

JESSICA COLLINS, Chair  
WALTER R. WOLF, DPM, Vice-Chair  
KAREN WALSH PIO, LICSW, LADC 1, Clerk  
TONY JUDGE

SHARON D. HART, Public Health Director

## Board of Health Minutes

July 29, 2020

As Approved – September 15, 2020

Present: Jessica Collins, Chair; Walter R. Wolf, DPM, Vice-Chair; Karen Walsh Pio, LICSW, LADC 1, Clerk; Tony Judge; Sharon Hart, Public Health Director; Jennifer Jernigan, Assistant Public Health Director; Town Attorney Lisa Meade, Meade, Talbot & Costa, LLC

*Jennifer Jernigan alerted all present at the virtual meeting that it was being recorded and started the recording.*

*The Board of Health Meeting was called to order at 4:34 p.m.*

Collins started with introductions for Town Attorney Meade to know who was in attendance this afternoon. Board members and Health Department staff introduced themselves.

### **I: Topic: Statement Regarding the North Pole Estates Subdivision, and Board of Health Authority**

Collins stated that the agenda today is to go over a process regarding an email the Board of Health submitted to the Planning Board. The meeting is to clarify the process on that. The second part of the agenda today is to talk with Attorney Meade on the North Pole Estates Subdivision application and her letter back to the Board of Health dated June 9, 2020. Everyone at the meeting indicated that they were clear on what the agenda for tonight's meeting was for.

Collins reviewed that the Board of Health had put together a letter to the Planning Board on June 19, 2020 in order to get it in time to the Planning Board for one of their public hearings. After the Board of Health drafted up that letter, which they had agreed on at their previous meeting, Attorney Meade's letter came to the Board of Health members. Collins then sent out an email to the Board members stating that here is the letter we agreed on, however, Attorney Meade's letter just came in, dated June 9, 2020. Are we still in agreement on the letter that we drafted June 19, 2020? That process of the Board members all agreeing on the letter for June 19, 2020 should be done now and not in an email. So, we just want to clarify that the letter that the Board of Health submitted to the Planning Board on June 19, 2020 and then rescinded was not voted on in email but will be in this meeting. So nothing has officially gone to the Planning Board as of right now. Hart stated that the letter was rescinded and now a vote needs to be taken on it. Hart stated that they should discuss the letter with Attorney Meade before it is voted on and brought

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forward. Discussion occurred that the letter can now be redrafted if the Board chooses to before being sent to the Planning Board.

Collins asked the Board to look at the letter dated June 19, 2020 in their Board meeting packet. The urgency of getting that letter out previously was then reviewed. Wolf asked for a “pulse” on the Planning Board, like how many meetings on North Pole Estates have they had, have they had any discussion about the Board of Health’s letter... Walsh Pio stated that she did follow up like stated in the last Board of Health meeting in asking that question. Walsh Pio was told that they had not discussed the Board of Health’s letter.

Attorney Meade stated that the Planning Board is in the middle of going through the peer review comments that they have received. It is taking some time to do that. They are not under the same time constraints that they would be under typical subdivision review due to the special executive orders and special legislation passed due to the COVID-19 situation. They do not have to have a meeting but certainly do not have to render a decision until the end of the declared emergency by the Governor, plus 45 days. So, they have some time to be able to really look at this. They are examining it very closely. Wolf stated that he is relieved that they have some time to really look at this. He is reassured by this.

Judge stated that his concern about the Board of Health letter in question is that it might have been interpreted as offering its approval to the applicant. “That the Board of Health is signing off on this.” Judge stated that he does not think that this is reality, at least for him, and that in future communication, the Board should be clear about whether they are truly offering a sign-off and approval. Judge feels that the Board has some time. There is still a lot to be known before a decision is made.

