

HULL ZONING BOARD OF APPEALS

Applicant: David Klayman

Property: 110 Manomet Avenue

Date: Thursday, June 20, 2013

Time Meeting Began: 7:35 p.m.

Time Meeting Concluded: 9:00 p.m.

Place of Meeting: Hull Municipal Building, Main Meeting Room

Zoning Board Members Present for Hearing:

Alana Swiec, Chair	Sitting	Attending	Absent	Abstain
Dr. Roger Atherton, Clerk	Sitting	Attending	Absent	Abstain
Atty. Mark Einhorn, Member	Sitting	Attending	Absent	Abstain
Phillip Furman, Associate	Sitting	Attending	Absent	Abstain
Jason McCann, Associate	Sitting	Attending	Absent	Abstain
Patrick Finn, Associate	Sitting	Attending	Absent	Abstain

Others in Attendance:

James Lampke, Town Counsel

Peter Lombardo, Building Commissioner

David Klayman, Applicant

Michael S. Nuesse, Attorney for Applicant

Robert Galvin, Attorney Representing Six Residents in the Town of Hull

Karen Morgan, Recording Secretary

General Relief Sought: Public Hearing – An application filed by David Klayman, 164 Beach Street, Sharon, MA regarding property at 110 Manomet Avenue, Hull, MA – to appeal the Building Commissioner's decision per his letter of February 27, 2013 to issue an order of cease and desist use of the dwelling as a business/commercial venture – a seasonal rental – in a Single-Family Residence District, which use is not allowed per Hull Zoning Bylaws, Section 31. Failing to do so will result in criminal/civil complaints being filed. Copies of said application, with additional details, are available for public inspection at the Town Clerk's Office and Building Department, all at the Hull Municipal building during normal office hours.

General Discussion: Mr. Finn begins by making a disclosure that he was a political supporter of Myron Klayman. Applicant Klayman said there is no relation.

Mr. Nuesse spoke to the ZBA and read a memorandum that he prepared that the ZBA has a copy of as well. The reason he is here tonight is because the Town has suddenly taken the position that renting your house or renting a unit in your building, that this act of renting your property is somehow illegal or not allowed under the current Zoning Bylaws. Other towns have bylaws which describe what these rentals can do and what they can't do. There is no clear direction that he can find within the bylaws to justify how the Town reached this conclusion. They are here tonight to object to that finding and also to point out that Mr. Klayman is also requesting a special permit. If the Board finds that there is a justification for this interpretation of the bylaw, then perhaps a special permit could be issued. It is important for the Board to take this issue up because his understanding is that there has been a number of complaints about these types of properties, which in Town there must be a couple of hundred rentals, especially in the summer time. This may be the first of many cases that you'll hear if this interpretation continues. If you take a look at the bylaws, you'll see that they initially are to be put in place for the health, safety, convenience, morale, and welfare of the inhabitants of Hull and the act of having bylaws is a restriction of property rights, preventing someone who owns a piece of property to use that property as they see fit. Renting a property, having profits from the rentals, is one of the fundamental rights of property ownership. There is no justification that it causes a violation of health concerns or safety. There are no moral implications and it does not affect the welfare of the Town. The bylaws that they reviewed contain no definitions as to what a rental is or what a business is. It is unfair for the Town to all of a sudden do this at the prodding of a singular individual and a few neighbors who complained about not just Mr. Klayman's rental but also many other rentals; there are hundreds of these situations in Town. The Town benefits from having tourists and renters come in during the summer time. The ability to rent your property in this Town in the summer has been going on for over 100 years. He thinks the Town needs to take a step back and put a hold on this and use the zoning bylaw study committee and have that committee form and bring Mr. Gladstone in on it; and have people get involved and to have that committee come up with some regulation rather than having people who are coming into Town, purchasing property, not knowing what they can do with it; or have people who have been doing it for years now faced with cease and desist orders – it doesn't make sense. There is no real definition of what a rental is and what is and what is not allowed in single-family zones. Mr. Klayman's house is in fact a single-family dwelling and is being used by a single family using the dwelling. Who is to say that renting month-by-month is OK, but renting week-to-week is not? Where in the bylaws does it say that? In paragraph D in a single family zone bylaw, it allows accessory uses, customarily incidental to a permitted main use. He suggests to the Board that the renting of a property that has never been found illegal before under these bylaws, that the rentals can be viewed as an accessory use that is incidental to a permitted main use in a single family zone. There have been no types of activities such as bad behavior going on at Mr. Klayman's property, nor any police reports

