

TOWN OF SUTTON
Planning Board
Meeting Minutes
June 24, 2008

The meeting was called to order by Chair, Dan Sundquist at 7:00 p.m. Members in attendance were Carrie Thomas, David Burnham, Paul Raynor, Robert Wright, Jr., Peter Blakeman and Richard Krajewski. Not in attendance were Courtney Galluzzo and Joe Burns. Paul Raynor was appointed to sit for Joe Burns and Richard Krajewski was appointed to sit for Courtney Galluzzo. Also in attendance were Jae Whitelaw, Town Counsel and Paul Parker, Road Agent for the Town of Sutton.

Members in the audience were Jeff Evans, John-Michael and Judith Rogers, Philip Murphy, Ted and Valerie Blachley, Jeremy Blachley and Erick Derlith.

Motion made to open the hearing by Robert Wright, Jr., seconded by Paul Raynor. Unanimous.

Dan Sundquist, Chair ran down the sequence of events that have brought the Planning Board to where they are at this point in the processing of this application for a major subdivision on Birch Hill Road.

At the final meeting of the full application, the Planning Board framed a conditional approval with 8 conditions. The last condition on the approval was Town Attorney review and Jae Whitelaw was in attendance tonight to assist the Board with the process. The Board received prior advice from Town Counsel regarding clarification of wording in certain conditions that the Board had drafted and also recommendation of 2 courses of action for the Planning Board to take.

1. Along the route of the conditional approval and pros and cons associated with this.
2. An approach of denying the subdivision based on the scattered and premature clause, which the Board will talk about later in the hearing in more detail.

The Planning Board met on 6/10/08 to act on the Attorney's review. They did act on the clarifications of the conditions, the wording changed a little bit and the Board fashioned a conditional approval. At least one of the conditions hinged on the applicant's willingness to pay for limited road improvements required by the Planning Board for public safety reasons which we already established. This was sent to the Town Attorney for a second review and the Board was advised that the Board cannot require road improvements by way of a conditional approval and we must hold the public hearing, which is being held tonight, to decide whether to deny the application as being premature or whether the applicant would be willing to pay for the road work so that it would no longer be premature. Part of this is also that the scope of work on the road improvements has not been well understood. The Board did do a site walk in April. There were 3 areas that were identified by the Board that evening. They were mapped and measured. This information is on file. Neither the Board nor the applicant has a detailed understanding of the work that would be necessary to carry out these road improvements. Paul Parker, Road Agent was asked to meet with the applicant on site to conduct a walk through and to define the work that needs to be done. The site walk was performed on 6/20/08. Paul Parker submitted a list of the findings. The costs were not determined at this time, but the Board hopes the applicant has a better idea of the work involved.

The purpose of the hearing tonight is very narrow. The hearing wants to review the work that has been decided by the Town Road Agent to be done on the road way improvements for public safety reasons and the Board also wants to learn about the willingness of the applicant to make these improvements in the road at their own cost. If the applicant is willing to absorb the costs the Planning Board may finalize a conditional approval along the course of action that the Board had been shaping, if not the Board, based on the 6/10/08 meeting, is leaning strongly towards denying the application based on scattered and premature; public safety being the core issue on Birch Hill Road.

Chair Sundquist asked Paul Parker, Town Road Agent to give a recap of the site walk he made with Mr. Rogers. The following information was presented by Mr. Parker.

The site walk started at Route 103 by MCT Pole #2

Ledge/Rocks – 1 on each side of the road that should be removed. There is more ledge up the hill just passed #31 – Tarnowski, his driveway is on the same side of the road. This is a narrow spot. Up the road further there is ledge/rock by #47 – Whalen, driveway is on the same side. These areas of need some type of ditching system done. Up the road and across from #52 – Donahue’s mail box there is a clump of trees and one of them leans out into the road. This clump should be removed. Up the road further, the road narrows up, there are 12 trees/stumps and that abuts Knudson property on the left hand side as your going up the hill. Going up the hill further on the Knudson property there are another 9 trees/stumps that need to be removed. Up the hill further as you get up to MCT guide pole #13S on the Knudson property as well, there are 2 trees/stumps that need to come out there. Moving up the hill a little further there are 3 trees/stumps on the left hand side which is just past the Knudson property line between MCT Pole #14 and #15. Up there just a little further there is one tree that I marked today that we did not talk about. I told Mr. Rogers that there had been a couple changes to that. Then just past Harwood Street on the left hand side there is stump that Jeff and I marked that was in the ferns. It was hidden when we did our walk. I did mark that one today. Then there is 2 trees/stumps just past MCT Pole #19 on the right hand side of the road, there is a culvert right there that crosses the road. Then up further just past the Log Landing there is a big maple tree on the left hand side of the property that abuts the Rogers’ property and then just past that, which we did not talk about is one more tree on the left hand side.