Attorney Meade wanted to talk about the process at this point. Attorney Meade stated that the Board of Health review on a subdivision under Chapter 41-81U is almost simultaneously done with the Planning Board review but should be done earlier than that. That is why there is a timeframe under the statute. The timeframe right now, due to the COVID-19 situation, has some more time on it but the reason for the timeframe is that if for some reason the Board of Health finds fault with the application, **you need to be very specific with the Planning Board about what those changes need to be and why – what public health issue exists and how they can be addressed or what the issue is.** Attorney Meade told the Board of Health that they cannot really wait till the Planning Board is almost at the end of their review to do this. The applicant needs time to be able to revise their plan if the Board of Health recommends them to do so in order to accommodate issues that the Board of Health has. Attorney Meade told the Board of Health that they need to take action and ask the applicant for more information if needed. You also need to be **specific.**

Attorney Meade asked the Board of Health to refer to the June 9, 2020 memo she sent. She told the Board that they have the right to say that “the plan can’t be used for building sites without injury to the

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public health, certain areas of the plan, perhaps, or all of the plan, or none of the plan.” You need to be very specific about that or point to a statutory or regulatory basis for that decision. **The Board will need to show a “rational relationship” between what you are denying and its protection of public health if there is no statute or regulation that you can point to. The applicant also will need the opportunity to come in and meet with you to discuss how something is not a deficiency or how they can overcome that deficiency. You must give the applicant an opportunity to be heard by the Board of Health.**

Walsh Pio then asked Attorney Meade about the letter that they wrote on June 19, 2020 and if it was too broad-based. Attorney Meade stated that it was. It needs more specifics in it. Collins stated that this is very helpful. Collins stated that they did give a more specific letter in the Fall regarding the preliminary plan. Collins stated that this could be their third letter to the Planning Board. They had stated in the Fall letter about contaminants, that the Board of Health wanted a hydrogeological assessment done and to understand broader health impacts. Collins told Attorney Meade that what they got back from the hydrogeological assessment regarding contaminants was deemed by the peer reviewer as “inadequate.” Collins stated that, for her, those concerns that were stated in the preliminary report are still at large. She feels that this could be the most specific thing that they could say. Attorney Meade stated that the Board of Health could do that for sure, but the applicant needs to be allowed to come in address the concerns in front of the Board of Health.

Attorney Meade told the Board that they could say that the applicant submitted a preliminary plan and the Board of Health gave preliminary comments on it. She went on to say that then the Board of Health could go on and state that the applicant addressed those comments or didn’t address them by doing the following... The Planning Board’s peer review company reviewed the hydrogeological report that the applicant provided and you could state that they found it lacking in the following ways.....The Board of Health could then ask the applicant to come in for the next Board of Health meeting to address these concerns. Attorney Meade then told Madam Chair Collins that she needs to “close the loop” by showing how those concerns relate to the protection of public health. Attorney Meade stated that “that’s the letter that needs to go to the Planning Board.”

Wolf then shared his concerns about any potential residential development down the road having the potential to lose covenant enforcement (ex: pesticide restrictions) and thus damage the public water supply. He stated that he thinks other board members here tonight share the same concern. Wolf does not think that the applicant can ever address this to his satisfaction. Wolf asked about 50 years from now or when a resident sells their property – who enforces this? The applicant can come in and address this concern but they may not be around in 50 years.

Attorney Meade then asked the Board to look at the following questions: (general rules)

- 1: How many other single-family homes are currently in Zone 2?
- 2: Does town zoning allow construction of single-family homes in Zone 2?

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3: Does the Massachusetts Department of Environmental Protection allow the construction of single-family homes in a Zone 2?

Attorney Meade then went on to tell the Board that the answer to all these questions is “Yes” and they even allow them with Title 5 systems. Attorney Meade told the Board that they can then base their concerns on these 3 items above because they are excavating down closer to the ground water. Elevation concerns were then discussed such as: potential mishaps, purposeful dumps, use of pesticides, etc. Attorney Meade then stated that these concerns should be addressed by the applicant to the Board of Health. The Board then will look at the applicant’s responses and decide if the questions or concerns have been answered. If there are still concerns, then the Board writes this up and tells the applicant.