Mr. Atherton asked about the why the need for a special permit and not a variance? Mr. Nuesse replied that he contemplated whether to ask the Board for an amendment to their petition because either a request for a special permit or a variance can take place at any time that may be come up with regards to the Building Commissioner's decision. It is possible to consider both issues.

Mr. Finn stated that this is a single-family home in a single-family district being used as a single-family home. While reading Mr. Nuesse's information on Part 3F, it says, business is not defined by the bylaws. And while reading the Town's letter that they are in violation of the zoning bylaws because they are operating a business in a single-family district. He was wondering how is renting your house a business? Ms. Swiec replied by saying that they are allowing the applicant to speak and thinks that it is a good question. Mr. Nuesse said that the business section of the bylaw, renting a property is not included in any of those uses. Ms. Swiec said that Mr. Lombardo wrote the letter asserting specific items and we will hear from him and Mr. Lampke regarding those questions.

Mr. Einhorn wanted to know procedurally when this was filed. A non-compliance of Section 15 of 40A and he does not know if the Building Commissioner's letter dated February 27, 2013, under Section 15 of 40A it has to be filed within 30 days with the Town Clerk. He wanted to know when that was filed? Mr. Nuesse said it was filed with the Building Dept. on March 26th. The procedure that the Town goes by is that the application is given to the Building Dept. and the Commissioner reviews this and then files that with the Clerk's Office which is what happened in this circumstance. Peter and he talked regarding this as to why he held it for as long as he did – Peter thinks he asked him to, but he does not think so. It was held until May 15th. It would not be an issue if it was not held at all and given directly to the Town Clerk. He submits to the Board that he does not think that we should get tied up in this issue because this is not an issue on the question if the Board has the authority to issue a special permit or not. The Board could say it doesn't see any problem here, as you don't need a special permit. There is nothing in the bylaw preventing these rentals. Are there grounds to even have a question here?

Mr. Einhorn said that it would likely be raised in any appeal as the appeal is commenced with the filing of a notice with the municipal clerk in 30 days, and if not will result in dismissal even if the petitioner is filing per instructions issued by the Board of Appeals that do not purport to require filing with the Town Clerk. Mr. Nuesse said that is a special permit request which can be filed at any time. Mr. Einhorn said he is speaking of the Cease and Desist letter being appealed which applies here. Mr. Nuesse said that may be an issue, but the issue is really not so much whether or not that was part of the issue; it is whether there is a problem here at all. Mr. Einhorn asked what the procedure is – do we ask people to file with the building Inspector or the Town Clerk?

Mr. Lombardo said that as long as he has been here, the practice has been filing with the Building Dept. first to go through the applications, make sure everything is complete, to have proper permits, to go through the file, to verify if there are prior zoning hearings/decisions that may be pertinent. That information gets put together, checked for accuracy, other relevant previous decisions and application included, and passed onto the Town Clerk.

Mr. Atherton said that it must be recorded by the Town Clerk within 30 days, nothing of what he is describing prevents that. Mr. Lombardo said that this particular application was received by the Building Dept. on the 26th which would have required for him to go through the process and then pass it onto the Town Clerk that day and it takes time to review. Mr. Einhorn said we have to address this and it's not what the statute requires and will be raised as we continue along this hearing.

Mr. Einhorn continued that to appeal the decision of the Building Inspector has to be done within 30 days of the date of the decision of the Building Commissioner and he has to file with the Town Clerk and then file it with the Building Dept. and copies given to the Board of Appeals. The Town Clerk was not part of this and it was filed in reverse when it was filed by the Building Dept. and then to the Town Clerk. Case law is on point and states it must be filed with the Town Clerk within 30 days. This is not how our process works.