Mr. Parker felt that this was a reasonable request to Mr. Rogers. He also stated that Birch Hill Road is one of the better dirt roads in the Town of Sutton. The Highway Department has spent a lot of time in Mr. Parker’s 22 years of working for the Town on Birch Hill. The road has drastically improved in the past 22 years. Chair Sundquist asked about the ledge and asked if they corresponded with the Board’s findings of the narrow spots. Mr. Parker stated that indeed they were the same spots. No special drainage would need to be done but there needs to be some kind of ditch. There are existing water turnouts on Birch Hill. He feels that there is one pinch point that if it had to be any wider than what is there right now, the stone wall would be affected. Mr. Parker also added that Birch Hill Road is a 3 rod road which is 49.5 feet. Chair Sundquist asked that if by working in the ledge areas if the road width could be widened to 16’. Chair Sundquist counted 36 trees/stumps which seemed like a lot of tree work. Mr. Parker stated that if they really wanted to get pushy, there could be a lot more. He feels that what he submitted is not an unreasonable request.

Peter Blakeman inputted that some of the information submitted was about creating some areas just to widen out the road so people would have a spot to pull over and wait in the narrow areas so someone could drive by rather than widen it all the way down through. One of the most notable pinch areas was at the culvert by Bob Zocks. This is 13’ in width with no room to widen it. One of the areas right above that could be widened out so somebody could pull over coming down the hill and wait as someone is coming up. When Peter Blakeman and Paul Parker looked at this problem, the length you would need to pull over, a fair amount of trees would have to come out. Mr. Parker also added that while they were doing this walk together his truck was parked at this particular point in the road and a car passed and had no problem. It was tight but the car made it without damage to either vehicle.

Chair Sundquist asked if the pinch point on Zock’s side of the road would be fixed. Mr. Parker stated that not on his side of the road. All the work would be done on Knudson’s side of the road. The strategy with the trees and the stumps is to make space for people to pull to the side while someone goes through the pinch spots. He also inquired as to whether this would help in the winter with pushing snow to the side to make the road wider. Mr. Parker stated that it would be helpful.

Robert Wright, Jr., wanted clarification on the 3 rod road. Mr. Parker confirmed this. But there may not be a 3 rod distance between the stone walls. If the Board went back to viatical use and maintenance could it be possible that drainage and/or swales could be outside the stone wall area on a land holder's property but still be within the right-of-way of the road. Robert Wright, Jr. wanted clarification on the way he was interpreting this. Mr. Parker answered yes and no. It would start but would end on private property in a lot of areas. Mr. Parker also added that several years ago on Mr. Zock's property he authorized a ditch on the other side of the stone wall which actually is in the second ditch where his sugar operation is. This eliminated a tremendous amount of water that used to come out of the front wall and into the road. It is now going through his property then across the area. This culvert will be updated in the near future.

Robert Wright, Jr. inquired if by mitigating the situation even if you're outside of their stone wall, it is still within the right of the town to be able to make some "deemed necessary changes" even if they are outside the stone wall if they are within the 3 rod right-of-way. Mr. Wright wanted to make this point clear in his own mind. Per Mr. Parker if there are existing water turns they have the right to maintain them. New ones Mr. Parker has to have property owner approval to do that.

Jae Whitelaw, Town Counsel stated that a 3 rod right-of-way which is 49.5 feet the town has the right to do what it needs to do in the right-of-way to have its road go through there, whether it wants the road to be 16' or 25' wide and then use the rest of the for maintenance for water runoff for those kinds of things. She stated yes if you have an existing easement because someone granted it to the town or because its been there long enough to have the legal right to keep it there, you can continue to maintain that beyond the boundaries of the 3 rod right-of-way if you have the legal right to have your water flow which is usually what is water flow onto somebody's property. Mr. Wright was satisfied with this answer.

Peter Blakeman also stated that a question had come up as far as cutting the trees themselves. Per Town Counsel because this road is old and most roads are not owned, the land under the road is not owned by the Town. It is an easement or right-of-way. When it is an easement or right-of-way the abutting property owners own to the middle of the road and they own the "stuff" that is on the road such as the trees, stone walls, etc. If the town was going to widen the road so that it took the trees, the property owner has the right to damages. The property owner also has the right to keep the wood at their option. When you're talking about moving stone walls there are damages involved with that, but this is not an issue in this case, there are also stone wall laws that need to be followed as well.

Mr. Parker felt there was no need to interfere with any of the stone walls that are in existence. There may be an instance where a stump has to come out and when it does may damage the stone wall but the Highway Department would repair it.

Chair Sundquist asked how many new stone water run outs would be needed to do the work. If there were to be any would they be satisfied under the existing conditions. The Chairman asked Town Counsel for the proper procedure for tree removals with the abutting landowners. Town Counsel stated that if the Town where to do the work, the town would notify abutting land owners and explain to them what they would be doing and see if the abutting land owners had any input regarding the work to be done. Where it is somebody doing it, acting like an agent of the Town, she was unsure and will get back to the Board on that procedure. David Burnham asked if it fell under the guidelines of maintenance due to safety reasons at the Town level even though it would be being done privately.