Judge asked Attorney Meade about General Bylaw 245 that is specific to the removal of sand and gravel and limits of excavation. Attorney Meade responded that this issue is being handled by the Planning Board and Building Inspector. They will determine if the removal of sand and gravel in order to construct this portion of the subdivision is incidental to the construction of the subdivision or is really a part of a sand and gravel operation. This is not an issue with the Board of Health as it is not in the Board of Health’s jurisdiction. Attorney Meade then gave some background information that in order to freeze the zoning, because the applicant didn’t know what was going to happen, they filed a subdivision plan for 60 lots. Now they are proposing to build a portion of it (4 or 5 lots) but they could decide to build more in the future.

Collins asked if this is the right time now to ask the applicant to come in and address the concerns that the Board of Health had on the preliminary plan. The Board of Health had sent those questions to the applicant in a letter in the Fall. Meade stated that this is the right time now to ask them in. The purpose of a preliminary plan can be for a developer to freeze zoning and it can also be for the developer to ask the Town for feedback before they go to the expense of paying for engineering for a project. It goes to the Board of Health and the Planning Board. Statutes do not require the Planning Board to make a decision on a preliminary plan. “It affords the developer certain protections.” Attorney Meade stated.

Collins stated that the Board of Health does have concerns with this project and they can clearly point to the hydrogeological study and the massive amount of excavation that leaves the perc tests irrelevant and gives them greater concerns about the oversight of the water quality. Attorney Meade believes that the applicant has redone some of the perc tests now at the correct elevation. Attorney Meade asked Hart to look into this.

Collins then discussed the traffic study. Attorney Meade stated that the Board has to be really clear and relate their concerns to specific health concerns. Attorney Meade stated that there are other areas than traffic that you can do that easier with. You have to make a connection between public health and your concern.

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Judge brought up his concern that this is a big project of houses and septage systems or “something” over a public aquifer. He asked, “What is more important to public health then clear water?” Attorney Meade responded that if the Board “believes that this particular aquifer in South Hadley, in this area, is of a unique nature, as opposed to the general rules, because of all the things you just said, then you need to say that.” **List out why the general rules don’t apply and how public health and this water supply could be in jeopardy. You must be very clear in stating why this water supply is different than many or most Zone 2 water supplies.**

Attorney Meade told the Board that she has seen a developer do a type of flow test on a site to monitor how the water under the ground flows across the site to where the well heads are. You can see geological interferences and the rate the water flows. This is one example of what you can do. Attorney Meade then stated that maybe they will or won’t provide that information to you, but it is an idea that you can use to make your conclusion. There is going to be a significant amount of earth removed for this project. So, these are the specifics you need to look into and should be part of your decisions and conversations.

Collins mentioned the presentation at the Public Library and the unique position of this aquifer and Dry Brook Hill. There have been documents on this that the Board can refer to. Attorney Meade said that Madam Chair Collins can pull the specifics from the reports for when you meet with the applicant. You can tell them that this is what the science says, or this report says, giving them specifics so that they can respond to them. You can even give this information to the applicant ahead of time for them to review for the meeting with you. If they can address things, they should be given the chance to do so. “This is not a game of gotcha.” per Attorney Meade. The applicant should be told what your serious concerns are. Collins stated that all these documents are public already anyway.

Collins brought up a question from a resident stating that there is no rush for the Board of Health to make a decision to the Planning Board. It was put forth in a form for this particular meeting. Collins went over what was just discussed with Attorney Meade, how to formulate concerns for the applicant and have them in to explain themselves. This would address this resident’s concerns over rushing to give the Planning Board a letter. Attorney Meade stated that it is not a rush but you want to make sure that the Planning Board knows that the Board of Health is going through a process and not to close out before you have your process. **Attorney Meade suggested setting up a calendar showing when the letter will be done by, when the applicant will be in to meet with the Board of Health at a public meeting and then when the report to the Planning Board will be in.** “You don’t want to miss your opportunity before the Planning Board starts to deliberate.” Collins stated that this was very helpful.

