafard had expended a lot of resources in the process. If the conveyance had already occurred, it probably wouldn't have come up. The other thing about the zoning freeze though is that once you get a building permit, you've got a different freeze in place. So, had Fafard been approved, had they been able to get a real approval in 2013, that allowed them to go in and get a permit, this one didn't. This one said you cannot apply for a permit until you do all this work out there. Had they gone in and gotten a building permit, there would be a new freeze in place. Then this issue wouldn't even be on the table. So they have been prevented from locking down the freeze through the regular course because they have been prohibited from filing for a building permit application. Now we get it, because the land court told us to do it. But the site plan says not to.

Matt Sherrill: Do you think it would be reasonable for this board to argue all those conditions on a plan that has been, more or less, modified?

Jeff Roelofs: This is a good question, because this is a question that was raised at the last hearing. What happens with that old project because before the Planning Board we're talking about a new project. My read of things was the Planning Board is more receptive to it, the

neighbors are more receptive to it, they'd rather it still stay as it is and there's lots of changes they'd like to see, but...

Matt Sherrill: We're still hung up on this 15% affordable units.

Jeff Roelofs: That's a big issue. But that issue doesn't have to constrain the Planning Board process because they don't have to rule on that one way or the other. It is not their game. They can issue a site plan approval for the new plan, and the question of whether or not 15% has to be held aside is up to the building inspector or the court or this board. So if Planning Board is just quiet on this issue one way or the other, they can issue their approval, we can go to Conservation Commission, we're going to start that process soon. If those proceedings go well, and we can secure those permits, I don't think the challenge that we have before you on the earlier decision are alive. I think it becomes moot and everything gets withdrawn. We can't say that yet because we don't know how the process is going to unfold. So right now, we're protecting our rights, we're traveling on two courses, and I'm reluctant to stall this one because there are people in the city who are saying that my client is dragging his feet to the point where he is breaching the deal with the town. So I am under fire right now to keep the process moving. So we'll proceed on two tracks. That doesn't mean we wouldn't continue this hearing if you wanted to undertake more review, but I'm not going to request a stay of this process to let that one unfold, as I might normally do. My client has spent almost a million dollars just on design and engineering work. We are now proposing a project that is half the size of the project that the property was marketed for. So we're plowing forward on two fronts. If we make progress on the other one and can secure those approvals, then these issues are doubtful to remain alive.

John Goldrosen: On the zoning freeze issue, that issue is actually still alive in the land court. When Fafard appealed the Planning Board decision to the land court, they included a number of different issues. One was just the straight Planning Board decision is unreasonable, but they also asked land court to look at the zoning bylaw and interpret it and decide whether the 8 year period was told. When the land court decided that the appeal of the Planning Board decision itself was pre-mature, so the Planning Board dismissed that, and said go back and start with the building inspector. The land court kept that one count of the complaint, that one issue, the affordable housing issue. So that is still alive. If it were unable to be decided at the local level, then land court would probably decide whether it gets told or not.

Jeff Roelofs: I cannot request a continuance. If the board was interested in a continuance and was requesting our consent, we would consent to a continuance.

Bob Orem: please explain to this board how much time to reach a decision without a continuance?

John Goldrosen: You would need the consent of the applicant to go beyond Jan. 10 or Jan. 13. You have 100 days from when the appeal was filed. One thing I should cover is this issue of the extent to which the Planning Board or you now being in the shoes of the Planning Board can impose conditions on site plan review. In the case of site plan review for use that is allowed of right, the purpose is to review the details of the plan and see if it does in fact conform to the requirements of the zoning bylaw, and it should be a less discretionary process. This case is a little complicated because there are a whole list of requirements in the site plan review bylaw, standards and criteria, that are part of the zoning bylaw. The Planning Board would say that each of these conditions that it has imposed reflects a criteria or requirement of that site plan review bylaw. The issue of the slope in the north pod? The project is supposed to not just conform to the neighborhood but also fit into the natural features of the site. In the attempt to get all those units into the north pod, that is what is forcing the digging into the slope. It is true that a Planning

Board should not deny a site plan unless there is no way that it could ... sometimes there are issues that can't be resolved without traffic or something for a shopping center. There may be some circumstances in which the board cannot deny site plan approval outright. But normally it is just supposed to impose conditions to ensure that it conforms to the zoning bylaw. That is the difficulty here.