Chair Sundquist asked Jeff Evans and/or Mr. and Mrs. Rogers if they had any input. Mr. Evans stated to Town Counsel that he wished she had been at the two day seminar that the NH Land Surveyors Association put on. Mr. Evans learned a lot. He inputted that there are two types of roads. There are roads by layout and there are roads by prescription. Prescription has no layout. The road is just there. Paul and the Town have been maintaining it for years. All of these roads the Town owns or can maintain are what it is maintaining now. Those trees must have land owner permission to take down. If there is a

layout, a returned layout from the landowners they are actually compensated for this 3 rod strip right through their land.

Town Counsel asked what the road was. Mr. Evans stated that it is a 3 rod by layout. Mr. Evans stated that both he and Mr. Parker have both seen the layout. The Town owns 3 rods right through there regardless of the width of the stone walls. The Town actually owns it and the Town actually without even doing anything is able to take more for the good of the public.

David Burnham asked if the Town actually owned the trees within the right-of-way. Town Counsel disagreed with Mr. Burnham because even though the road is a layout it is on top of the ground. Unless the abutters deeded that part of the road to the Town the layout is on top of the land and it gives you a right to go over the top of the land. It does not give the town the ownership of the things that are growing in the stone walls and stuff. Town Counsel was not sure if the road was deeded to the town, but this would be rare particularly when the road has been in the Town for a long time.

Jeff Evans stated that it does not need to be deeded it only needs to have a return of layout. Town Counsel stated that was for the layout but it does not give permission for the land. Mr. Evans stated the only ownership and the compensation gives ownership to the Town.

David Burnham wanted to know how it could be proven that most of the layouts given have had a compensation paid. For a lot of the state information there is a book. Per Town Counsel some of the old books stated that compensation had been paid.

Philip Murphy challenged the 3 rod road information. He has inquired at previous hearings how to find the information. He found information from an 1806 Town Meeting were a northern part of Birch Hill Road was deeded back that was a 2 rod road. Mr. Murphy wanted the exact Town Meeting date where this road was deeded back or where it was deemed a 3 rod road. Chair Sundquist referred the question to Jeff Evans whose response was "I don't think we need to address that as a Planning Board situation. I think if he would like to do the research he can, it is in the Town records".

David Burnham stated that there is a book of Road Records in the vault. Mr. Murphy stated that was where he got his information from the 1806 Town Meeting where they turned back the northern part of Birch Hill Road and indicated it was a 2 rod road. Chair Sundquist suggested that maybe it was just 2 rods up in the northern part of Birch Hill Road. He also stated that digging deeper would need to be done in the Town records. Mr. Murphy stated that he felt that the Board is taking this on faith and he would have to do the research to prove to the Board that it is a 3 rod road. David Burnham replied that the Board is taking it on the professional licensed position as a land surveyor that if Mr. Evans is inaccurate he would be the one to go to before a Board and could potentially lose his license if he is in the wrong or doing something maliciously. Chair Sundquist asked what the Gephardt book states. He stated that the base of reference for the Planning Board has always been the Gerrhardt-Gephart research and work. He wanted to know if anyone had checked this book for the information to see if it was a 3 rod road. Mr. Evans stated that that was where he had gotten his information. Mr. Evans felt that Sutton has a very poor record of its roads and its roads by prescription and the original records. Town Counsel added that roads are very difficult to deal with. In New England there are old roads, legislature has changed along with a couple of hundred years, how roads could be created and what happened to them. You have to really go through from when you think the road began all the way through to see the different things that happened to that road. She felt that it seemed like with Birch Hill Road they are not getting any where near 3 rods with what is going to be done. Even if it is a 2 rod road it is within the 2 rod distance. She fully understands the frustration of Mr. Murphy.

Peter Blakeman stated that there was no area on the list that they had gone beyond any stone walls on Birch Hill Road and much beyond 16' off the center line. As an example as how roads do switch the

Town has one the Board is starting to look at and it is Baker Hill Road. This road has 2 layouts along the road. It starts as a 3 rod and then it becomes a 2 rod at a certain point.

Valerie Blachley was concerned about the number of trees that are very close to the utility poles Mr. Parker had listed. She wanted to know if there was a need for this work to be done. Mr. Parker felt that there would not need to be any work done on these at this time. There are a group of trees on the Knudson property that is near a guide pole which would need to be moved, but the poles are still okay at this point.

Chair Sundquist asked Mr. Parker if any of the poles that are in the ditches or shoulders need to be moved. Mr. Parker felt not at this time.

Mr. Murphy asked about the minimum width of 16' travel way. There is a section that is under this and if the minimum is going to be 16', would Paul Parker, Road Agent be the one judging that after the work is done. Would he do a walk to make sure it is 16' along the entire length. Mr. Parker felt that at the one pinch point you could not get 16'. But with the taking down of certain trees the visibility would be enhanced which would eliminate some of the issue. Chair Sundquist asked what would prevent getting the 16' travel way. Peter Blakeman stated that on the Zock side it was almost straight down into the ditch, then the edge of the road, then the stone wall on the other side where it dropped off beyond the stone wall. They felt that it could not be widened there without putting in a full drainage system all the way up the hill and where we are out there looking to mitigate the safety, he felt a big part of that was that it is so narrow all the way down the hill that there is no opportunity to get off any where if a car is coming up the hill so they looked at an area where you could actually see that pinch point and widen the road right there. That really goes in line with what was actually talked about on the walk with the Planning Board when the members were out there. But rather than try to widen the entire 5 or 600 foot section there 16' plus, we are trying to be a little bit sensitive to everything around it.

