

HULL ZONING BOARD OF APPEALS

Applicant: Kenneth L. and Donna L. Kaplan

Property: 73 Manomet Avenue

Date: Thursday, April 18, 2013

Time Meeting Began: 7:30 p.m.

Time Meeting Concluded: 9:02 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

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, over the alleged failure of the Building Commissioner per his 2/6/13 letter to enforce zoning as it relates to 2 Alden Street, as stated in more detail in said application and the papers filed with same. 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. Kaplan began his discussion but stated if there is a need for a motion to dismiss, it might be a waste of time and did not know if it will be ruled upon. Ms. Swiec stated that all the Board members will have the opportunity to look at all the materials and it does not necessarily mean the application will be dismissed. Mr. Atherton said it depends if we have jurisdiction in this matter. Mr. Kaplan is speaking of 2 Alden and what he is concerned with is Parcel #5 and at the last meeting, we decided we did not have jurisdiction, then we should address that first and the issue Mr. Duggan brought up after. Mr. Lampke said it is up to the Board, typically if there is a legal proceeding and a Motion to Dismiss, we take the Motion to Dismiss and address that first or take the Motion to

Dismiss, hear it, continue with the Hearing, take the Motion under advisement and when a decision is to be made, the Board will rule at that time as part of their decision; to see if a Motion to Dismiss is appropriate. You do not have to get into addressing the merits of the case. If it is denied, the rest of the Hearing can continue or you can hear it in the beginning and take it under advisement throughout the Hearing and make a decision based on the conclusion of the Hearing. Mr. Atherton asked Mr. Lampke about a decision if the ZBA lacked jurisdiction or the appeal that Mr. Duggan made, which would be first? Mr. Lampke answered by saying that the same principle will apply. If the Board believes that based on what this appeal is all about, you can address it right in the beginning and conclude that you do not have jurisdiction and you do not have to get into the merits of the appeal or even the Motion to Dismiss. Mr. Atherton said that versus a Motion to Dismiss, he would think a lack of jurisdiction would be a hierarchically heavier argument. Mr. Lampke said that the Board has the right to raise the issue of jurisdiction. Mr. Atherton said that he would like to raise the issue of jurisdiction based on the findings of the proceedings that they found 2 weeks ago.

Mr. Kaplan began speaking to this effect. He said that there is a record and that can be significant. It is not a correct presentation that the Board has all the paperwork and he has other exhibits that he will be submitting. He wanted to make noted for the record that he has not seen certification of a list of abutters or even a list of the abutters and when he went to get a list at the Assessor's office and they did not have a copy for him and directed him to other departments. Mr. Atherton said that he has a copy for him to have. He continued to state that when Mr. Lampke offers testimony or evidence that it be identified as to the source, if it is the expression of the BOS, the Building Commissioner or his own personal opinion.

He continued by speaking of the issue of jurisdiction in his mind it is clearly not an issue. He knew the jurisdiction was an issue based on the 12/27's letter by the Building Commissioner and that is precisely why he structured his appeals in two separate venues. This is the appeal of the 2 Alden Street and it was clearly shown on the certified Town of Hull's zoning map that it was in a zoning district. Parcel #5 was questionable in that the zoning map appears as was presented by the Building Commissioner as does every other street or road in the Town of Hull. It was suggested that because Parcel #5 showed on the zoning map as every other road and street within Hull that this Board had no jurisdiction over the streets and roads. He thinks it is ridiculous and legally wrong. He does not think there is any basis to conclude that 2 Alden St., clearly not shown as a street, would not be under the jurisdiction under M.G.L. 40A. There is nothing in M.G.L. 40A that would exclude 2 Alden Street. He thinks Section 6 in part that there has to be a specific exclusion or a list of exclusions. Mr. Atherton wanted to clarify that he did not say anything about 2 Alden, but was speaking of Parcel #5 as the railroad station property. Mr. Kaplan said that he does not want any structures removed, but it should be the subject of a Building Commissioner's building permit, it would entitle us as abutters to come back to the ZBA to be part of a public hearing to abide by the way ZBA interprets zoning and establishes special permit criteria. There was a remove order by the Building Commissioner; we have always asked that there be a requirement that the structures be subjected to a building permit and what he found disturbing, when this Board at the first hearing voted, that MGL Chap. 40-A, Section 7, the enforcement provisions, Mr. Einhorn asked the Building Commissioner that if you people want protection that a building permit would still be

required and the answer was yes. Here it is 2 years later and there is no building permit. You are dealing with the safety and welfare of the community. On one other statement about the structures located on Parcel #5; this earlier decision does not exclude any structures on 2 Alden St., in fact, a good portion of the Hearing will be that a special permit was applied for and granted by the ZBA and what was built was totally different. The ZBA approved a deck and pool was built by someone that was a licensed contractor, who is fully aware of the rules and regulations.