Matt Vincent: Same question I asked Attorney Roelofs: Do we have the ability on the ZBA to go condition by condition as imposed by the Planning Board, red line things, change timing or when requirements are due?

John Goldrosen: Yes, I think you do. I think the intent of saying that a Planning Board decision, and therefore ultimately a building inspector decision, should be subject to another board's review before you go to court, if you choose. You could just say "Planning Board made its decision, they had 3 years of hearings and engineering reports," but I would still say you'd want to get some explanation of why the Planning Board did what it did. If it was your decision to go through change, modify, or eliminate some of those conditions, essentially engage in a new negotiation process with the applicant, in the same way that that process played out in the Planning Board hearing, if that was the route you wanted to go, I think you have authority to do that.

Denis Nadeau, building inspector: My question, if I can do this, Matt, I'd like to refer this to the two attorneys too. My question is, when I denied this application, I denied it on several of the conditions that were defined by the Planning Board. Most of my denials were on that I couldn't issue a building permit because the plans and the building permit did not meet the requirements of the decision of the Planning Board. My question is, you people are all talking about going through and discussing every one of these conditions and see which ones you will uphold and which ones you strike. The problem I see with the decision of mine on whether or not I have to issue a building permit is; I have to go by every one of these complaints. So even if you were to take and change 20 of these, the other three still have to meet before I can issue a building permit. So, I'm telling you it could get complicated. Would they agree to do the other ones? That's what could be negotiated. But my appeal still stands until I either change it or all the conditions get met. The town did a site plan review, I uphold their decisions, if you don't meet the requirements to their decision, I can't issue a building permit. Whether I agree with them or not is another thing.

Matt Vincent: The way that I had understood it was that if we had to go through this condition by condition, then come up with what our view of them was, hopefully if you still, in the end, were to have to issue a denial of permit, that we'd now be down to just negotiating.

Jim Chandler, 7 Riverview Heights: I was on City Council back when this project came to town. Mayor Hildt really signed, from my point of view, a very squirrely deal with Fafard. It never came to City Council, nobody knew about it, it was a done deal. When we got to see the deal, it was a crazy Purchase and Sales agreement, because Fafard was given title to the land but he didn't even have to purchase it until some undetermined date. So the town would get no taxes on it, would get nothing, it was crazy. So I'm the one that actually wrote the letter and took it to the Inspector General. You guys should find the files, the original contract, and the inspector general's report. Another problem was there was only one bid on the land. So why did the town sell it with only one bid? To go past that, I've got other concerns about it. First, when a developer wants to build that density, I live in a condo in a multi family unit. We have in total ten buildings, twenty units, on 12 acres. That makes sense. Fafard has been around years and

years. They know how to do these huge developments that are just too dense. No place for the kids to play.

Matt Sherrill: Mr. Chapman, are you suggesting we go condition by condition then?

Jim Chandler: No I'm not. I'm supporting Denis' rejection. That's all.

Jane Sill, 44 Fern Avenue: I've been attending meetings for a long time. I can tell you that I just don't see how you, as a board, can make a decision, because I could probably, in my crazy notebooks of what I keep on meetings, could present you with this much, and I don't live near this project, I have no investment in this project, but I can tell you that it has been hours and hours. At the Conservation Commission meeting I attended, they talked about retaining walls, they were concerned about the way it was going to affect the pond, the wildlife. Then Councilor Chandler had the letter to the IG. We heard from an attorney who came to a councilor meeting and it was an hour long special meeting, and he talked about the IG report, etc. Then from there, council appointed a subcommittee, and there were 3-4 councilors, and I took all the notes. It went on for months, going through document by document about the Purchase & Sales, different Planning Board things, and it was very difficult. They couldn't get documents that they were trying to get to make their final decision. I think you would want to read what that final project was. How you can condense this down into now making the decision? It would take you months to go back through. The only alternative that I could see would be for you folks would be to take the current deal and see if somehow you can't hold on to it and go forward with that. Just reading all that data would take months. Just my thoughts.

Tom Kusik, 3 Beacon Street, abutter: I keep hearing referrals to the Master Plan, and that PUD was something that Fafard...the city went out and we all know what they did, and Fafard went ahead and put their proposal through and what the city thought they wanted for that area. After 2010-2012, they also came in with a report for open space. I'm a firm believer that this particular parcel really falls within that. I think what is being missed is the open space, the pond, the recreation area, all of that is a real benefit to the existing community. Obviously, that adds value to the area. A project like this is not going to add value to that area. It will diminish what we're looking at. The area is no longer a run down gravel pit. It is today a really nice area. The youth take advantage of it; the whole community takes advantage of that area. It's not costing the city any money for upkeep. It is being overlooked as to what that benefit is. Back in 1996, if you look at the open space recreation plan, it says the actions to be undertaken: improve and maintain local areas of scenic beauty, Bailey's Pond.