Mr. Murphy felt that if the improvements where made and it wasn't able to make it 16' in that spot the road would be improved well enough to the existing traffic on it but he felt that if adding 7 lots and a dozen more cars 16' minimum really is the minimum.

Jeff Evans had two points. The first being the minimum standards in the State of NH for Class V gravel roads. He felt they had to work where they were there. His other point was as a citizen of the Town of Sutton, he felt that the Planning Board could refuse the application as scattered and premature. He personally has a problem with that with a 201 to 25% growth rate up on Birch Hill Road in 30 years with 113 in the last 25. He felt it does not seem premature and scattered. If the Planning Board deems this scattered and premature then he feels it is going to affect all the roads in the Town of Sutton. He questioned if the Rogers withdrew their application and the Planning Board deemed this road unsafe, which is basically what the Planning Board would be doing, is the Town not liable to fix that road under the RSA that gives them time to fix the road. Next of all what happens, are there no building permits on this road. There is another 20 lots that can be built on without any subdivision. If it is unsafe for 4 new lots it certainly is unsafe for any more than what it is getting now. He felt that the Town really needs to look at this if they are dealing with Class V roads and scattered and premature. Mr. Evans would also like the Planning Board to know that the Rogers are being taxed near \$85,000 for excessive frontage and excessive acreage which is assessed as developable land. He feels that if the road is not safe and the land cannot be developed the Town would have to do a rebate to the Rogers.

Mr. Rogers felt that if the tax person says the land is developable but the Planning Board is saying the road is not safe enough for developing, why is he being taxed because his land is developable.

Town Counsel expressed that these are two separate issues. And the way that Mr. Rogers deals with them are two different issues.

Jeff Evans understood Town Counsel's answer but they meet the subdivision requirements of the Town and the State. There are no building permits at this point. It is only for subdivision. Whether it is developable or undevelopable is already defined.

Town Counsel stated that if someone wanted a tax abatement because their property was assessed at more than what it was worth, they have the burden of establishing that it is not really what the Town is taxing it at.

Mr. Rogers felt that if it was developable or not, the Planning Board is the deciding factor. He is now asking the Board if he can develop his land and what the Board has said in general is that the road is unsafe. He wanted clarification on this. Chair Sundquist stated that it would be unsafe with the traffic generated from this proposed application. Mr. Rogers stated that that is not what was being said. David Burnham stated that what the Planning Board deems to be an existing public hazard by RSA and statutes that the Board is bound and have to adhere to the Board can not legally magnify the hazard. Mr. Rogers wanted clarification that, right know, on Birch Hill Road there is an existing hazard. Mr. Burnham agreed and that the Planning Board can not allow magnification of that hazard. Mr. Rogers wanted to make the point clear that there is an existing hazard. Mr. Rogers read statute 231:90 from the New Hampshire Planning and Land Use Regulation – 2007-2008 Edition – Issued by the New Hampshire Office of Energy and Planning, Concord, NH. The statute reads as follows:

231:90 Duty of Town After Notice of Insufficiency

- I. Whenever any class IV or class V highway or bridge or sidewalk thereon in any municipality shall be insufficient, any person may give written notice of such insufficiency to one of the selectmen or highway agents of the town, or the mayor or street commissioners of the city, and a copy of said notice to the town or city clerk. The notice shall be signed and shall set forth in general terms the location of such highway, bridge, or sidewalk and the nature of such insufficiency.
- II. For purposes of this subdivision, a highway or sidewalk shall be considered "insufficient" only if:
 - (a) It is not passable in any safe manner by those persons or vehicles permitted on such sidewalk or highway by state law or by any more stringent local ordinance or regulation; or
 - (b) There exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway at posted speeds or upon such sidewalk, in obedience to all posted regulations, and in a manner which is reasonable and prudent as determined by the condition and state of repair of the highway or sidewalk, including any warning signs, and prevailing visibility and weather conditions.
- III. A highway or sidewalk shall not, in the absence of impassability or hidden hazard as set forth in paragraph II, be considered "insufficient" merely by reason of the municipality's failure to construct, maintain or repair it to the same standard as some other highway or sidewalk, or to a level of service commensurate with its current level of public use.

In Mr. Rogers' opinion this means that either it is insufficient or not. And if it is insufficient what the statute says is that the Planning Board needs to fix it.

Chair Sundquist referred this to Robert Wright, Jr., Ex-Officio, who stated that notice shall be signed and set forth, to his knowledge there has been no notice or sign. Number 3 "a highway shall not be considered insufficient merely by reason of municipality's failure to construct, maintain or repair, his point is that this is an interesting RSA, however, it really had nothing to do with the point at hand with due respect to the applicant. Because what the Planning Board is talking about is a change that does it make a mitigated hazard and this is where the Planning Board goes into an area of the responsibility and the rights and now they wander over to that area of RSA 674:36 on page 456 of the same New Hampshire Planning and Land Use Regulation – 2007-2008 Edition – Issued by the New Hampshire Office of Energy and Planning, Concord, NH book. This reads as follows:

4. Access roads

Planning board may properly consider the present condition of access roads when ruling on a subdivision application, and if a hazard is created by the present level of development, it may find that future development is premature.