Mr. Atherton then said to Mr. Kaplan that not only is he talking about what was built of Parcel #5 but some of the structures that were built on 2 Alden. Mr. Kaplan said that he is speaking primarily of 2 Alden St., but Parcel #5 is a separate legal lot and there are zoning bylaws about combining the lots and building structures over other people's property. This is about the structures on 2 Alden St. that is on the zoning map as a single family use district. He feels that this Board has jurisdiction of structures on Parcel #5, so the ZBA has jurisdiction.

Mr. Duggan then addressed the Board by speaking of Mr. Kaplan's presentation. His argument centered on the structures on 2 Alden St. and the lack of a building permit. This is the subject of the first enforcement letter back in June 2011. The letter issued the removal of those structures that was appealed by the Costellos. This Board overturned it cited Section 7 Chapter 40A. The Kaplan's had appealed that and it was taken to the Superior Court which is pending. If the Kaplans wanted to entertain these arguments on those structures on 2 Alden Street that is their right, but the Superior Court is the proper venue at this point. The Board should not continue to hear repetitive arguments that already have been raised and decided; the courts will ultimately decide on this issue.

Mr. Kaplan addressed the Motion to Dismiss. The decision clearly said that the ZBA only dealt with the dimensional issues, not the uses of the land. Having read the decision and going on what the Board said, he structured this so it would not be duplicative. You are dealing with the uses of the land and the Board never dealt with uses. The instructions of this Board that you would be dealing not with the uses, so therefore come back to the ZBA and this is what he is doing now to deal with the uses of the land on 2 Alden Street. The case in the Superior Court is dealing with the issues that the ZBA erred and should have dealt with uses and could be ordered by the Court back to the ZBA to deal with uses.

Ms. Swiec feels that Mr. Kaplan makes a good point. Mr. Atherton said that we are talking about the structures that were built on 2 Alden. Ms. Swiec said that by extension of Parcel #5 encroaches from 2 Alden. Mr. Atherton said that he does not think we have jurisdiction over Parcel #5. Ms. Swiec said that we have jurisdiction over structures. Mr. Atherton said not on Parcel #5. Ms. Swiec said someone has to have jurisdiction to keep people from building on the streets. Mr. Furman said that the police have jurisdiction. Ms. Swiec said that technically that the police can remove structures that are sitting on the railroad bed without permits because the police have jurisdiction which opens up a whole new different kind of hearing. Mr. Lampke said that it is incorrect that no one has jurisdiction over the railroad bed. The railroad bed is under the jurisdiction of the BOS and if someone wants to make use on Town Property, they have to get permission from the BOS. The BOS do not want to grant their permission for some reason and a person does not have jurisdiction and someone put something there and the Board wants it removed, the Board has the authority to have it removed. The BOS do not give a free pass to