Matt Sherrill: I'll ask the same question to you that I asked Mr. Chapman: do you want this board to go through this condition by condition, or are you suggesting we uphold Mr. Nadeau's decision to deny the building permit?

Tom Kusik: I think you have to, based on your bylaws. Everybody is at a stalemate here, and somebody is trying to take a position and move forward with it. Would I like to see the project not happen as a whole? Yes. But I'm a realist and I'm a capitalist at heart, and I can understand why the city would want to see something developed out there, to bring in tax revenue. I'd hope it would be a net gain for everyone. If these were higher end units, great. PUD development from the stand point of what happened with Hatters Point, that was a run down old hat factory that somebody put a lot of money into, and now brought property values up. This isn't that case. You don't have a run down building that you need to put PUD in there. It's up to you. My point is maybe a mixed use, maybe an overlay, maybe just strike Phase II. I looked at the plan they submitted. Maybe there is a happy medium. Thank you.

Matt Sherrill: Seeing there are no more speakers, does the board need to hear any more testimony from either attorney, or are we ready to discuss this?

Matt Vincent: I have one more question for Attorney Roelofs. I'd like to clarify: is it your position that the 8 year freeze, now that the Planning Board is giving unreasonable restrictions on this development because of that freeze, or just not because of the freeze?

Jeff Roelofs: No. I think most of their conditions are unrelated to the freeze issue. Our argument is that they are beyond their authority under the site plan review requirements. The one condition that they imposed that violates the benefit of the freeze that we got is the one that says we have to comply with the affordable housing portion of the current bylaw. By them saying that, if the court rules that this project or you rule that this project is subject to the 2005 bylaw, then that condition is invalid. The Planning Board cannot subject a project to a zoning bylaw that doesn't otherwise apply. They can't do that in site plan.

Matt Vincent: So when you applied for your permit, which Denis denied, the affordable housing was a part of that denial. Correct?

Jeff Roelofs: I don't even know if that was part of it. The building permit application was for one building. The fact that we filed the building permit application is a really awkward way to get back before the town our challenge to the site plan review conditions. We weren't really looking for a building permit through that application. It was the means by which we could give the town a local appeal avenue of the Planning Board decision. While we were doing that, we also said, "by the way, Mr. Building Inspector, since you have the authority, we'd like you to issue a Zoning determination that this project is subject to the 2005 zoning bylaw. He declined to do that. He also denied the building permit, the affect of that was really just to uphold the conditions within the Planning Board decision. He also could have gone through the Planning Board decision and rendered the conditions invalid. The reason we went there is because the land court, the case out there doesn't really have a good way for dealing with site plan decisions, because its this oddball permitting process in the world of zoning. It is not a creature of the state law. So the land court said "I can't review your appeal yet. It's got to be reviewed by the building inspector, and in order for you to get it there, file a building permit application." I said, "We can't because the site plan approval says we can't." He then said "well, I'm saying you can" basically, so we did. It is a really awkward process but the questions before the building inspector were the same as the ones before you. I think I'm right that the Planning Board also, when reviewing the project, were reviewing it under the 2005 zoning bylaw. In the end, when they wrote their decision, they included this affordable housing requirement, and I think it's because, and I wish Nipun was here, they thought at the time they wrote that decision that the 8 years had expired. If they ran the 8 years from the date of the frozen zoning bylaw, then the 8 year period would've been done. I think the town made that argument in court, at one point, that the 8 year period ended in June of 2013. Planning Board issued its decision in later in 2013. Therefore, they were right to include that provision in it, because the freeze had expired.

Matt Vincent: So really, that isn't horribly relevant then, really your objection is the unreasonable conditions?

Jeff Roelofs: That's right. Those two issues will get independently resolved.

Bob Orem: If the affordable housing issue stands, upheld by the court, will the project still go forward?

Jeff Roelofs: I believe it probably would, yes.