Collins then asked Attorney Meade about Attorney Meade putting forth an injunction on any excavation that is happening to date. Because the Peer Review Journal had so many inadequacies in it for the future excavation, residents are actually concerned about the current excavation and any mitigation processes they have in place for risk. Attorney Meade responded that they have a legal right to operate on the grandfathered permitted gravel operation. The Zoning Inspector did issue an enforcement last year against a gravel operation on a portion of the property that was not grandfathered. This was appealed to

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the Zoning Board and the Zoning Board upheld the Building Inspector's enforcement. It was determined that there was a grandfathered portion of the gravel operation and they are allowed to operate it, per Attorney Meade.

Collins stated that Nate Therien's second comment about Title 5 oversight and being very specific about concerns was already addressed earlier. Collins asked Jernigan for any other public comments coming in. Jernigan said that there was a request that the video of this meeting be loaded to the public Town of South Hadley website within 24 hours. Jernigan will send the video to the Cable TV Department as soon as she can and then it is up to them to post the link.

Judge asked then about if, after the public meeting with Chicopee Concrete, the Board of Health finds their answers lacking and they are not persuaded, and then the Board of Health tells the Planning Board but the Planning Board goes ahead and approves the application, what recourse does the Board of Health have?

Attorney Meade stated that the Board of Health has a right to deliberate and decide a plan after getting answers from the applicant. Chicopee Concrete can then modify their plan to meet the Board of Health's requests. If they can't modify the plans to meet public health concerns, the Planning Board may then potentially deny their request. If the Planning Board fully disregards the Board of Health's concerns that meet the statutory requirements and are within their scope, the Board of Health can then possibly appeal their decision. Attorney Meade would have to look into this. It is a pretty big step.

There were no other questions. Collins told Attorney Meade that this has been very, very helpful. She wishes they could have done this 5 months ago. Collins wondered if the Board would now like to set some dates and get agreement on who and how they are drafting up this very specific letter. They would have to meet again. Collins can't get an approval on the letter via email. There has to be a vote on it.

**Attorney Meade said that the Board can brainstorm the specific items they want in the letter and then direct the Chair to draft the letter and request the applicant to come in to address those items at a date and time certain. As a Board come up with the very specific things you are concerned about and request the applicant to come in address them at a very specific date and time prior to the Board voting on them.**

Collins asked the Board what they would like to do. Do they want to stay on the meeting and come up with the draft of the letter and then leave it up to her to finalize the letter and then Hart would send it to the applicant or meet again and talk about the specifics of the letter? Judge asked Attorney Meade about there only being 4 members right now on the Board of Health. This complicates communication between the Board members. Attorney Meade confirmed that they cannot speak among themselves, like two of them. You could form a sub-committee but the meeting must be held publicly like this one is now. Attorney Meade stated that the Board of Health could brainstorm and then give the letter to Collins or Hart to draft in 48 hours and then meet again to approve the letter. Judge asked the process of obtaining

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another member. They are elected members so they need to give notice to the Selectboard that they have an opening and that they want it filled, per Attorney Meade. Then you have a joint meeting to fill the position. The Selectboard has to call the meeting. Dr. Wolf asked Jernigan and Hart if the Selectboard has been notified of the vacancy. Hart responded that the Town Administrator has been notified of this. Wolf stated that it sounds like the Selectboard needs to be notified and urged to fill the vacancy as soon as possible. The vacancy occurred over a month ago, per Wolf. Attorney Meade said that we are still within the time period, especially with everything that is going on. This is not unusual. Collins asked Hart if she would inform the Selectboard. Hart stated that Mike Sullivan, Town Administrator would do that and she will follow up with him.

The Board decided to talk right now and discuss their concerns surrounding the North Pole Estates subdivision. They would come up with ground work and then they would draft the letter and get it to Attorney Meade for review, prior to circulating it to the rest of the Board. Attorney Meade stated that this fine to do. After it is reviewed by Attorney Meade then they would set up another meeting and include Attorney Meade in it to approve the letter that will be sent to the applicant.

