

HULL ZONING BOARD OF APPEALS

Applicant: Kenneth L. and Donna L. Kaplan

Property: 73 Manomet Avenue

Date: Thursday, April 4, 2013

Time Meeting Began: 7:45 p.m.

Time Meeting Concluded: 9:20 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

Others in Attendance:

Kenneth L. Kaplan, Applicant

Donna L. Kaplan, Applicant

James Lampke, Town Counsel

Peter Lombardo, Town Building Commissioner

William Costello, 2 Alden

Attorney Bryan Duggan, representing Mr. Costello

Karen Morgan, Recording Secretary

General Relief Sought: Hearing Continued - An Appeal filed by Kenneth L. and Donna L. Kaplan, 73 Manomet Avenue, on the Building Commissioner's 12/27/12 failed to properly respond to a written request for zoning enforcement. Copies of said appeal are available for public inspection at the Town's Clerk's Office, Zoning Board of Appeal's Office and Building Department, all at the Municipal Building, during their normal office hours.

General Discussion: Mr. Einhorn, acting as chair, spoke about how this hearing was rescheduled due to a charge of conflict of interest. Mr. Lampke had sent correspondence to the Board for signatures that provided his rebuttal to the charge of having a conflict of interest in representing and providing assistance to the Building Commissioner, the Zoning Board of Appeals, and the Board of Selectmen, in which the Board's decision might be in opposition to one or more of those. The required signatures indicating approval of the arguments for no conflict of interest were executed at this time.

Mr. Kaplan presented his case to the Board. He would like to request if Town Counsel offers any testimony that he present on behalf of which client he is offering that testimony, or that he is offering

his own testimony and own opinion and not on behalf of the client, and that the record should so reflect. He also stated that he has not seen any certification of an abutter's list and 73 Manomet Ave, abuts Parcel #5 and Parcel #5 is a deeded lot with defined lot lines and boundaries. He did not see, on the list that he received, that Parcel #5 was listed nor did any notification on the list indicate any notification had gone to the owners of Parcel #5. Mr. Furman then questioned whether the hearing should proceed without proper notification of interested parties?

Mr. Lampke said the subject of the appeal is stated in the application and the assessor's office produced the abutter's list in accordance with customary and required procedures. People have been given notice who are entitled to be notified on the abutter's list. This is the point that Mr. Kaplan wished to make as he noted it for the record, and he does not see a problem with the abutter's list that was utilized in this case and therefore he believes that proper notice was given to those that are entitled by law to the notice. Mr. Lampke indicated that Parcel #5 is the station area at that location, and that Mr. Kaplan referred to Parcel #5 as a Deed called it that. He can call it Parcel #5 if he wants but this is the distinct parcel that he is dealing with on this appeal, not the whole track. Mr. Furman further questioned whether the abutters are those abutting the 2 ½ miles of railroad bed or just parcel #5? Mr. Einhorn opined it is just Parcel #5.

Mr. Kaplan said that Parcel #5 has a deeded owner and that deeded owner should have been notified and that owner is the Town of Hull. This is stated in MGL, chap. 40A. He has not seen a certification. He cannot tell if this was certified or not. He was told that there is a stamp on the form that acts as the certification but he took precise note of that note and noted that the stamp is put on the form upon payment of the check before any work is being done. There has been no notification that he can see of the deeded owner of Parcel #5 and MGL 40A is rather clear.

Mr. Einhorn asked Mr. Kaplan if he feels that the Town has not been properly notified. Mr. Kaplan said yes, that there is a procedure that has not been followed. Chapter 40A says that once you open, or close, the hearing and accept notice has been given with that uncertified list that he loses his rights. He made the objection before on this. He hasn't seen any certification and does not see Parcel #5 as an abutter, on the list of people that were notified. He also stated that he requested to Town Counsel as to what client he represents. Mr. Lampke said this was already addressed.

Mr. Einhorn asked Mr. Kaplan to summarize the application to the Board.

Mr. Kaplan began by stating that within the boundaries in the Town of Hull, there is no statute, ordinance or by-laws that permits legal uses of swimming pools, sheds or decks without a building permit. The ZBA has oversight and authority of the enforcement of the by-laws and can order the Building Inspector to apply the zoning by-laws to Parcel #5. He stated that Mr. Lampke offered testimony that the Building Inspector in due time was going to enforce the requirement of a building permit of Parcel #5.