Those are particularly salient and this has really been upheld. Mr. Wright stated he was not an attorney but the responsibility of a Planning Board cannot change what is and the reason that the Board cannot change what is is no Board can hold Town Voter hostage. It cannot be done and the Board does not have that authority. What the Board can do and what they are employed and are responsible for is does a new development make a change to such a degree that it does create a hazard. What the Planning Board is wrestling with is:

A: is it scattered or premature and it is done or;

B: by making changes to the road can the Board go forward and allow the applicant in cooperation with the Town to be able make some changes that it can go forward.

Now there is also some authority that is fairly recent and the Supreme Court has made a decision on this. So once again what the Board is wrestling with is:

A: is it scattered or premature it is done and we go home or;

B: are we able to work with, in such a way, that we can upgrade the road to a point where it is sufficient for the development.

Those are really the two issues and Mr. Wright stated that he had not yet made a determination because the Board is trying to upgrade the road and certain things, and that is why the hearing is being held and then we go forward to see if things can be worked out. Mr. Wright thanked Town Counsel for attending the meeting to assist in this project.

Chair Sundquist asked Town Counsel to speak regarding this issue. Town Counsel stated that scattered and premature is actually two different things. The statute states it is "scattered or premature". Scattered means you have a bunch of houses you go up the road two miles and you have more. Premature means that the existing conditions are not sufficient for what's there now. So to add more to that would not be an appropriate thing to do and that is the type of thing that is being considered now. In this circumstance what is there now, and she has not heard anyone say that they don't think that Birch Hill Road is hazardous and everybody has to be careful when they use it, snow plows have to be careful, everyone has to go slower, all of these things indicate that it is hazardous now which she thinks based on what she has read of the Planning Board minutes from the last meeting led the Planning Board to the conclusion that it was premature because of the existing hazardous conditions. If the Planning Board has determined that Birch Hill Road is hazardous it can not grant approval for more houses to be added to the road without there being a change in the road. The conundrum is the Planning Board can not say to Mr. Rogers "the road stinks you have to fix the whole thing before you can do it" because that is taking his money to do something that the Town is responsible to do. But, the Planning Board also can not say that the Town has to fix the road. The Planning Board does not say that, the voters say that. But it is the voter's decision to make. What it does to the Planning Board and Mr. Rogers', the applicant, in a position of, to be a legal fish in the making. The Planning Board has to say "well we found out it is hazardous, everybody agrees, we are going to have to deny it because it is premature, I'm really sorry and everybody waits a minute and then the applicant says wait a minute I'll volunteer to fix the road, your not making me and I'm going to volunteer and I'm going to say to you that as a condition of giving me my approval I will do 'x' amount of work to the road". That is what we are here tonight doing is to figure out what is that "x" amount of work that has to be done. Both because Paul Parker needs to know, the Planning Board needs to know and the applicants need to know what they are getting themselves into if they decide to do the work. Because, how are you supposed to know if you want to put that into it if you don't know what that will entail. That is where we are. The Planning Board, last time around, already made the decision that this

was premature and now what they are dealing with is what are they going to do about it and what happened last time was they went that extra step and stated that as a condition of approval and you approve it if he will fix the road. The problem Town Counsel had, being a lawyer, with that is that if that was appealed and it got to court and the court would say that the Planning Board could not make him do that because the Planning Board can not make them do it. So what the Planning Board had to do is this extra step in order to set this process on the right path for where it has to go.

Mr. Rogers understands that the Town cannot be held hostage. Mr. Rogers asked if everyone in the room was in agreement that Birch Hill Road was hazardous. No one answered. Robert Wright, Jr. interjected that hazard should be defined. Mr. Rogers stated unsafe conditions. Once again he asked if everyone there was worried about the unsafe conditions. No one answered. He questioned Paul Parker stating that if they walk away from this and his subdivision is denied is he going to recommend to the Town that the Town spend the money because right know Mr. Rogers is not going to spend the money as there is not enough profit in the job. He is already 2 years in the project. If the road is truly hazardous and there are safety conditions is Paul Parker, Road Agent going to go to the Town and ask them for the \$18 to \$10 to \$15,000. Mr. Parker stated that if someone put something together for Town Meeting and they asked the Highway Department to spend the money on the road he would say "no". Mr. Rogers wanted clarification. What is being said is the road is unsafe. Mr. Parker stated he is not saying that the road is totally unsafe, what he did say was there are some pinch points and everybody agreed to that fact. As he stated before he has worked on Birch Hill Road for over 22 years and it has come a long way. Mr. Parker also stated that as far as going to Birch Hill Road and revamping the whole road, he would say "no". If a tree needed to be removed or stump needed to come out it would be taken care of. But he is not going to go up there when he has other roads that are not in as good a shape as Birch Hill Road and spend that kind of money.