Matt Sherrill: Any further questions from the board for either side? Hearing none, I guess the crux of our conversation should be is; what is the feeling of this board? Do we feel like we want

to delve into this and look at all the separate conditions and go through this plan and try to resolve this at this level, or are we comfortable saying we don't really have the background or knowledge necessary to be able to do that, then we should consider upholding the Building Commissioner's denial of the application for the building permit? Boiling everything down that we've heard tonight, that is the crux of what we need to decide. So I'm open for discussion.

Matt Vincent: One of the decisions for the board tonight can be whether or not the zoning freeze should be tolled, extended, whatever you want to call it. The second piece ought to be, I think we ought to maintain some control over these conditions, so if the new plans don't get approved by the Planning Board, and the other thought here is to continue to appeal this plan, at least we've had some ability to maintain some local control over as many conditions as we can, in terms of reaching a resolution that we think is livable for this town, rather than handing the whole package to a judge and letting that judge make a decision line by line.

Matt Sherrill: So if I'm hearing you correctly, then you want to be a co-board with the Planning Board to run through this plan as it is being presented. Is that correct?

Matt Vincent: If the Planning Board can't reach a conclusion on the new plans in front of it, and the resolution of this is not going back to the Planning Board, it's going to court, then yes. We're not a co-board with them, we are independently applying ...

Matt Sherrill: But we've got to keep our focus on the old plan.

Matt Vincent: I'm not saying we go through the conditions tonight. I'm looking at this and saying it sounds like there is some willingness on the part of Attorney Roelofs' client to consent to continuation of this process, allow the Planning Board...

Matt Sherrill: Wouldn't it come back before us again with the new plan if there was some appeal or dislike of some conditions on the new plan? Wouldn't it come before us again, and wouldn't it make more sense to wait to be a co-board with the Planning Board until or if that process plays out?

Matt Vincent: This process would preserve it. If we continue this, and that is the outcome, and...

Matt Sherrill: I'm not hearing where you're coming from. I don't see how continuing this discussion with the old plan has anything to do with the new plan. It doesn't.

Matt Vincent: If we deny this tonight, we've opened the door for an appeal to the courts. Do we all agree on that? So this plan goes before the court, not back before anyone in this town again, in terms of consideration of those. What could happen next is Attorney Roelofs' clients could get to the Planning Board next month, run into as many roadblocks again, and say "we'll withdraw this plan, we're going to appeal the original plan. We're going to save ourselves a year worth of time of going back through all of this again. We already have the appeal set up in this original plan, we'll take our chances in court and let the judge red line those conditions, instead." That is the potential consequence. Not that they've shifted to the other plan, and this one is completely moot, it's just that they simply withdraw the other plan when they don't get what they want out of the Planning Board from it, and we've set the appeal up in this one and taken it out of the town's hands to go through and look at the conditions themselves. All I'm saying is, for me, it is buy time on this, hope that you and your client can reach some reasonable place to begin with the Planning Board or at least have a set of issues that are more approachable by us if we have to review that, but not having turned this into a situation where they get to appeal this right away without our ability to look at it in a condition by condition basis.

Matt Sherrill: I just don't know how you are going to get there, but I'm willing to listen.

Bob Orem: I think counsel for the applicant has indicated that they would consider a continuance of this.

Matt Sherrill: I think we heard that we have to vote on this, or there has to be a vote on it by Jan. 13 if there is no consent to continue the hearing.

Matt Vincent: If they're not making any progress with the Planning Board, the risk is that we'll go through this. I'm guessing that if you're making progress with Planning Board that they will agree to the continuations as they are needed before we have to put any time into this, if at all.

David Haraske: That's a big guess as to how that will go. They don't seem to have a great relationship with Planning Board.

Matt Vincent: This is a great opportunity to place everyone's feet to the fire, isn't it? We're saying to the Planning Board, we don't want to have to step in, but if that helps save some money in terms of reducing the issues that are going in front of the court, that's what we're willing to do. We're not as close to this as they are. This isn't a knock on their judgment. This is another pair of eyes from a group of people that live in this town that will have to live with this development, looking at this and asking what was the reasonable thing to do, and taking as much of the discretion on behalf of the town for these conditions before it is turned over to the court. So for now, it would be continue this, and hope that Fafard would consent to additional continuations as necessary to work on the current plans in front of the Planning Board. Again, offering to extend the application of the pre-2005 zoning bylaws, maybe that has a shelf life to it.

David Haraske: I'd still recommend some kind of time stipulation, versus something unlimited. Otherwise, we've had 12 years this and it's not beneficial to anybody.