He continued to state that the ZBA may be aware of Exhibit 5 from the Plymouth County Registry of Deeds which is part of the deed of April 1938 that deeded into the name of the inhabitants of the Town of Hull the land that is referred to as Parcel #5. He presented this deed and that Parcel #5 has very specific

boundaries. At this point, Mr. Kaplan represented the deed to the Board. He also wanted to reference the document from the Plymouth Country Registry of Deeds that it was recorded in April 1938 in which it refers to the Town of Hull, Town Meeting dated 3/12/1938 in which they voted to take the land inclusive of Parcel #5 for a stated specific purpose and he thinks the Board should give special attention that town meeting specified a purpose for the land. The specific purpose for the land is to be used as a town way for public convenience and he has from the Registry of Deeds the taking of Parcel #5 as a town way for common convenience. By a unanimous vote by the BOS, they took this land for a specific purpose as a town way for common convenience. This is his interpretation as he has no legal experience. Based on his research, he found nothing of any subsequent town meeting where town meeting has changed the specific purpose of Parcel #5. He is not saying it does not exist, he asked a lot of people, and no one has been able to produce any further evidence that showed any change in the purpose or use of Parcel #5. The only way that a town way - that was approved for that specific purpose by a town meeting - will be opened, used, and disposed of is only by coming back to town meeting and town meeting would have to authorize the BOS prior to the BOS disposing or converting that municipal owned or used land for a private purpose. He found no record at Town Hall. Mr. Einhorn said that this is a separate issue than what is before us tonight, but Mr. Kaplan disagreed with that conclusion.

Mr. Kaplan continued to say that he found no town meeting stating that this town approved anything other than a Town way for common convenience. Our zoning by-laws, under the section for uses in a residential area, lists legal uses for municipal purposes. This land and that piece of land can be used for municipal purposes. It is highlighted as Item #B under Uses. He then wanted to compare Exhibit 5 to the zoning map. He wanted to show the discrepancy. At this point, Mr. Kaplan showed the zoning map to the Board members. He also showed the Board members the official map that has this identified at railroad bed. On some maps, there are railroad beds along Kenberma Street. This clearly shows what was expected at town meeting as to the railroad bed and that is different and unique from every other street. He believes this is what is referring to legally as the railroad bed, meaning a 50' easement in MA. He does not think there is a street name. He found no names for the street. It's a common way where there would be an exception if labeled as a railroad bed. The deed said that it is a former railroad station called Kenburma Station.

Parcel #5 is a land area, approximately 45 feet wide and 185 feet long, that is about 8,000 sq. ft. It is recorded in the Registry of Deeds and held in the deeded name for the Town of Hull. After the approval of Town meeting on 3/12/1938, the BOS unanimously voted to take Parcel #5 for the specific purpose of a Town way for common convenience. He cannot find any record to this date authorizing any uses of Parcel #5 other than as a town way for public convenience. A town way for public convenience in his opinion is a municipal use. The Town of Hull Zoning By-Law Section 31-1B states that municipal uses are a permitted use for single family resident District A. Section 31-1B allows accessory uses customarily incidental to a permitted main use on the same premises, or permitted main use on same premises. To put in an accessory building on Parcel #5, he is presenting the legally permitted use is a town way for common convenience. Same premises is important because Parcel #5 is clearly, it's boundaries are clearly identified and shown as a lot by definition of Town of Hull Zoning By-Laws. The Town of Hull Bylaw 22-1 defines accessory building and use, a building in use on the same lot with and clearly

incidental and subordinate to the principle use or structure. He takes the position of what is conveyed at the Registry of Deeds. We are dealing with two separate lots -a lot that is 2 Alden Street and a separate lot which is Parcel #5. They have two separate distinct primary uses. Two Alden Street is a single family residence. The abutting lot, Parcel #5, has the clearer specific use to being a town way for common convenience. Incidental means that the use must not be a primary use of the property but one that is subordinate and minor in significance. It must also incorporate reasonable relationship with the primary use. To ignore this aspect would be to permit any use, that is not primary. As accessory use must remain subordinate once it is established. Parcel #5 the section that is under the license of the BOS, there is about 5000 square feet of which about 3000 square feet of that is covered with structures that are an accessory to a single family residence. They are not an accessory for a town way or common convenience. Swimming pools, decks and sheds are not an accessory use to the town way for public convenience. Parcel #5 perhaps may be located in a residential district but the primary use is determined by town meeting and for the 1938 BOS is for town way for public convenience. It is not a public convenience with the swimming pools, decks and sheds are used for private use.

Two Alden Street is not the same lot as Parcel #5. They are two separately recorded lots. An accessory use must be on the same lot. You can't combine two lots together in the Town of Hull to decrease a non-conformance on one lot. It is not allowed anywhere in the zoning bylaws. We basically have two lots joined together, this is not an accessory use as it has no significance to this municipal town way. The pool is attached to the house and it is on both lot lines and goes over to Parcel #5. Mr. Furman expressed concern that the pool is on the lot line, and without setback conformance.

Mr. Einhorn said that you have to see if you agree that Parcel #5 is a lot. Mr. Kaplan is calling this a lot. Mr. Kaplan said that this is not a settled issue. Mr. Einhorn said that he is not convinced that this is a lot. Mr. Kaplan said that if it is not a lot then it is road and you cannot build a pool on the road.

