

**TOWN OF DAY PLANNING BOARD
REGULAR MEETING
MAY 7, 2012, 7 P.M.**

Members Present: David Cox
Ted Mirczak
Jack Vaillancourt
Eileen Brennan
Dick Traeger
David Avigdor, Town Attorney

Members Absent: None

Others: Ken Metzler
Raymond Lockey
Dave Barrass
Mr. and Mrs. Walter Mowle

Motion by Ted Mirczak, seconded by Board Member Traeger to approve the minutes of April 2, 2012. Ayes: Cox, Mirczak, Vaillancourt, Traeger. Brennan. Carried: 5-0.

New Business: **LOCKEY, Raymond**
 Tax Map #42.-2-31 and 32
 Revert to Tax Parcels Prior to 2003 Subdivision

A new survey map was submitted indicating revised road frontage dimensions for Lot A which will bring all parcels into compliance with zoning regulations. Town Attorney Avigdor disclosed for the record that he represented Mr. Lockey in several matters including this real estate parcel currently before the Board. He stated he has a conflict of interest and should not participate. Board Member Mirczak inquired if this would preclude Town Attorney Avigdor from dispensing any legal advice to the Board. Town Attorney Avigdor stated from a technical standpoint, he would be unable to do so because legal advice is not absolute and legal advice would be dispensed from the point of view of his client. If he has two different clients with two different views, it would be a conflict of interest. If there is a matter of not being advocacy but simply a statement would be truthful, he would be able to give some assistance without being the advocate for either side.

Chairman Cox asked for any questions from the Board. Board Member Mirczak stated he wished to clear up several issues from the April meeting:

- ∞ The application has not been revised. On the application and on the SEQR, Mr. Lockey indicated he wished to return the lots to their original configuration which is not technically

correct. The line between the two structures was redrawn at the time of the original subdivision application in 2001 which Mr. Lockey wishes to retain. The road frontages have shifted on all lots. Mr. Barrass, land surveyor for Mr. Lockey, stated he believed the only revised document to be resubmitted would be the survey map. While Board Member Mirczak did not believe would be technically important, he wished the record to reflect this Board is considering a three lot subdivision which is not the original configuration. Mr. Barrass agreed with Board Member Mirczak's statement.

- ∞ Board Member Mirczak stated at the April meeting, Mr. Lockey stated he wished to merge Lot A into Lot B for tax purposes and keep this area green space. Mr. Lockey stated he has purchased an additional lot to the south, had previously acquired the lot to the north and had merged four lots into two. Mr. Barrass corrected Mr. Lockey and stated there were only three lots which were merged into two. Board Member Mirczak stated the reason for the first subdivision in 2001 was to have each structure on its own lot and there was no necessity to merge Lot A into Lot B. Mr. Lockey stated the separation of the two structures and the merger of Lot A into Lot B were required as part of a divorce settlement.
- ∞ Board Member Mirczak stated this was not the statement Mr. Lockey made at the April meeting which was that it was intended to be green space and to receive one tax bill for Lot A and B. Mr. Lockey stated he did not believe it was material what his reasons were for the merger. Board Member Mirczak stated he wished to state for the record that since 2001, Mr. Lockey has enjoyed ten years of lower taxes due to this merger. Mr. Lockey disagreed stating the taxes on undeveloped land are minimal. Board Member Mirczak stated this would have been taxed as a building lot and the taxes would have been higher as a single lot than when it was merged into Lot B.
- ∞ Board Member Mirczak stated at the time of the merger, Mr. Lockey stated his attorney was not aware of the encumbrance on the lot and Mr. Lockey wishes to subdivide Lot A which will allow the encumbrance to be eliminated. Board Member Mirczak inquired if the encumbrance was included on Lot A when Mr. Lockey purchased the lot? Mr. Lockey stated it did not. Board Member Mirczak inquired when Mr. Lockey did the merger, was he aware of the encumbrances? Mr. Lockey stated he wasn't aware it would be included on the other lot.