Mr. Atherton stated that what needs to be raised and addressed is that we did not advertise the request for a special permit and the rules for that are somewhat different and so that might not be an issue for the 30 days, but if we haven't advertised it for a special permit, how does that affect what we are trying to decide? Mr. Lampke said that if a special permit wasn't advertised, you cannot act on a request for a special permit. One option would be to reschedule at least part of the Hearing to address the special permit request and to allow for the proper time to advertise and notify the abutters.

Ms. Swiec asked if we can allow the Applicant's to withdraw without prejudice. Mr. Lampke answered that the request has to be made in regards to the special permit. The appeal from the Building Commissioner's order is a different matter. Ms. Swiec responded that the two have to be separate. Mr. Finn said that's the only issue now and that the special permit issue has to be re-advertised. Mr. Lombardo said that the letter that was dealt with this situation was dated February 27, 2013. The appeal of that letter was received on March 26, 2013. Mr. Finn said that we can hear it since it is within 30 days. Mr. Lombardo stated that it did not get to the Town Clerk until May 15th. Mr. Einhorn said that we do not normally hear appeals for decisions of a Building Inspector, it is more special permits, variances, dealing with construction and it helps with Peter reviewing them. It does not work for these types of issues because the statutes are specific and there are case laws. Mr. Finn said that 40A says it must be within the 30 days from the date of the decision of the Building Commissioner. Mr. Einhorn said that is for the appeal. Mr. Lampke replied that the statute says it is with filing with the Town Clerk. Ms. Swiec spoke of the due date is with the Town Clerk's office, not the Building Commissioner's office. Mr. Finn said that he does not see anything in our bylaws that needs a special permit or has a process for a special process for someone to rent their house. Mr. Einhorn said he intends to agree, but that we may not have jurisdiction to hear this; that is why he is raising the issue of jurisdiction first.

Mr. Nuesse said that there will be a number of these issues to come up. This jurisdiction issue was just raised. Mr. Einhorn said that there was a memorandum submitted to the ZBA and he did some research and it is clear in the answer that this is not the process that we use. Mr. Nuesse is not sure it makes sense to go forward with any of it and to give him the opportunity to respond. Mr. Einhorn said that he was not aware it was not properly advertised.

Ms. Swiec said that we do not open the Hearing to the members of the public for comment until after the applicant's presentation has been done and the Board is satisfied with the answers to these questions. Also, at the opening of the letter that she read was the language that was advertised in the local paper. And nothing in the advertisement refers to a special permit/variance, which is required by law if appealed.

Mr. Finn answered by asking if we have any written policies or procedures that spells out what was just described when you say we do not allow input from the public until we hear from the applicant, if this is in our bylaws. Mr. Furman answered that Alana runs the meeting. Ms. Swiec said she presented packets to the new members that describe the Rules and Regulations. She then asked what the feeling of the Board is in light of Mr. Einhorn's statement. Mr. Donahue (from the audience) stated that the attorney brought up a point that he does not think it should be before you. Ms. Swiec is going to recognize the attorney representing the Town. Mr. Einhorn asked Mr. Lampke if he would like to weigh in. Mr. Lampke said that he does not have the statute in front of him, but if the statute says an appeal is perfected by filing with the Town Clerk, the appeal needs to be filed with the Town Clerk in accordance with the statute; if the question relates to the special permit request, that is a different story. Mr. Nuesse said that if are not going to move forward on the special permit because of this advertising issue, he thinks it makes sense to not move forward with any of this. Mr. Einhorn said that we set up the procedures and the does not necessarily fit with what the statute requires. Mr. Lampke said that at some point you have to address the fact of statutory provision to be first filed with the Town Clerk and then to the person whose order is being appealed. Sometimes a Court will take an issue like this under advisement and continue with the rest of the Hearing and include that in their ultimate ruling. Mr. Nuesse said that this will give us a chance to respond and look at it more closely. Mr. McCann asked if the Board decides on this tonight with this procedural issue and then it is re-heard as a special permit at a separate meeting, you will be deciding twice on the same issue. Mr. Einhorn said that we will have to decide about the two issues as they are separate. Ms. Swiec said that she thinks we are all in agreement that the statute is clear and the application was not filed timely for the process we have to adhere to for Hull, MA. If we cannot hear about the special permit because it was not advertised, she does not object to going forward with the Hearing. Mr. Einhorn said that we do not have jurisdiction to hear about the appeal. Mr. McCann said that if you do advertise the special permit, you have to re-hear everything again. Mr. Furman asked why he cannot withdraw without prejudice? Mr. Nuesse said that they need some time to look at this more closely. Ms. Swiec said that the withdrawal without prejudice is a two-year window. Mr. Lampke said that the filing of the appeal, if you do not contemplate to making a final decision tonight, we could continue with the Hearing, as it relates to the appeal of the Building Commissioner's order, and we haven't heard from the people who raised the issue either. We could afford the opportunity to those who want to weigh in on that issue to do some further research and provide information. You can continue to another date and advertise the special permit and at that hearing re-address whether or not there was compliance with the 30-day filing with the Town Clerk or you could decide the 30-day issue tonight and just advertise the issue of a special permit. Mr. Finn stated that he agrees with Mr. Lampke and Mr. McCann and he hopes the Board is not going to make any decisions tonight. The two new members did not have all the information and would like to read more about the statute.