Mr. Kaplan continues by stating that 2 Alden Street and Parcel #5 are not in common ownership. There are two separate owners. In November 2011, 2 Alden Street was granted a license that says to clean and maintain structures located on Parcel #5. One had to ask, who owns the sheds, the decks and the swimming pools? Allegedly they were built around 2001. The license was granted in Nov. 2011 over 10 years past the point it was built. The license says that the commencement of the license is the date that the licensee commenced use of the land. The Costello's testified in prior hearing that they bought the house on 5/15/2006 so if the license commenced upon the beginning of their use, the 2011 license would have at best have a commencement date of 5/15/2006. In 2001-2006, they had no authorization legal or illegal to use the land and that is called trespassing. Neither date seems beyond the 10-year statute. He also wanted to suggest that what the license does in his opinion is actually creating zoning by saying Nov. of 2011, we authorized you to use this land for cleaning and maintaining structure back to 2006. He does not believe in MA that you can retroactively apply zoning. You can only have zoning move forward for when zoning is initiated and the process of town meeting passing and the BOS accepting and the AG validating and attesting to. It is a forward process. It is not just the Costello's but the people that constructed the pool without a license or building permit. The lot has always been two separate owners. The BOS do not determine the zoning uses of land. It is this Board that rules and the BOS are subject to the rules and finding of the ZBA. Parcel #5 is municipal and not residential. The lot

known as 2 Alden Street has less than 5000 square feet of land. Parcel #5 consists of 8000 sq. ft. of land. MGL Chap. 40A Section 6 offers no grandfather protection to Parcel #5. Parcel #5 does not merge with 2 Alden Street and to be treated as an independent lot by itself.

Zoning Bylaw 22-1 defines accessory use as the use on the same lot. Swimming pools, decks and sheds on 2 Alden are not an accessory use and are the only use on Parcel #5. Section 3-1 reads no use of land shall be become or changed without a permit being issued by the building commissioner. There is no building permit that he is aware of. According to our bylaws, there is no legal use of that land until the permit is issued. Section 30-3 D except as provided for MGL's, Chapter 40A or in this bylaw, no building or structure of land shall be use except for the purposes permitted in this district. There is no use because there is no building permit. Building permits are safety issues as well as for zoning issues. He stated that Mr. Lampke informed another Hull Board that it is the intention in due time for the building inspector to require a building permit.

Mr. Einhorn said that he is hearing the points of Mr. Kaplan's complaints. We will work at what points to make. Mr. Atherton thought that Mr. Kaplan was saying if Mr. Lombardo committed to a building permit process, then Mr. Kaplan's issue would be withdrawn. Mr. Kaplan stated that there is a case was in Aug. 2012 with the Hingham ZBA that was similar as to what we are dealing with here. The attorney representing the appellant and as part of the resolution, the Hingham ZBA believed they had authority in their decision just to ask the appellant if he is willing to come for a building permit and it ended with the ZBA, in the negotiated position in the public hearing with the property owner, the decision is that the owner agreed in 30 days' time that they would make application. Mr. Kaplan wants some type of agreement for this to move forward to the building permit process. Mr. Atherton pointed out there are two levels of decision here – the first is whether Mr. Lombardo will require a building permit, and if he does whether it will come before the ZBA, which might require a special permit or a variance. Mr. Lampke pointed out it is not the purview of the ZBA to query the building commissioner as to his intended actions.

Mr. Lampke stated that public officials are presumed to comply with the law. The building commissioner is expected as a public official to act with accordance to the law and he has never said that he is not going to enforce or that he has not enforced the building code. The problem is that the Kaplan's do not like, approve or agree with how the building commissioner is handing the situation. The building commissioner will obtain the building permit in the proper time in the proper format. The issue is whether the ZBA has jurisdiction, as the parcel in question is un-zoned. Parcel #5 is not in a zoning district as Mr. Lombardo has pointed out. So, Mr. Einhorn asked how can a building be built in a public way? Mr. Lombardo said that there had been several occasions in the past similar to this case where a structure was built in a railroad right of way when the Town and State approved that particular structure. Mr. Kaplan said that this is a false statement.

Mr. Duggan opined that the way is unzone, unregulated, and there are no applicable by-laws in an un-zoned area within the Town, so the ZBA lacks jurisdiction.

Motion: Move to dismiss due to lack of jurisdiction.

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

Comments: Unanimous

Action Taken, if any:

Mr. Einhorn will write the Decision.

Recorded by Karen Morgan

Approved by Roger Atherton

All actions taken:

All action taken includes not only votes and other formal decisions made at a meeting, but also discussion or consideration of issues for which no vote is taken or final determination is made. Each discussion held at a meeting must be identified; in most cases this is accomplished by setting forth a summary of each discussion. A verbatim record of discussion is not required.