Donna Collins: If we ask for continuance of whatever length of time we're allowed, and at the end of the last possible continuances, there's been no progress, would we still be allowed to uphold Mr. Nadeau's decision?

Matt Vincent: Yes. At that point, we could make whatever decision we want. We could go line by line through it, or we could simply just say "we uphold Denis' decision. Personally, I'd want to go condition by condition.

Jeff Roelofs: The only issue I have is, I actually agree with everything just said, in terms of what seems like an appropriate process, but if the board as a board already knows that it is not going to get into a condition by condition, not make that effort, then I'm not feeling real comfortable about continuing this, because then it's for nothing, or it's just going to delay our court case even further. If the board is receptive to it, and you still want to think about it, then we have a limited time, and I'm ok with that.

Matt Sherrill: I think condition by condition is a complete waste of time, and if continuing and delaying really messes them up, and it stalls the process, why would we want to do that?

Matt Vincent: Its not that there isn't another plan in front the Planning Board, but there IS another plan in front of the Planning Board. It's not that we're delaying or stalling them in any way.

Matt Sherrill: I'm just confused. I don't see any reason to continue this at all.

Bob Orem: I think Matt's point is that if we made a decision to deny tonight, it goes to court. The town loses control over the process. But by not making that decision tonight, and continuing that, if the applicant is agreeable to a continuance, we would still retain the right to either deny it or to go through condition by condition.

Matt Sherrill: I understand that, but I personally do not want to go through condition by condition. I just don't see that as productive use of our time.

Bob Orem: Well, hopefully it won't happen, because that the alternative proposal is going to be resolved.

Matt Sherrill: So, do you think it is the position of the town that they don't want this to go to court? Because I think it is the position of the town that they are basically telling us tonight "uphold the decision, let us go to court, let us figure out the issues in court, and let the court decide between the arguments of the two attorneys, if the conditions and the zoning freeze... I think the town is in the position of saying "let the courts..." I don't think the town loses control of the project.

Matt Vincent: Oh yes they do. What was his name...Alexander Sands III deciding it for us. He or she is going to go condition by condition, it is going to be that person's discretion as to what is reasonable and not reasonable in this regard. We are the last stalwart against putting this into the hands of somebody in a court when this can't go back to the Planning Board in this form. It is in front of Planning Board in another form, but this does not go back to Planning Board for their review. Bottom line is, this is set up to be reviewed by a court. Planning Board, like it or not, that is what's happening. In the end, that decision comes down to one person, a judge, not us, not the Planning Board making the determination as to what is appropriate in these conditions.

Matt Sherrill: I understand that, but I still think it's a waste of time. Bill, do you have anything to say?

Bill Lavoie: The problem I have is with the freeze. It seems like the town changed the rules midway through, and we don't know what the freeze is, whether applicable or not.

Matt Sherrill: Would you think you want to discuss at this level the freeze and make a decision whether we think that freeze should be upheld or not?

(three to four voices speaking at once)

Matt Vincent: Whether the freeze is relevant or not, it will still be relevant in the final plan but not according to what they are looking for... If the Planning Board does the same thing in the conditions in the current plan as they did here, it's going to be relevant again. I think they need to hear from us what our opinion is as to whether or not they are dealing with post 2005 zoning bylaw or pre 2005.

Bill Lavoie: I just don't think it's fair for these guys to be working on a plan that had, say, 5% affordable housing, and all of a sudden, midway through, the town says no, you have to do 15%. Now they've got to change. That's my problem with this. I'm inclined to do a continuance to see if the new plan takes hold.

Matt Vincent: I think tonight we should determine whether we think the freeze applies or not, because I think that is instructive to the Planning Board as to how they may deal with the new application, as well. Also it would deal with a piece of litigation the town is already spending money on.

Donna Collins: Isn't it already in housing court? You said that is the part the court didn't throw back to us?

John Goldrosen: The zoning freeze issue is in land court. But what is before you now is the single appeal of the building inspector's decision. That is what is before you now.

Matt Sherrill: I feel the board is split. Some feel lets just give it back to the courts and let them decide. I don't know where we stand on this. In all my years on the board, I've never had to worry about a split decision on whether to uphold or not uphold a decision.