people who may need other permits or authorizations under the law. Mr. Kaplan said that is a legal opinion, it is incomplete and incorrect. He has done a lot of research and spoken with a lot of attorneys, what happens by statute is that the taking of land is not a BOS decision. It is a town meeting decision. The Board of Selectmen by statute had to follow the direction of town meeting. Town meeting took Parcel #5, town meeting gave authority to the BOS to oversee Parcel #5 but you have to read that the taking, that town meeting said that they specifically take this land for the purpose of a "town way for common convenience" and they entrusted the BOS and gave them fiduciary responsibility over this as specifically designated by town meeting – a town way for common convenience. Also, the Commonwealth of MA was involved because this was considered a transportation corridor and there are 16 different Depts. that retain control of this common way. The BOS do not have the authority that Mr. Lampke is suggesting. It is town meeting. Mr. Atherton spoke with Mr. Kaplan about 2 Alden Street and that the entire speech he just made was about the railroad bed, and we are going to focus on 2 Alden as Parcel #5 is not in the ZBA's jurisdiction. Mr. Kaplan indicated that the law says that abutting land to a former state transportation is subject to permissions. Two Alden abuts and it is not restricted to Parcel 5, it also restricts the use of abutting lands. Mr. Lombardo stated that the code clearly states that the jurisdiction is over former railroad land; it does not say abutting land or properties. Mr. Atherton then says that at reading of Mr. Kaplan's letter that the petitioners argue that zoning board restricted the use of the setback areas of 2 Alden Street and the small portion of Parcel 5. Mr. Atherton is trying to get this topic and discussion in focus, and not have a discussion the whole railroad bed and station properties. All we are trying to deal with tonight is Mr. Kaplan's issues with a piece of land called 2 Alden Street and a small portion of Parcel 5. The Town needs to think about this railroad bed and the other parcels; but for tonight we can only focus on 2 Alden and Parcel 5 and he does not think the ZBA has jurisdiction over Parcel 5. He thinks we do have jurisdiction of 2 Alden Street. Mr. Duggan stated that we are focusing exclusively on 2 Alden Street and those structures are the deck. The deck was the subject of the first enforcement order and has been appealed and is in the Superior Court now. He feels that Mr. Kaplan confuses the word "use" in the zoning context, he seems implicate that the actual use of the actual deck is a violation and Mr. Duggan believes the zoning use does not mean the actual physical use, it means the zoning district use. There has been no finding of a use violation. In referring down to the third paragraph on the Motion to Dismiss that he presented, "Ultimately, the Board denied the Kaplan's appeal, stating in part "[a]s to the decisions and actions taken by the Building Commissioner concerning structures on the former railroad bed and station property abutting 2 Alden, the Board believes the license granted by the Board of Selectmen permits the intended use and the structures themselves are exempted by Section 7 of M.G.L. 40A." He continued that nothing tonight has brought out any new structures or uses, so is just repetitious. Mr. Furman agrees with this statement as it is being brought up in the Superior Court. Ms. Swiec also agrees. Ms. Swiec said that it is not an issue of jurisdiction, but more of an issue that there are matters before the court and the ZBA actions should let the Court do their job. Mr. Atherton said that part of Mr. Kaplan's appeal of the railroad station property is out of our jurisdiction. That part that focuses on 2 Alden he agrees upon, but it already has been argued and the ZBA came to a different conclusion than Mr. Kaplan wants. Mr. Kaplan said for the ZBA to read the decision, as uses were not included only structural issues.

Mr. Lampke suggested that the Board could take the suggestions that are commented on and conclude that the issues being raised in the appeal that is before you tonight are either duplicative or rehashing of prior appeals that you already ruled on. Perhaps the Kaplans are going to be able to convince you that they are different from what you previously did. There are two cases pending in the Superior Court. Mr. Atherton speaks of the usage and thinks Mr. Duggan is right and that the bylaw is not about if you swim in the swimming pool or sit on the deck, it is about the zoning district uses which are single family/multi family, etc. and this is clearly a use in a single family general district, but the problem in his mind is that that zone is a right of way and is not zoned, so we cannot speak of the use of the swimming pool or any other use of that area, as it is out of jurisdiction except for the part that is on 2 Alden's property that we already decided on a previous decision. It says something to the effect that the BOS's approval to use it in the way it was being used and to have the structure there was exempt because of section 7 in the bylaws that it has been there for more than 10 years. This has been decided in a previous decision.

Mr. Kaplan wanted to make sure that his submission of the four case laws gets put in the record. Mr. Kaplan presented the new material to the Board to review. The plot plans indicated where the lotlines were and presented to the Board that part of the swimming pool was on 2 Alden St. He suggested all along that absent a certified stamp because surveying is a science, not a lawyer taking a marking saying where the lot line is. Until he is shown a seal, he wants to hear a licensed architect to say how much is on which property and for the ZBA not to take that word of the lawyer drawing on the map. He indicated that this Board accepted that the swimming pool was on Parcel 5 and you did not have jurisdiction over the swimming pool and he feels that this is an incorrect statement. He thinks the Board should see a seal of reputable certification. The pool is on 2 Alden Street. Mr. Furman questioned whether we cannot trust the lawyer, but can trust Mr. Kaplan? Mr. Kaplan said that he lives there and does have surveys. One has to define where and what is the pool? Pools typically have decks. Assuming you follow Mr. Kellem's presentation, he was inferring that pool started with the water line then there is a 3 foot deck with a railing that goes around the pool. The water line itself begins on 2 Alden Street. The 5 ft high deck to the railing is entirely on 2 Alden Street, it is not on the extended land. If you pull the 1998 special permit, that drawing seems to be the most accurate. Mr. Duggan stated that he feels we are going in circles. A pool is an allowed use in a single family district, so there is no use violation.

