

# TOWN OF DAY ZONING BOARD OF APPEALS

## PUBLIC HEARING – JULY 21, 2008

**Members Present:** Dave Davidson, Chairman  
Judy Traeger  
Hank Lang  
Ken Johnsen  
Pat Volpe  
David Avigdor, Town Attorney

**Members Absent:** None

**Public Present:** Peter and Jean Murphy  
Phillip Logan  
Richard and Joan Hoffman  
Ted Mirczak

Chairman Davidson reopened the Public Hearing regarding Peter and Jean Murphy, Tax Map #43.14-1-16 at 7 p.m.

Chairman Davidson stated the Board had requested the Murphy's submit engineered drawings for potential drainage problems. Board Member Volpe who was not present at the previous meeting stated he had reviewed the new survey map which Mr. Murphy had submitted which indicated a catch basin would be installed. Chairman Davidson asked for any additional public comments. There were none. Chairman Davidson asked for a motion to close the Public Hearing.

Town Attorney Avigdor stated at the last meeting there was a motion to require to submit plans as appropriate, discussion followed and that motion was changed to "by a licensed engineer". Chairman Davidson agreed. Town Attorney Avigdor stated there is no indication on the newly submitted map of a stamp from a licensed engineer. He stated he wished to make the Board aware of that before the Public Hearing is closed. Mr. Murphy stated he spoke to Ted Serbalik to determine his intent after his discussion with the Planning Board Secretary regarding drainage issues and Mr. Serbalik stated his intent was that Mr. Murphy obtain the proper permit from him. Mr. Murphy stated he contacted Dave Bogardus whom Mr. Serbalik stated was an excellent choice to complete the drainage plan. Mr. Serbalik reviewed the plans and felt they were appropriate and correct way to handle drainage. Board Member Johnsen inquired if the motion could be amended. Board Member Traeger stated she was satisfied with the submitted drawings because the County was and she wished to amend the motion. Board Member Lang inquired of Town Attorney Avigdor if the Town would be subject to any liability if the drainage plan failed. Town Attorney Avigdor stated if the plan fails an interested party could point to the lack of an engineered plan. He further stated he knows Mr. Bogardus and that he is a competent surveyor and that his firm is titled Northeast Land Survey and Title Company. However, he is a not licensed engineer but would have the ability to draw a drainage plan. Town Attorney Avigdor stated there is less protection for the town

if this Board were to approve a plan without an engineered drainage system. He is not advising the Board what they can or cannot do.

Chairman Davidson stated he is comfortable with what has been submitted and also feels that if a party is interested in litigation, they will pursue it. Board Member Traeger stated if the County has approved it, the party could pursue litigation against the County. Chairman Davidson stated he would like to change the motion due to what has been submitted meets the spirit and intent of what the Board was requesting. Board Member Volpe inquired how a motion is nullified once the motion has been made and voted on requesting the plan be completed by a licensed engineer and it was not. Town Attorney Avigdor stated if one of the Board Members makes a motion to close the Public Hearing, the Board is stating it believes what was submitted was adequate. He further stated if the Public Hearing is closed and a timeline is then in place to make a decision. He did not feel the Board should close the Public Hearing until they are satisfied they have all the information they need to come to a decision. Board Member Volpe stated it would seem like the application is not complete.

Board Member Lang inquired if the Public Hearing is closed and the variance granted with respect to the driveway, could Mr. Murphy sign a hold harmless agreement based on the absence of the engineered report in the event of the drainage plan failing to protect the Town. Town Attorney Avigdor stated it could be done with the consent of Mr. Murphy. Town Attorney Avigdor stated such a hold harmless agreement was once obtained from a homeowner on Kathan Road for a garage which was built close to the road. It was felt that either a snow plow or flying snow from the action of the plow may damage the garage or a car and the homeowner consented to a hold harmless agreement. Mr. Murphy stated based on Mr. Serbalik of County Highway not requiring an engineered plan, he was not agreeable to entering into a hold harmless agreement. He further stated he and the Board would never be in this loggerhead if Mr. Serbalik had not stopped in to the Town Hall. Mr. Murphy would like to know how the Board Members feel about it. Board Member Lang stated if Mr. Murphy was confident that the drainage plan would work, he would stand behind it if it is as solid as he has said. Board Member Volpe agreed. Mr. Murphy stated by opening an avenue like this, a number of variations can enter into the mix. He stated he has followed all directions that the Board has given him, now another hurdle in the form of a hold harmless agreement is being put up and that is why he is reluctant to enter into any hold harmless agreement.

Board Member Lang stated the hold harmless agreement would limit your liability to only the variance and given the fact that Mr. Murphy has not submitted the engineered plans, this Board could indicate that while they have not accepted what was submitted, these are the steps they have taken (hold harmless agreement). He further stated the record contains comments regardless of what conversations Mr. Murphy had with Mr. Serbalik. Board Member Volpe stated it may be to Mr. Murphy's peace of mind to have an engineered plan. Mr. Murphy stated he is confident that Mr. Bogardus'

plan is sufficient. Town Attorney Avigdor stated while he is sympathetic to Mr. Murphy's aversion to signing a hold harmless agreement, this is a very atypical application. He further inquired if the Board satisfied with what was submitted or not. Board Member Johnsen inquired if this has been requested previously and are we setting a precedent by requiring engineered plans. Town Attorney Avigdor stated he is aware of the Planning Board requesting engineered plans but not in the drainage context. He further stated in planning and zoning boards in general, it is more common that engineered are required than not but a search of the records would be necessary.

Chairman Davidson asked for a motion.

**Motion** by Ken Johnsen, seconded by Board Member Lang that in view of this, move this Board close the Public Hearing for Peter and Jean Murphy, Tax Map #43.14-1-16, PB08-01ZBA. Ayes: Dave Davidson, Pat Volpe, Hank Lang, Judy Traeger, Ken Johnsen. Carried: 5-0.