Valerie Blachley agreed there are some pinch point areas particularly with children walking up and down. But what their argument is if the development goes in, that road would be extremely unsafe with that much more traffic and children walking. Paul Parker has done an absolutely fantastic job on that road but it would be unsafe if you put more traffic, and that is common sense, on that road the danger level is just going to go up.

Peter Blakeman made a couple of quick comments. First as far as questioning the Road Agent on this he felt that it was unfair because he has to look at the priority of all 60 or 70 miles of road in Town and make a decision on the budget which roads he works on and is there other areas which require that money more than say Birch Hill Road and he thinks that what is really the crux of why he might recommend "no" to the town people is because he would rather spend that money somewhere else. It doesn't mean that he does not feel that there are these areas of the road which do need work it is just there are other areas in Town which more critically need that money and Second the point was brought up, and he was unsure of the answer to it and maybe Town Counsel can offer some enlightenment on it, but there is a questions of if we are saying there are areas that are unsafe and a subdivision would be scattered and premature if these areas were not worked on, it was brought up that there are a number of lots up there remaining and, he personally felt that anyone has a right to build a house on your own property, what does or does that have any bearing on building permits in the future. The Planning Board can only authorize a subdivision. How does this affect the Selectmen for future building permits on this road?

Per Town Counsel, building permits can not be denied because it is scattered or premature. Existing lots can get building permits, unless there is another reason why they cannot get one.

Per Erick Derlith of Birch Hill Road, the only reason they where there is because of this subdivision issue. If it was less than the 3 lots they would not be having this discussion. If it was less lots they would not have to get subdivision approval. It was clarified by both Town Counsel and the Chair that it would be 2 lots or less.

Peter Blakeman stated that any new lot requires subdivision lot approval. It would depend on whether it was a minor or major subdivision. The question is whether the minor subdivision can be deemed scattered or premature.

Chair Sundquist stated that that is not why the Board is meeting.

Philip Murphy wanted to define that none of the citizens who came to the hearings gave any kind of notice as hazardous but were trying to talk about it being kind of a threshold or tripping point. Almost as if somebody wanted to put a 50 unit condominium at the end of the road that would be ridiculous because that road can not take that much traffic. His point was that further up cannot take that much traffic. So they were not complaining about the road and its condition now, they were talking about what would happen if the excessive traffic got on the road. And of course if the subdivision is turned down, there are still 2 lots that can be built on the property so there isn't a total economic loss.

Chair Sundquist stated he remembered on at least 2 or 3 different occasions the concept of a tipping point being presented here as part of the testimony that came in from abutters. It is a valid concept in my view. I am going to be asking the question pretty soon. Are there any other comments that want to come out or any other things the Board wants to have.

Paul Parker, Road Agent stated that he does not care one way or the other how this hearing goes. He has nothing personal to gain or lose.

Chair Sundquist thanked the Road Agent for taking the time to do the walk through. There is one other thing that he wants to put in because we look at the Road Agent to remedy so many situations on Town roads and his day is literally from the ground up. He gets all kinds of detailed road questions, many of which are dealing with public safety issues. But there is another sort of 30,000 feet down look that people should really be aware of. I just want to lay it on the table here as part of the consideration. We do have a Capital Improvements Program in town and roads are part of that. There is a road committee which is comprised of members of boards and other members of the community here who are charged with making a review of the town roads for these kinds of issues and this is a solid recommendation in the Master Plan. I can't talk about progress that's being made on that but this is a process and a function that is out there so that, and you may remember in the early 90's we bonded ½ million dollars in order to take care of a few miles of roads in town and the Road Agent has found other ways to help up do that without having to bond. There is a forum for this kind of discussion and part of this whole process of reviewing this subdivision application has been part of a phase of discovery for the Planning Board as well. The Chair does not travel Birch Hill Road very often and he doubts that other Board members do. The people in the audience live up there and they understand the questions. So that's all been put into the mix here. We looked to the Road Agent for solutions but we should also be looking to the committees in the Town to see that these broader issues are developed and acted on too.

Mr. Rogers wanted to ask about the development, Meadowview Estates. He had been told by a surveyor in Town that there are 4 new lots up there. That's all he is asking for is 4 new lots. There were 2 homes on that road. That is a 200% increase and the road in some spots is 11' wide. If you think about what he is doing at 16% when the road is 14' wide, he is not really sure if the Board is trying to set a new standard with him. But he does need an explanation on that from everybody and he wants to know what the Board is thinking. If 200% and 16% is a long way in the difference between 11' which is not even 2 cars and 14' is a long way and it is only in 1 spot that is 14'.

Chair Sundquist stated that it is all case specific. The Chair ruled that that was then and this is now. Mr. Rogers' point was made and in it will be in the record but the Board is not going to respond to that.

Mrs. Rogers stated that if she understands Mr. Murphy correctly he is saying that the abutters are not discussing the road as currently unsafe. They are saying that this subdivision will create unsafe

conditions. As the road exists right now they are fine. Increasing the traffic on the road with this subdivision will make it unsafe. So what she has heard the Planning Board say is that they cannot extend or litigate preexisting conditions according to RSA.

