

HULL ZONING BOARD OF APPEALS

Applicant: Kenneth L. and Donna L. Kaplan

Property: 73 Manomet Avenue

Date: Thursday, May 2, 2013

Time Meeting Began: 7:30 p.m.

Time Meeting Concluded: 8:55 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

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 February 6, 2013 letter, to enforce zoning as to uses at 2 Alden Street and a portion of Parcel #5, adjacent to 2 Alden. 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 noted this is a continuation of a hearing that started on April 18, 2013 and noted that Mr. Kaplan at the last meeting had submitted paperwork that the Board wanted to review and to allow Mr. Einhorn (absent from the first hearing) to study the paperwork and review the taped recording and Minutes from that meeting. Mr. Lampke said that Mr. Einhorn has to file a certification that he listened to the taped recording and he is allowed to miss one meeting, if he intends to vote. Ms. Swiec said that Mr. Einhorn will not be voting on this hearing, but he can still offer an opinion, based on his having reviewed the information.

Mr. Einhorn then spoke of where the meeting left off last time. One issue is the difference between the extensions that were made on 2 Alden vs. what is on Parcel #5. Also, there is the use issue raised in the

previous decision. Mr. Kaplan pointed out that decision was on the Costello appeal (2 Alden Street), and not 73 Manomet. Mr. Einhorn said that Mr. Kaplan has brought up, at the last hearing, the issue of uses.

Mr. Kaplan answered by saying that it was determined previously that, in the Building Commissioner's letter, his complaint was only for the dimensional aspects of the structures and the Board therefore did not have the issue of uses in front of it. He appealed that and that is now in the Supreme Court. He had asked the Court to remand that back to the ZBA because he said that he disagreed with the Board that in his opinion that the June 8th order to remove did refer to uses because it referred specifically to a 70A CMR building permit and, prior to a Building Commissioner issuing a building permit, he has to consider all aspects of zoning of which uses of land is part of zoning.

Mr. Einhorn asked what does the word "use" mean, in terms of permitted zoning district "uses"? There is a different meaning for the word "use" for zoning purposes, like commercial and residential use as opposed to the "use" of using a pool. Mr. Atherton said to Mr. Kaplan that he used this argument when Mr. Duggan raised this issue as to why we are having this discussion. Mr. Duggan said to Mr. Atherton that it was a Motion to Dismiss. Mr. Atherton then said that Mr. Kaplan said that we never did talk about the use issue and we encouraged Mr. Kaplan to come back and discuss the use issue. Mr. Kaplan said that the use he is referring to is dealing with MGL 40A Section 7 whereby you have two statutes of limitations and two aspects (dimensional and use). The use that the Board did not deal with is the use as referred to in MGL Section 7, because the 10 year statute exempts the use from protection.

Mr. Einhorn then said that there is a difference between use as in commercial use, residential use, etc. vs. the ordinary meaning of the word as in using the pool. He thinks that the distinction is that you do not get the Section 7 protection for a use that is not ordinarily permitted. We are talking about a pool on a single family residential lot. He thinks that the use is not an issue. Mr. Atherton said that he raised the issue with Mr. Lampke as to why it is included as part of the protection with a six year limitation but with a 10 year it is not included. He said that Mr. Lampke stated that you wouldn't want to excuse or provide protection for someone who built a structure without a building permit and whose use of that structure is multi-family in a single-family zone. You wouldn't want that to be grandfathered, excused, or allowed to exist in single-family zoning as a zoning use, even if 10 years have gone by. This is why he thought the use issue, in this context as 10 years have gone by which protects the structures; it's not people making use of the structures, but whether the use is a single family use. He thinks it is single family use on 2 Alden. Also, he pointed out that the structures and the uses of the Parcel #5 area, which is not zoned, are not in our jurisdiction. We have nothing to say about what takes place in un-zoned lands. Mr. Lampke stated that the BOS has jurisdiction on this area, parcel #5 and the railroad bed, to the extent that these are public ways.

Mr. Kaplan said that the BOS has police power over public ways and streets and when the BOS determined that that public way or street is not necessary to be used as a public way or street, that they have the power to re-designate that use to private use from municipal. Once they no longer use that land for the intended purpose; that the land gets returned to zoning. This will be the basis of his appeal. Mr. Atherton thinks that it is un-zoned as Mr. Kaplan's attorney said it was. Mr. Kaplan said that was incorrect and he was speaking of a different issue.

Mr. Kaplan said that the BOS have no authority to turn it over for public purposes absent the vote of Town meeting because Town meeting voted in 1938 that this land not be taken for the BOS to do as they please or when they please. It says that this land has to be used as a public way for public convenience. Mr. Einhorn said that this argument is not part of this appeal. Mr. Kaplan said that it is. Two Alden Street is using two lots for accessory uses and 40A says that it is not common ownership.