- ∞ Board Member Mirczak inquired what the encumbrance is. Mr. Lockey stated a first and second mortgage were on the building lot and by adding it on Lot B, it clouded the title. Board Member Mirczak inquired of Town Attorney Avigdor if a mortgage is an encumbrance? Town Attorney Avigdor stated this would be a basic question and the answer would be that a mortgage is an encumbrance.
- ∞ Board Member Mirczak inquired if this mortgage was Mrs. Lockey's mortgage? Mr. Lockey stated it was part of the divorce settlement.
- ∞ Board Member Mirczak stated Mr. Lockey told this Board to obtain a reverse mortgage; he needed to clear up these encumbrances. Mr. Lockey stated that was correct and he was told the encumbrances on Lot A which was merged into Lot B, resulted in a clouded title which prevents him from obtaining a reverse mortgage.
- ∞ Board Member Mirczak stated it was his understanding that in order to obtain a reverse mortgage, it must be owner occupied. Mr. Lockey stated that while he does not physically occupy the residence at this time, it is his intention to do so in the future.
- ∞ Board Member Mirczak inquired if Lot A is subdivided from Lot B, will the encumbrances revert to Lot A? Mr. Lockey stated it would revert back to Lot A to which he is adding additional land to by increasing the road frontage. He further stated he met with an attorney in Westchester County for a legal opinion who stated because he is adding to the parcel; it would not have a material effect.
- ∞ Board Member Mirczak inquired if he could ask the following legal question to Town Attorney Avigdor: If a lot existed with encumbrances in 2001 which was merged with another lot, and now this lot would be once again split, it was his impression that once a lot is merged, that would move the encumbrances to the merged lot and anything which applied to one lot would now apply to the other. If there were encumbrances or easements, etc., they would not be able to be transferred back to the original lot. Town Attorney Avigdor stated this is a basic question and Mr. Lockey stated he did not object to Town Attorney Avigdor answering the question. Town Attorney Avigdor stated he believed he understood the facts, if an encumbrance such as a mortgage is placed on a particular piece of land, that encumbrance affects that land to its perimeter without regard to any later changes in lot lines. Therefore, if parcel A has a mortgage placed against it, the mortgage affects to the perimeter of parcel A without regard to any changes or

boundary line adjustments being made. The mortgage is not defined by future parcel changes but defined by the description of land that was on the face of the mortgage at the time it was created.

- ∞ Town Attorney Avigdor stated he believes Mr. Lockey is stating there is an existing mortgage which he is assuming by the mechanism of this reverse mortgage that the encumbrances would satisfy the existing mortgage or eliminate it in some fashion. Mr. Lockey stated this is correct with the additional explanation that the mortgage is not the issue but the title insurance company considers it to be a clouded title and will not provide title insurance to the mortgage company.
- ∞ Town Attorney Avigdor stated he believed Board Member Mirczak's question would be: If it is a clouded title, it is a clouded title and how would this Board changing the lot lines affect it? He believes the answer to that with Mr. Lockey's clarification would be: If the current mortgage affected a certain perimeter originally, this mortgage would disappear by virtue of a new mortgage being obtained. In spite of the fact that one was a mortgage and the new mortgage would be a reverse mortgage or a refinance, the new mortgage could be placed against whatever perimeter that bank proposes to place it against.
- ∞ Town Attorney Avigdor stated he does not know if he has all the facts. On the other hand, if the existing mortgage needs to disappear for this to work and Mr. Lockey is going to place a new reverse mortgage on the parcel to make the old mortgage disappear, he is not sure why the change of lot lines is necessary. He further stated he understands a title company will not write title insurance when there is a lien on the property and while he understands a mortgage is a lien, he does not understand why the lot lines need to change back. Board Member Mirczak agreed this would also be his question. Mr. Lockey stated he consulted with a law firm in Westchester County and they explained the first and second mortgages are on the second lot perimeters and this would be all they would be entitled to. However, a reverse mortgage company which he has conferred with must insure the title to the bank to obtain a reverse mortgage on the remainder of the property because they would consider it to be a clouded title. He has spoken to three different reverse mortgages with the same result.
- ∞ Town Attorney Avigdor stated for clarification, Mr. Lockey wishes to obtain a reverse mortgage on a different piece of land than the mortgage is on but there is an overlap due to