David Burnham reaffirmed that the Board cannot magnify existing hazards.

Town Counsel stated that the Planning Board has found that it is hazardous in its current condition.

Mrs. Rogers asked even though the abutters are saying that it is not currently hazardous.

Town Counsel responded that the abutters have testified as to what their view is.

Chair Sundquist stated that the Board takes in the testimony.

Mrs. Rogers asked the Planning Board if it is saying that they can not add to that hazard but there is no existing hazard according to the abutters who live there, so it seems like that RSA should not even be considered (I could not understand what was being said) meeting. If the abutters are saying that hazardous conditions do not exist right now, they will only be created by the subdivision, it seems the Planning Board needs to disregard that RSA of expanding the hazard.

Mr. Evans wanted to state 1 more thing. He has lived in town probably longer than most anyone else in the room. He was not born here but he only crossed a couple of town lines to get here. He remembers the roads well when, and he really wanted to compliment Paul Parker, Road Agent, on his work; he lives on a dead end Class V road that, when he built his house where he is now, 20 years ago he was lucky if he could get there. It was part of living in Sutton. He does not see a 16% increase as being a substantial number. That would be what would concern me if say if we are overburdening the road, given the fact that the Road Agent has already said it is one of the better Class V roads in town and Mr. Evans agrees with him. He has been up there in the past. In the past year Mr. Evans has spent a lot of time up there and it is a lot better than the road he lives on which has an extremely similar situation. He believes that what they are dealing with is a bunch of abutters who simply do not want the subdivision. They have complained about the condition of the road, they complained about everything they could complain about under the sun and tried to grab something they could hang on to to stop this subdivision. In his personal opinion Mr. Evans would like to see Mr. Rogers go down there clear that thing 49 ½' and build a 16' raceway because he thinks that is what Mr. Murphy and the rest of the abutters are due because that is not what they want but that is what they have argued for.

Chair Sundquist gave last call.

Mr. Rogers stated he would like to have on the record, and he wants to see this in the minutes. He also stated that if the Board wanted him to speak into the microphone he would and he stressed quite emphatically that the Land Use Coordinator write this down in her notes. He wants it on the record that you, as a Board are saying that this road is a hazard to the Town of Sutton and its residents. Okay, because he is taking it to Town Meeting.

Chair Sundquist stated the Board was not going to respond to that but it will be in the minutes.

Mr. Rogers stated he was not asking the Board to respond, the Board had already said it. He wants it in the minutes.

Chair Sundquist replied that was fine. We have been at this a little more than an hour now. The Chair had a few questions for the Rogers. The Chair clarified that Mr. Rogers went by Mike not John-Michael and Judy. Do you feel you have an understanding of road work that would need to be done by walking through with Paul Parker, Road Agent? Mr. Rogers answered YES. And if you have, do you feel that

you have an understanding or a sense of the probable costs involved? Mr. Rogers answered YES. I think you have mentioned you have estimated it. Mr. Rogers answered YES. So the final question is, and this is the purpose of the hearing, are you willing to make the recommended road improvements as part of this subdivision application at your own cost?

Mr. Rogers asked if he could have another questions answered. If he were to say no he was not willing to do it, and the application is then denied because it is scattered or premature, is he allowed to then reapply for this or another application at some other date.

Town Counsel expressed that there were 2 things to address. The first is if it is a different application, more lots, less lots, yes. There is a case Fisher v. Dover where the Supreme Court has said but she didn't think it applied here and why, but there is a case and the rule of law is that if you have submitted an application and you've gone through the whole process to the point where you get denied you can't submit the exact application again. What Town Counsel would submit to the Rogers is that it would be her view that you would not be submitting the same application because you would be saying "I'm going to pay for all the road work". So that would be different. And, just for your thought process you also could say yes now and then you have a time period within which you have to start the work and if you don't it lapses.

Mr. Rogers stated that right now the market is not that good. Chances are the land is not going to sell anyway. He has had a lot up for sale for 8 months and he has yet to be called regarding it. His thought is if he goes and asks every working people at Town Meeting to spend \$15,000 to fix that road because that is when he is going to have an estimate in his hand, and at that point at \$10 a resident you can all decide if in fact that road is hazardous to your safety. Maybe in a year or 2 years later he will be ready. He has incurred the expenses so far and those are not going to change whether he gets the subdivision or not. It is a matter of will the market bear an additional expense of \$15,000. He does not think it will.

Paul Parker Road Agent asked the Board if they were in fact saying the road, at this time, is hazardous or is it going to become hazardous with future expansion.

Chair Sundquist replied that the Board finds there is a public safety issue with traffic and school children with regard to the traffic generated by the subdivision.

Town Counsel stated that this was a wrong statement and unless the group wanted to make a different finding the finding last time was that there was a problem currently existing.

David Burnham reiterated that there was an existing public hazard.