Mr. Kaplan said that was wrong legal advice. Chapter 7 does not protect or erase any illegalities. If you do not have a permit, if the issue is found 12 years later, that you are exempt from getting a building permit, it says, you have protections against the dimensional location that the building commissioner cannot deny the building permit because of where the structure is located because the times, the 10 years, has passed as to the location of the structure. It is clearly in our bylaws. It says no use of any land without a building permit. M.G.L. Chapter 7 does not erase the illegality of not having a permit. There is protection under the zoning statute with the dimensional aspect after a certain period of time. Mr. Lampke said that he will request a building permit meaning if one is required and it will be requested at the appropriate time. Mr. Lombardo said that the pool is not permitted. The issue is primarily because of all the legal hearings going on and is not sure where all the legal documentation is going and once that results in an established legal standing, then he will proceed with his duties. The pool does have an

electrical permit. It has been inspected by him. Mr. Kaplan said that the ZBA has jurisdiction over the pool and it is a public process. Everyone is doing zoning except for the people supposed to do zoning. Mr. Lombardo said that he does not recall any public hearing in regards to the swimming pool. Mr. Duggan stated that the pool and the lack of the building permit were subject to the first enforcement order. Mr. Kaplan said that the decision excluded use.

Mr. Atherton asked Mr. Lampke about the discussion of Mr. Duggan's statement. He wanted to know about Section 7 in which it discusses the six year period of the statute of limitations, in a condition where there is a building permit, where a public process is involved. If there is not a permit such as the case here, there is a 10 year period statute of limitations. It did not talk about use, what is the purpose and why in the second part of the statute is use excluded and what is the implication in this appeal? Mr. Lampke answered as to why the legislature did it this way, he could not answer, other than the fact that in land use matters there is a distinction between dimensional issues and use issues. Variances can be from a dimensional requirement or if the local bylaw permits it, the variance requirement can also be for use. Not every town has bylaws for uses. There is a distinction between uses and dimensional requirements under local bylaws. They view uses as having a different type of an impact than dimensional changes or requirements. He will research and give the benefit of a considered opinion, if requested. Mr. Atherton cannot understand how you can separate a use of the structure - use as defined by zoning district use, not the activity of the use- from the structure itself. Mr. Lampke stated this use is consistent in a single family residential area. Mr. Kaplan then stated that if a citizen that is law abiding and follows all the rules and regulations and applies for the permit, if it is accurately presented permit and if the building commissioner makes a mistake and accepts that permit, we shouldn't punish the citizen, so therefore under the six year statute, we are going to protect you in all regards after six years because you did everything right. After 10 years, if you did not follow the rules, no permit was done and you got caught and you get a slap on the wrist, we will give you some protection as to the structure but are not going to give you protection for the use. If you did not get a building permit, it is illegal to use. In this case the building permit was for the deck, not the pool. Mr. Lombardo pointed out that a permit was obtained and cleared, and then the additional construction took place without a permit.

Mr. Atherton said that we should have a recess or postpone the hearing to review the newly presented documents. Ms. Swiec would like to Board to make a decision about whether to have a five minute recess or continue. The Board took a brief break while papers were exchanged. Ms. Swiec indicated for the record that Mr. Kaplan's original copy of the building plan was given to her for the file and that Mr. Kaplan's memo an "Appeal of 2/6/2013 letter about not enforcing zoning at 2 Alden" was distributed. She would like to have Mr. Einhorn read the documents as well. Also to have Mr. Lampke review the documents too. Mr. Kaplan says that his arguments are with uses. The Board made a decision to continue this Hearing to two weeks from this date.

Action Taken, if any:

Hearing will be continued to May 2, 2013 at 7:30 p.m.

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.