the subdivision and Mr. Lockey needs to eliminate the area with the mortgage. Mr. Lockey reviewed the latest version of his proposed subdivision map stating he tried to obtain a reverse mortgage on merged Lot A and B and it is considered to be one contiguous parcel. Town Attorney Avigdor inquired what parcel the current mortgage is on. Mr. Lockey stated it is only on the vacant Lot A. Board Member Mirczak stated Lot A does not exist. Mr. Lockey stated in the County Clerk's Office in Ballston Spa, this lot is registered. Town Attorney Avigdor inquired even though the lot does not exist? Mr. Lockey stated this was how it was registered and offered to provide the legal paperwork for clarification. He further stated the mortgage used the existing description of Lot A as it existed in 2001.

- ∞ Town Attorney Avigdor stated there is no law which requires a bank to take a lien against an entire parcel. He further stated he has had prior situations where an individual owns a home on ten acres and they wish to obtain a mortgage against their home. The bank rejects the mortgage on the entire parcel due to the existence of a flood zone on one part of the parcel which brings with it the necessity of flood insurance and flood risks. The homeowner proposes a mortgage on the house and two acres which the bank agrees to. It would not have to be a second parcel which may appear curious. A second example would be obtaining a lien for a car loan. Most are familiar with a lien on the complete car. However, there is no law which states an individual cannot obtain a lien on the engine only. While this is not customary, there is no law which states it cannot be done. Further, the situation with Mr. Lockey would also be curious but legal.
- ∞ Town Attorney Avigdor stated this Board may request that he review the lien document but for the moment, this Board may wish to take Mr. Lockey at his word that a lien was only on the vacant strip of land. If that is the case, what Mr. Lockey is stating he wishes to do would make sense. He further stated that since this Board has jurisdiction over subdivisions, if a bank does take a lien on a portion of a parcel which is legal and then forecloses, they would own that portion of the parcel. However, they would have difficulty reselling because it was not part of a legal subdivision and may become an after the fact subdivision. In this case, Mr. Lockey is applying prior to any foreclosure and Town Attorney Avigdor now understands what he is attempting to do but leaves the ultimate decision to this

Board. There were no further questions from any Board Members.

Motion by Eileen Brennan, seconded by Board Member Vaillancourt to deem Application No. PB12-03SUB, Tax Map No. 42.-2-31 and 32 complete and schedule it for a Public Hearing on June 4, 2012 at 7 p.m. Ayes: Cox, Mirczak, Brennan, Vaillancourt, Traeger. Carried: 5-0.

Cochrane, Robert/Garrahan, Colleen
Prior Tax Map #42.8-1-55
New Tax Map #42.8-1-55.1 & 55.2
Possible Illegal Subdivision

Letter received from Saratoga County Real Property Tax Services alerting Town of Day that a deed was filed recently which split a parcel of land with no subdivision map filed indicating a possible illegal subdivision. Town Attorney Avigdor stated he spoke with the attorney representing the seller and an unapproved subdivision was created through a clerical mistake in his office. The intent was to convey an entire parcel and not a subdivision and that was the clerical mistake. A corrected deed was completed and as of two weeks ago, this deed was in transit to Florida and three other locations for signatures and understandably not returned as of this meeting date. Town Attorney Avigdor recommended tabling this issue to the June meeting in anticipation of receiving a corrected deed by that meeting.

Town Attorney Avigdor stated Code Enforcement Officer Metzler is aware of the situation and this Board will formally notify his office if there is no action on the part of the property owner.