Town Counsel asked for 2 minutes to go back to RSA 231:90 which was the statue that Mr. Rogers read and talk about the duty of the Town after a Notice of Insufficiency. Her view on this would be that Paragraph III applies in this situation. If the problem of the road, and the Town is not doing as much work on that road as it does on other roads, or as we found out it is even doing more than it is doing on other roads, that does not qualify as a kind of insufficiency that they are talking about under the Statute. She felt what they were really talking about here is one of those sink holes found in the middle of a road once in a while. Then somebody would notify the town there is a sink hole and it need fixing. The town has to do what it needs to do under the Statute otherwise it has some liability. So she thinks that this statute does not apply to this particular situation. But that is her view.

Chair Sundquist requested closure. He inquired as to the Rogers' position.

Mr. Rogers informed the Board that he was not going to fix the road.

Chair Sundquist wanted to make it clear that the Rogers' were not going to fix the road. He asked if anyone had any more questions or comments.

Rich Krajewski, Board Member pointed out that he is relatively new to the area about 10 years ago. He has an engineering background and he has lived a lot of places. Overall he thinks that concentration is on this road need which needs to be fixed or it needs to be determined as unsafe, he actually has not been on the road, what he is going to say is that overall, and New Hampshire is a really really good place where this applies, in the entire state the roads are unsafe. What he is saying is that he has asked this question before and he thinks it was 1 of the Board meetings, somehow he got onto roads and what do we do about making our roads better? And 1 of things that came up was well most of the roads in the state don't comply with the road standards to begin with, so taking this one road out and making it a case study or an example, he does not think is applicable here. What he sees as a Board member, again he, like the Road Agent and everybody else, does not really care he does not have a dog in the fight, what he is concerned about is that, again magnifying an existing condition that is probably not the safest, maybe as the state would like it to be and he has a problem with voting yes on something like that. In an age of litigation, he does not want to see something 5 or 10 years down the road where it comes back and sues the town because they approved it. That is his point of view on this application. Not fixing it. He does not know. Someone has to do it.

Chair Sundquist once again called last call. Seeing that no hands were raised he asked for a motion to close the hearing.

Robert Wright, Jr., - so moved. Paul Raynor – seconded.

Chair Sundquist asked if there was any discussion. All those in favor of closing this hearing, please say I. Unanimous. The Rogers' position on this is that they are not willing to move ahead with upgrades to the roads. Chair referred to Town Counsel regarding the motion she fashioned as it seems to be back where the Board needs to be. The Chair read the proposed motion.

Move that the Board deny the application for subdivision approval because the subdivision is premature. This decision is based on the Board's finding that hazardous conditions exist on Birch Hill Road in at least 3 locations where the road way travel surface width narrows from 13' to 14.5' with virtually no shoulder and deep ditches causing public safety issues for passing vehicles, emergency vehicle access and pedestrian safety in the case of the school children living on the road who must walk to Route 103 to meet their bus. These situations are made more adverse during the winter due to snow plowing and lack of adequate space to store the snow along the road. The Board also finds that traffic safety issues exist at the intersection of Birch Hill and Harwood Road and places where trees and utility poles crowd the road travel way. Should the condition of the road change such that the Board can reasonably find that the hazardous conditions no longer exist, the applicant may submit a new application for subdivision review.

Chair Sundquist asked if all Board members understood the motion.

Robert Wright, Jr., asked if the section where it stated that "the applicant could resubmit a new application for subdivision review" should this actually be included in the motion.

Town Counsel replied that it does not need to be. The reason why it was put in when she was proposing it was really to signal the applicant. But because the applicant is present they do not need to.

Robert Wright, Jr., made a motion to amend the motion to not include this sentence.

Peter Blakeman felt that it was not a bad thing to have in the proposal. If people outside of the hearing read the proposal it would give more insight to the give and take of this process.

Town Counsel stated that this is what a court would do if they dismiss something without prejudice meaning they could come back with it.

Robert Wright, Jr., felt that was okay and agreed it should be kept in.

Chair Sundquist asked if there was any need for further discussion on the proposed motion. Motion made by Robert Wright, Jr., to accept the proposal as written. Peter Blakeman seconded. There was no discussion and no one felt that it needed to be reread. Roll call was taken. 7-0 unanimous.

Mr. Rogers approached the Land Use Coordinator and asked for an e-mail regarding the decision. Chair asked Land Use Coordinator to make sure file is complete.

Paul Raynor made a motion to accept the May 27, 2008 meeting minutes as written. Peter Blakeman seconded. Unanimous.

Carrie Thomas made a motion to accept the June 10, 2008 meeting minutes as written. Paul Raynor seconded. Unanimous.

Chair Sundquist reviewed the application submitted to the Land Use Coordinator by Bruce Ellsworth for a subdivision at Blaisdell Lake. Mr. Ellsworth requested a waiver for the survey and the Land Use Coordinator was not sure how to proceed. The Board stated that on Page 20 of the Sutton Planning and Site Review Regulations, Section 3 a survey is part of the requirements. The Land Use Coordinator will let Mr. Ellsworth know this and will take him off the July agenda.

Correspondence was reviewed.

Carrie Thomas made a motion to adjourn the hearing. Robert Wright, Jr., seconded. Unanimous.

Respectfully submitted,

Linda D. Ford
Land Use Coordinator