**Attorney Meade then left the meeting.**

Collins stated that she thinks Attorney Meade is suggesting they start with the big picture which needs to refer to the presentation done at the library by the professors regarding the uniqueness of the aquifer and Dry Brook Hill. “We need that big picture to say that we understand that generally, subdivisions are allowed to be built on aquifers, however, we think our aquifer is different and therefore doesn’t fall under the general law.” Collins stated. Then Collins stated that she thinks they go back to their original letter they sent in May that had the very specific concerns in it. The peer review did not address potential contaminants, there were concerns about how to ensure that future ownership does what they should and then the hydrogeological assessment concerns with inadequate answers. We give them very specific concerns and then invite the applicant in to address them. Collins asked for volunteers to write the letter. Jernigan will look for the documents given out at the library presentation. Collins stated that Dr. Frantz had sent them to the Board, in their meeting documents.

Dr. Wolf asked Jernigan to organize a packet for the Board in order to write the letter that has the hydrogeological study in it, all correspondence sent to the Planning Board from the Board of Health, minutes from today and the SWAP report. Then the Board of Health can write up an outline of the letter and then use that outline to compose the letter. Walsh Pio stated that there is a condensed version of the hydrogeological report.

It was agreed that Jernigan would run by Collins first all the documents that the Board is requesting. Judge stated that that they are looking for all the arguments that they sent in the Spring letter to the Planning Board. We can use that letter already written as a basis for this new letter. We can then include any new issues in it that have come up. Wolf thinks Collins, Hart and Jernigan should decide the most appropriate information to send to the Board. Collins wants both letters: the Fall one and the May one.

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Collins thinks that they should take a high-level view like Judge has pointed out. Take what the attorney suggested of a high-level view of the general regulations of subdivision situations in Zone 2's in general and then narrow it to our Zone 2 and our aquifer referring to the public library presentation and then stick to our concerns but give more specificity to it with public health. They can reference the SWAP of 2003 as well as hydrogeological assessment and the peer review report that found the applicant's responses to be inadequate. Judge stated that they need to find a way to communicate together legally and efficiently, and soon on this.

Collins will draft the letter. She will then send it to Hart. Hart will in turn send it to Attorney Meade. Then the Board of Health will meet as a group to discuss the letter. At that meeting they will set a date to get it to the applicant to have a response for such and such a date and then let the Planning Board know the timeframe. Judge was curious about the timeline. Collins stated best case scenario that the letter is done by the end of August and then have the applicant meet with the Board in September? She asked Hart about how these timelines usually go. Hart said that we can ask the applicant what their availability is within a week or two for both the Levesque company and Chicopee Concrete (Mr. Ouellette).

**The next Board of Health meeting was set for August 12, 2020 at 4:30 p.m.**

**Dr. Wolf left the meeting at 5:35 p.m.**

It was reviewed with the Board that the draft of the letter can only be shared by Chair Collins to Hart and Attorney Meade. Hart will then share the draft to the **individual** Board members so that they in turn can prepare their **individual** comments on it for that August 12, 2020 meeting. Then the letter and the Board's individual comments on it can be discussed among the Board members at the August 12, 2020 Board meeting.

## **2: Adjournment:**

The meeting was adjourned at 5:37 p.m. All were in agreement to adjourn.

Respectfully submitted,

**Draft – Draft – Draft**

Jennifer J. Jernigan  
Assistant Director of Public Health

**ATTACHMENT A**

**DOCUMENT**

**RECORD LOCATION**

Letter from Lisa Mead, Town Counsel Dated June 9, 2020 - Role of Board of Health under Subdivision Control Law	BOH File
Letter to Brad Hutchinson, Chair Planning Board, Dated June 19, 2020 Regarding North Pole Estates Subdivision Definitive Plan Public Hearing	BOH File
Source Water Assessment and Protection (SWAP) Report For South Hadley Fire District No. 2 Dated November 21, 2003	BOH File