

## HULL ZONING BOARD OF APPEALS

**Applicant:** Kenneth L. and Donna L. Kaplan

**Property:** 73 Manomet Avenue

**Date:** Thursday, February 21, 2013

**Time Meeting Began:** 8:07 p.m.

**Time Meeting Concluded:** 8:44 p.m.

**Place of Meeting:** Hull Municipal Building, Main Meeting Room

**Zoning Board Members Present for Hearing:**

|                            |                |                  |        |         |
|----------------------------|----------------|------------------|--------|---------|
| Alana Swiec, Chair         | <b>Sitting</b> | Attending        | Absent | Abstain |
| Dr. Roger Atherton, Clerk  | <b>Sitting</b> | Attending        | Absent | Abstain |
| Atty. Mark Einhorn, Member | <b>Sitting</b> | Attending        | Absent | Abstain |
| Phillip Furman, Associate  | Sitting        | <b>Attending</b> | Absent | Abstain |

### **Others in Attendance:**

*Karen Morgan, Recording Secretary*

*Kenneth L. Kaplan, Applicant*

*Donna L. Kaplan, Applicant*

*James Lampke, Town Counsel*

*Peter Lombardo, Town Building Commissioner*

*Attorney David Kellem, representing Mr. Costello*

*William Costello, owner of 2 Alden*

**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:** Ms. Swiec welcomed the applicants and opened the hearing. Mr. Lampke said that there is a preliminary matter to be addressed. He stated that Mr. Kaplan raised an issue this morning as to whether Mr. Lampke is in a conflict of interest by being present this evening. Mr. Lampke said he takes this issue very seriously and questions whether the ZBA should go forward until this issue is resolved.

He further said that he read what Mr. Kaplan had to say and researched it. There are some ways of addressing this and does not want to subject himself to that. He hopes Mr. Kaplan can explain these issues. The issue has been raised, he is here as Town Counsel, he advises all town employees. If there is

a conflict for some reason, we address it. He is not aware of any conflict between this Board and the BOS. However, Mr. Kaplan raised the issue and he thinks it should be addressed to understand what the issue is. He realizes that we are all prepared to move forward, however, he does not want to have a problem later on that will lead to a disqualification because the issue is being raised. He does not understand what the issue is. There is a way of disclosing to both boards that he is saying that Mr. Lampke is in a conflict to provide all of the material facts and getting the consent of both boards. He has not had a chance to reach this Board or the BOS as to how to act. He does not know if this will affect his relationship to the Board. He still does not see what the conflict is.

Mr. Einhorn stated to Mr. Lampke that it should be something for further investigation. This is not the first time these issues are raised but if he does not feel comfortable and needs more time to do research, then it should be done. Mr. Lampke does not think there is a conflict; perhaps it is an issue raised for other reasons. If there is a conflict, he does not want to be the experiment on that issue unfortunately. He suppose Mr. Kaplan can be asked to explain what the conflict is and whatever the issue is, can be addressed. If there is a conflict, he would advise the ZBA and BOS, based on what is alleged. This has to do with the fact that Mr. Kaplan is saying that this Board must issue a decision. Mr. Lampke reads the email from Mr. Kaplan: "This evening's ZBA Hearing is regarding an appeal of issues related to Parcel #5. Parcel #5 is controlled by the BOS whom perhaps without Town Meeting authorizations converted municipal lands to private uses and changed a specific municipal use of the land to another use without perhaps legal effect, etc. I would suggest that if you are in attendance this evening, that your role be defined because if you are representing the BOS and at the same time counseling the ZBA adjudicators over matters pertaining to a decision they must make about the BOS oversight of municipal lands, then I would consider that to be a conflict of interest as defined by the SJC Rules of Professional Ethics. Thank you for all due considerations."

Mr. Einhorn said that the BOS was saying, you can use it to the extent that you get all permits necessary, etc. He does not understand where the conflict is. Mr. Lampke agrees. We already had two lawsuits from Mr. and Mrs. Kaplan pertaining to this general issue of the neighbor's use of railroad bed, and other zoning issues that are raised. He regrets that the issue has been raised especially at the 11<sup>th</sup> hour. He does not want to put the Town, the BOS, the ZBA or the Building Commissioner in jeopardy until the matter is properly addressed. There is a proper way to address this. If it is something for us to discern what the conflict is, other than what is in the email, he would have the matter researched and consult with other people. He would look at the rules of professional ethics. The conflict that there are procedures under the rules of our ethics that under certain conditions where there might be a conflict or an issue of dual representation; upon disclosure and obtain the consent of each of the effective parties. If there is conflict with representing one of those parties in the matter, it would have to be addressed. He does not see the conflict, but he takes it as a serious suggestion that he would be in violation of the conflict. He takes these accusations seriously and would rather err on the side of caution and hopes the outcome is that there is no conflict. Mr. Kaplan feels there is some dispute between the BOS and ZBA. The ZBA must make a decision that advising that ZBA on matters pertaining to a decision they must make about the BOS's oversight of municipal lands. He does not see that as an

issue the ZBA has to address. This is what Mr. Kaplan is alleging. He does not know if he should subject himself or the Town any possible issue.

Mr. Swiec said that we should continue this. Mr. Einhorn agrees. He does want the benefit of advice of from Mr. Lampke on this application. Thus, the Board should continue the hearing until Mr. Lampke has some time to research whether there is a conflict. Mr. Lampke said that if there is a clear conflict that cannot be obviated under the rules of professional responsibility, then the remedy would that if the Town wanted legal advice, they would have to hire outside counsel at the public's expense or they might have to hire outside counsel for this Board, the BOS or both. His responsibility is the Town, the ZBA is part of the Town, whether people like his advice or not, whether they comply or not. There is another issue that needs to be addressed that warrant to not going forward this evening. Mr. Lampke said that he is satisfied with the work that Mr. Atherton did with Hildred to get the notices out. Mr. Lampke said that people should not be communicating with the ZBA on matters that are before them, anything outside of the hearing should be dealt at the hearing itself or with the appropriate officers. The last couple of days, there have been communication issues from the Kaplans directly to the ZBA members and finds it inappropriate for people to be submitting material to the ZBA members directly outside of the hearing process or outside of the transparent public process, so that other people that have an interest in the matter can know in advance as to what those things are. The Board should not be taking in discussions outside of the hearing. In his mind, it constitutes a discussion outside of the hearing. Mr. Einhorn said that for the record, those items are out of our control as the items in question were sent via email to Board members without their consent. Mr. Lampke agreed and then asked the applicant not to communicate with the Board members on matters that are in litigation or that will likely come before them. Anyone who wanted to respond to that material; would not have seen or know about it until this evening.

Mr. Atherton said that he cannot read a 10-page document submitted at the last minute just as a hearing starts and conclude properly to anything, but that is apparently the only way all participants can be equally informed of the issues. Unfortunately, since the board needs time to analyze these last minute presentations, it forces the board to continue hearings that could otherwise be concluded. Mr. Lampke said that there were at least two detailed documents that were sent directly to the Board that should not have been sent.

Mr. Kaplan said that he would have explained the conflict if anyone would have called him today. Mr. Lampke said that he and Mr. Kaplan can speak outside the meeting about the conflict.

**Action Taken, if any:**

**Hearing will be continued to April 4, 2013 at 7:45 p.m.**

*Recorded by Karen Morgan*

Approved by Roger Atherton