Mr. Atherton said that Mr. Kaplan has a problem with Parcel #5 as it is behind his house and 2 Alden has extended into Parcel #5. There are two distinct legal theories at work here. One is that relates to 2 Alden, which is what Mr. Kaplan is focusing on, and the other issue that is related, but is distinctly different, is Parcel #5 and the railroad bed. He thought we had clearly decided in regards to 2 Alden that the structures were protected by Section 7, protected from zoning enforcement by the statute of limitations. Then as written in the decision, that Mr. Einhorn wrote, that this does not address the use issue because it was not raised by Mr. Lombardo and Mr. Kaplan's lawyer argued that that needed to be addressed. So we encouraged him to bring that issue back to the table which he has done. But that is only in regards to that part of it that is on 2 Alden Street, it is a whole new can of worms when you start to talk about the structures and use on Parcel #5 and the railroad bed. His argument is that both the structure and use on Parcel #5/railroad bed are out of our jurisdiction and is not something we have the right or authority to discuss or make decisions about. On 2 Alden Street, we do have the right to make decisions regarding zoning on 2 Alden. We already decided in a previous decision that the structures on 2 Alden were in fact protected by Section 7 of 40A. We did not talk about uses directly on 2 Alden because we asked Mr. Kaplan to bring it back up because it was his attorney that made a convincing argument that uses were not addressed. Since then the more he has thought about it, there are two kinds of uses. A physical use of swimming in the pool or storing something in the shed as contrasted with a zoning district use, such as single-family, multi-family, etc.; all the uses in just the small sections of the deck that has been extended without a building permit, has uses as a deck. There is no pool in that section. It is just a deck. The pool is on Parcel #5. Mr. Kaplan said that it is also on 2 Alden. Mr. Einhorn said that even if it was, it doesn't change what Mr. Atherton is discussing. Mr. Atherton continues that on 2 Alden, the deck is a single-family use and in a single-family district and there is no reason for Mr. Lombardo to issue a cease or desist or remove order when there is not a violation of any kind of zoning use. He would suggest that there is nothing for us here to decide other than to say we reject the appeal because the part on this property at 2 Alden meets single-family zoning and the part that is not on 2 Alden is not within our jurisdiction.

Mr. Einhorn agrees with everything that Mr. Atherton spoke of except that he doesn't agree we encouraged Mr. Kaplan to appeal the use issue.

Mr. Duggan stated that Mr. Lombardo addressed the usage and had chosen not to enforce because there was no use violation. He continued saying Mr. Kaplan is trying to appeal the issue of the non-enforcement. But since Mr. Lombardo didn't raise the issue of a use violation, he has indirectly established the inclusion of use.

Mr. Kaplan stated that he thinks he would like the record to reflect that the testimony by the Costello's was that the screened fencing was not built over 10 years ago and that was expanded upon both in

height and vertically because he testified that the benches were removed and that 16-20 foot area was replaced by screening that was about 5 feet higher and the 1998 special permit, that he gave the ZBA copies of, restricted any vertical or horizontal expansions absent the owners of 2 Alden Street coming back to the ZBA to either amend or get a new special permit to perform that work. It was undisputed testimony that there was a 16 to 20 ft. expansion that was not in excess of 10 years. The railing on the deck had to match the railing of the front porches which is 32 inches. The testimony that in April 2011, the Costello's removed the 16-20 feet of 30 inch high benches and replaced it with vertical screening which is 9 feet in height, about 6 feet above. It wasn't protected under the 10-year statute. The permit that was issued, the Building Commissioner revoked. There was no application by the Costello's to come back to the ZBA for a special permit so that they could get a building permit to increase that railing. The base on 2 Alden Street that was added to, with the lattice work, is disputed as more recent construction. Instead of a sweeping decision, including all the construction, you need to consider these construction timing differences. You have to deal with of the components consistently with the undisputed testimony. He can't see how this Board can amend what the 1998 ZBA specifically made as a condition of which the bylaws of those conditions have no zoning protection under Chapt. 7. You have to separate that piece out. You cannot make a sweeping decision that you wrote in the opinion that it is consistent with the character of the neighborhood. There has been no hearing to discuss this. This Board has a policy in doing site visits and when a visit was done on 2 Alden Street, he asked that the Board to come to 93 Manomet to look at the character of the neighborhood. Mr. Atherton said we did. Mr. Kaplan said that Town Counsel warned the ZBA that this hearing is about 2 Alden, not 73 Manomet. If the Board did, he had no notice of it. Mr. Lampke said that the Board did not go into Mr. Kaplan's house, as he requested because the hearing at the time was on 2 Alden. Mr. Kaplan said that he has 4 feet from his kitchen window a 6 foot stockade fence that is illegally there and then there is a sixteen feet high fence in back of that in which his view is burdened. The ZBA in 1998 said that the railing had to be 32 inches in height. Mr. Einhorn said that it has protection under Section 7. Mr. Kaplan said that the Board can listen to the tape of the testimony, do more research, and not take a vote tonight.