Matt Vincent: Again, it may not be an issue that we can tackle tonight, but the reason I wanted to think about and deal with the issue of which zoning bylaw applies, I actually don't think the town went after this applicant in particular. I finished looking up the date. 40R went into effect

March 25, 2005. What you saw in that period of time was a lot of towns racing to try to create smart overlay districts for affordable housing. Trying to put things in places where they could control it. That's what Amesbury tried to do. Until recently, we actually have been below the 40B requirements of 10%. We are about to go above that. So in 2013 where we were, you might've said we've got someone who wants to build something nice, let's impose the affordable housing requirements on them. But where we are today, I don't think we're going to be stuck on issues like 40B or 40R because of the percentage of affordable housing we're getting to. It isn't as relevant to this project as it might've been in 2013 when these conditions were put on it. This was a deal that was done. We asked part of the quid pro quo of this was that you deal with this issue of adult entertainment. The town then turned around and challenged it. I feel strongly that we should grant them an additional extension. If that comes back to the Planning Board, with us giving direction to them saying if it comes back before us on the new plan, and you put this condition in, and that is the grounds for an appeal, we are going to overturn it on that. I still go back to the fact that if it goes back to...if what you're doing by saying "lets continue this so we can see what happens with the 100 unit plan" which is irrelevant to what we're talking about today, based on what history I heard is that you've got two groups of people who don't quite see eye to eye. I don't see that coming to fruition anytime soon. So you'll have this going on in an endless loop of continuances until...

Matt Vincent: I think this ends when we say "if you guys can't reach a new plan, we're going to at least make an effort..."

David Haraske: Should we put a time limit on that? You have 120 days, 180 days to come to a new plan?

Matt Vincent: And you can imagine one party saying "I don't want to come up with a plan. I'll just wait out the 120 days."

John Goldrosen: Since I attended the first Planning Board meeting on the new plan, I don't know where that'll go or how it'll come out, but I don't think either side has the stomach for having that go on forever. Neither Fafard or the Planning Board want that. I doubt you'll see 12 more years of a plan before the Planning Board. It may take a few months, but ultimately they will accept it or they won't.

Matt Vincent: So we've got before us tonight an appeal from the rejection from the building permit. But we also have requested relief in Attorney Roelofs' letter. What are we expected to act on tonight? Is it simply the issue of denial of the building permit? Or are we considering the request for relief, which are actually...deal with additional issues, such as the application of the 2005 bylaws?

John Goldrosen: You have before you an appeal from the building inspector's decision, which may be decisions (plural). One part of his decision was to deny the building permit because the project did not conform to the conditions in the site plan approval. Another one of his decisions was to not remove the condition about the affordable housing or not give a decision that the affordable housing requirement didn't apply to this project. So there are several things being appealed. It is all the building inspector's decision, but there are several components to that decision. I would not recommend doing it that way. Ultimately you have to vote a decision which gets filed with the town clerk which to me is a single decision. I don't know how you could take a vote on that one, and continue the rest of it.

Matt Vincent: I think maybe that would be a motion to communicate to the Planning Board the position of this board with respect to the application of the 2005 bylaws. That way it is not a

determination on this. If Planning Board knew how this board feels about that, it might help them.

John Goldrosen: Suppose on the new plan, they come to an agreement with the Planning Board on everything except that one issue, well they could appeal... so the point is, that issue could potentially come back to you anyway.

Matt Sherrill: That's what I was saying. This stuff is going to come back to us anyway, if it is a problem on this new plan.

John Goldrosen: Well maybe they come to an agreement on the new plan with the Planning Board, and if you wish to give that kind of direction to the Planning Board, I don't have a problem with that.

Matt Sherrill: Yes, I don't have a problem doing something like that, saying "we uphold the decision of the building inspector, however, if there are issues with this new plan that the Planning Board wants us to weigh in on and decide, and wants to refer it back to us", I have no problem with that whatsoever. But I do have a big problem with extending, continuing, open endedness...that I'm not comfortable with. But I certainly would listen to your concerns and let's see if we can't come to a happy medium where your concerns are met, that you want this back to us at some point in time for us to have something ...some sort of say, if there is a hang up on the Planning Board.

Matt Vincent: Until the new plan advances in the Planning Board, I think we have to retain some ability to review this, or uphold Denis' decision to deny. But as soon as we ... if we act on that tonight, and that's the outcome, as we said earlier, we've lost the ability to come back to this plan and have any discretion in it in the future.