Mr. Galvin suggested you have all of the facts on this issue of the procedural requirements. It is very clear and it is undisputed that an enforcement letter was issued on February 27, 2013. It is also very clear that the applicant did not file with the Town Clerk within 30 days. There is no evidence that you'll hear on any of the date that will ever change that fact. It was done wrong. What happened here was that the gentleman filed an appeal with the Building Inspector. The statute requires the filing fee be

submitted to the Town Clerk. The applicant then takes the date-stamped application, brings that to the Building Inspector and then to the Board of Appeals, that is the statutory procedure – which is mandatory, not directory. As a result of that, the Board has no jurisdiction to hear this Appeal. He has not heard if a variance or special permit fee has been paid, but that appeal can be heard on another night. Ms. Swiec said that she feels that these are two separate issues. Mr. Atherton said that we have to re-advertise the special permit. Mr. Einhorn said there is still the jurisdiction issue, but he agrees Mr. Nuesse needs some time to research the issue. Mr. Mr. McCann said that no matter what is decided, people will have to come back anyway. Mr. Finn said he was not aware that the special permit was not advertised properly.

Mr. Atherton raised the issue that Atty. Nuesse had spoken, but that Atty. Galvin has not had a similar opportunity. Mr. Finn raised the issue that the procedures do not specify that the complainant can speak. Mr. Lampke rebutted that it is up to the Board Chair to decide who can and cannot speak and the purpose of an adjudicatory hearing is to allow anyone with pertinent information to be allowed to speak. Ms. Swiec called on Mr. Galvin.

Mr. Galvin spoke again that the problem is that this is not against renters, it is against rentals that are in violation of bylaws and if this gets stretched out all summer long, then his clients will be subjected to this problem all summer long, and that is not fair. Mr. Nuesse interjected that he had just heard of this jurisdiction issue two days ago and had not had an opportunity to research it properly. Ms. Swiec said that a continuation makes sense, but goes to the end of the summer which creates another problem for the complainants. Mr. Finn made the point that the ZBA can only grant zoning relief; enforcement is the responsibility of the Building Commissioner.

Paul Schneider, 107 Manomet Avenue, said he thinks that if the Building Inspector is going to make this decision, shouldn't the people who are involved have their say and have their opinions recognized? Ms. Swiec said that this does not have to happen in this forum. It can be directed to the Building Inspector to enforce or not enforce.

Mr. Lampke stated that Town hall would take care of the re-advertising.

Motion: Mr. Einhorn made a motion to continue the Hearing until August 15, 2013 at 7:30 p.m.

Member	Motion	Second	For	Against
Alana Swiec, Chair			X	
Dr. Roger Atherton, Clerk		X	X	
Atty. Mark Einhorn, Member	X		X	
Phillip Furman, Associate			X	
Jason McCann, Associate			X	
Patrick Finn, Associate			X	

Recorded by Karen Morgan

Approved by Roger Atherton _____ Date: _____