Mr. Lombardo stated that he has a copy of the original permit. The railings were not illegal to begin with. There is also a notation that the railings did not match the railings to the original house. Also there is a note that the railing should be 36-inch minimum; that is code requirement. A portion of the deck that Mr. Kaplan is referring to is not even included in this permit or decision. This was the original hearing on 2 Alden. He has the original permit from 1998.

Mr. Kaplan said this appeal is different. His appeal is based upon the enforcement of the 1998 special permit and the fact that based on his interpretations of the law that when an individual comes to a Building Inspector to apply for a building permit, and they represent to an inspector that they are doing things and they don't build that structure and build a different one, in essence because what was actually built is different than what was originally said. Therefore that permit becomes null and void and there is no building permit. This is his appeal. He is not appealing what the Costello's appealed or the 6/8/2011 decision, he is appealing enforcement of the 1998 special permit so therefore because XYZ wasn't built as applied for, it was ABC, and the law clearly says that the building permit is not valid. If there is no permit, we now are not protected under the 6 year statute. The case law says we have to

now move to the 10 year statute. So there will be protection to the 1998 ZBA, but not as to uses. This is what he is appealing. This is not the subject matter under the Costello's appeal; this is new subject matter for new consideration. In 1998 we had an illegal structure built without a permit, and something else was built. This is not the same as the Costello appeal.

Mr. Lombardo agrees with the Mr. Kaplan except his facts are wrong. The 1998 building permit was applied for through approval by the ZBA decision of 7/16/98 to build a deck and was approved by the ZBA at that time. The permit application was received, reviewed and a permit was issued. The deck was built according to the plan. This was inspected by an associate in 1999. After that, the additional deck was built, corners added, and then the pool added, all without a building permit. Mr. Kaplan said that it is the time frame. Mr. Lombardo said that we do not know the time frame. Mr. Kaplan said it was before 2001. Mr. Lombardo said he went back to the original plan and has no idea when this new structure was built. He would have stopped it. Mr. Kaplan said that the work was done immediately after the first permit was issued.

Mr. Atherton commented that earlier Mr. Kaplan indicated that if a building permit process was initiated, he would withdraw his appeal. He added that Mr. Lampke said that process would begin in due course and that Mr. Lombardo had said he was prepared to do his duties once the legal issues were clarified. Mr. Kaplan said that the response he got from the Town was that the Costello's would have to be willing participants in that process and he didn't get any further response and assumed that the Costello's were not willing participants. The building code and permit is clear that a permit is required. Mr. Atherton continued, if the Town is committed to initiating the building permit process, why do we continue if he has accomplished what he set out to accomplish?

Mrs. Kaplan said that people in this Town do whatever they want. We were told to not even bother going to the ZBA, no one cares anyway. It doesn't make a difference with what you want to do. People here have to follow the rules or face the consequences. Mr. Kaplan said we follow the rules and this is what happens to us, costing us thousands of dollars later. He added that the answer is that no one at Town Hall bothers unless someone complains. Mr. Lampke said that the Kaplan's should show some respect to the employees of this Town.

Mr. Atherton asked Mr. Lampke whether the ZBA has any authority to say anything in the decision about requesting the Building Department to start the building permit process? Ms. Swiec stated the ZBA can put anything in the decision it chooses to, and if someone doesn't like it they can challenge it or appeal. Mr. Lampke agreed. He suggested "in the appropriate time and in the appropriate manner." Mr. Atherton countered that that was too vague – it could be anywhere between two years and two months and he would prefer the latter. It was agreed in writing the decision he would try to come up with satisfactory language.

Motion: Move to deny the Applicant's appeal because the Board found that the structures on 2 Alden are protected under Section 7, 40A. The use being made of the deck and the pool on 2 Alden is consistent with the use of single-family zoning district; and the structures and uses on the portion

referred to as Parcel #5 are not designated in a zoning district on the zoning map and therefore are outside of the jurisdiction of the zoning board.

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

Comments: Unanimous

Action Taken, if any:

Mr. Atherton 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.