Matt Sherrill: I don't see this plan as being something that they want to continue with. They've said that they have already presented a whole new project, different building shapes, configurations, to the Planning Board and everyone seemed to like it, Planning Board also, neighborhood too. And we're going to be the people to throw the anchor back into the ground again. I'm not comfortable with that.

Donna Collins: Also, if this whole new plan gets approved, wouldn't that be under current zoning bylaws, so this 15%, if it's required for a certain size development, would come into play. It has nothing to do with how we feel about the plan.

Jeff Roelofs: Our position is that the new plan is still subject to the old zoning bylaw. I know Attorney Goldrosen disagrees. I'm afraid of creating more confusion on this than solving it. So right now, this zoning freeze issue is in land court. It's been there for a while. Land court, the discovery on that case is closed. It closes at the end of December. The court is going to want to resolve that case. If we don't resolve it here, definitively, we're going to resolve it in court. I'd prefer if the board is ultimately of the mindset of this project, as long as we keep continuing forward permitting, this project is subject to the 2005 zoning bylaw. If that is the board's view, I think it would be of huge value to have that definitively stated in a decision, filed with city clerk, and if somebody disagrees and want to appeal it, they have that right. But by making a definitive statement on it, if it is not appealed, then it becomes the rule and we don't have to litigate the issue in land court. If you are not inclined to do that and you just want to give guidance to the Planning Board, that that is your view, that's better than just upholding the decision and saying nothing on it. In the building commissioner's decision, Exhibit B to my letter, the last sentence reads: In regards to the affordable housing requirements for the project, it is my opinion that the project is subject to the provisions of the current zoning bylaws, since more than 8 years have passed since the town clerk's issuance of Certificate of Approval for the definitive subdivision

plan on April 26, 2006. So there is a definitive determination made on that question. In our appeal, I was very careful to delineate that as a separate issue. We're asking you to look at the site plan decision, but independent of that, we're asking you to ...it's an appeal of that zoning determination. Because it is important. Not just to this project but also the project now before the Planning Board. I did say that that Planning Board process can unfold even without it being resolved right now, which is true. But the land court action, if the issue remains an open issue, that litigation is going forward.

Motion to close and vote was made by David Haraske.

Matt Sherrill: I think before we do that, we probably ought to make a motion as to "I make a motion that we either approve or deny", we get a second...

Matt Vincent: Before we get to motions, someone mentioned a straw pole earlier. Right now, asking the board individually, would you vote for a continuation of this? Or do you look at this and say "one way or another, it ends here tonight in terms of this board's involvement in it?" Is that fair?

Matt Sherrill: It ends tonight.

Matt Vincent: I would continue it.

David Haraske: I just don't see productivity out of it.

Donna Collins: I'd uphold Denis' decision. It ends tonight.

Bill Lavoie: I think it ends tonight.

Bob Orem: I'm for continuance.

Matt Sherrill: Would someone make a motion on the item in front of us right now and let's just be clear, as we individually vote on this. Be clear what a yes and what a no is.

So the vote is about Denis' decision and the vote is uphold his decision or not.

Motion was made to uphold the decision of the building commissioner to no to not agree.

John Goldrosen: As a 7 member board, you are being asked to approve the applicant's appeal. It will take 5 of 6 (one member absent) to grant the applicant's appeal. So I think it is better to state the motion to either grant the appeal of the applicant or to deny the appeal. So only 5 can vote and you have to assign one of the associate members to vote.

Matt, Donna, Matt, David are full members. Sharon, Bill, Bob are associate members.

Matt Sherrill: So I have to appoint an associate member to be full in order to vote, so I appoint Bill.

So Dave Haraske, Matt Vincent, Matt Sherrill, Bill Lavoie and Donna Collins will vote.

Matt Vincent: Motion that the board approve the requested relief set forth on page 13 of Attorney Jeff Roelofs letter to the Amesbury City Clerk and Amesbury ZBA dated Oct. 5, 2015. A YES means we support the applicant. A NO vote says we uphold the denial.

Motion was seconded by Donna Collins.

Voting as follows:

Matt Vincent: Yes

Bill Lavoie: No

Donna Collins: No

Matt Sherrill: No
David Haraske: No.

Decision has been made to uphold the building inspector's decision to deny.

Motion was made by Matt Sherrill to close the meeting.
So moved by Donna Collins. Seconded by Matt Vincent. All in favor.

Motion to adjourn was made by Donna Collins. Second by Bill Lavoie.

Meeting was adjourned at 9:45 PM.