4M Group LLC (Walter Mowle, Manager)
PB12-04SPR
Tax Map #33.6-1-33.31

Chairman Cox reviewed the application for a site plan review to complete shoreline work with areas of fill in order to move the existing docks in and out of that specific area. Board Member Traeger inquired if the rocky area would be involved in the shoreline work. Mr. Mowle stated it would not but would only involve the large dips on the shoreline and filling these areas would allow Mr. Mowle to utilize a truck to remove the docks. He had a meeting scheduled with Hudson River Black River Regulating District representative.

There is a rise in the center of the beach permit area which will not be disturbed. The only area affected would be the large dips in the area of the docks (3-4'x10' sections). The area in question is twelve feet wide and relatively flat. All of the fill will take place on the Hudson River Black River Regulating District lands and that permit will be based on what that agency would allow. The fill will consist of five yards of stone and ten yards of gravel. Town Attorney Avigdor inquired if any fill will be below the high water mark. Mr. Mowle state it would not. If the water levels are low, planking will be utilized to remove the docks with no additional fill involved below the 771 foot mark. Hudson River Black River Regulating District would allow small rock removal by hand which Mr. Mowle intends to do.

Motion by Jack Vaillancourt, seconded by Board Member Mirczak to approve the site plan review shoreline work for Application No. PB12-04SPR, 4M Group LLC (Walter Mowle, Manager), Tax Map No. 33.6-1-33.31 conditional upon receiving a permit from Hudson River Black River Regulating District. Ayes: Cox, Mirczak, Brennan, Traeger, Vaillancourt. Carried: 5-0.

Cabrera, Joseph and Tina
Tax Map # 41.-1-39, 41.-1-41.1 and 41.20-1-4
Review of Jurisdictional Determination
Possible Subdivision

Chairman Cox stated a Jurisdictional Determination (J2012-0148) was received from APA dated April 12, 2012 in which the applicant inquires of APA of their ability to sell what is indicated on a tax map as Tax Map #41.-1-41.1. The corresponding map does not adequately explain the proposal. If Tax Map #41.-1-41.1 is sold, Tax Map #41.-1-39 will become landlocked.

Town Attorney Avigdor stated there are two different laws which would apply: 1) APA law which does not require a permit; and, 2) Town of Day law which states contiguous parcels which abut each other when acquired in a single deed would be considered a single parcel for subdivision purposes. Therefore, while the property owner would not need an APA subdivision, he would require a Town of Day subdivision. While they were purchased in 1973 and were acquired together, Town of Day would not define tax parcels for subdivision purposes but rather what was obtained in a single deed which would be the pertinent question. Other

than the APA jurisdictional determination, no additional application has been received from their property owner. If it is one deed and Tax Map #41.-1-41.1 is sold, there would be an issue.

Town Attorney Avigdor stated there are two options: 1) wait for notification from Saratoga County Real Property of an illegal subdivision; or, 2) notify the property owner stating APA has provided this Board with a copy of their letter of April 12, 2012 indicating they do not have jurisdiction over this proposed project. This Board in writing can inform the property owner that the Town of Day may have subdivision jurisdiction and would recommend a review with Town of Day Code Enforcement prior to proceeding. All Board Members agreed that the letter will be sent to the property owner and his attorney.

Board Member Mirczak for clarification stated if there are three deeds for the three parcels, this Board would not have any involvement. Town Attorney Avigdor stated most towns conclude a tax parcel is a tax parcel and if a property owner wished to subdivide, subdivision approval from this Board would be required. The Town of Day in a very intentional decision in the early 90's at the inception of the first subdivision law realized that there were very small lots (25x50) located in the town (i.e. Brownell subdivision near Horse Hill Road). Generally, multiple lots of small sizes were purchased (in rare occasions to obtain beach access one small 25x50 lot may be purchased). Language in Subdivision Law was in a single deed or other instrument of conveyance (i.e. will or court order), subdivision approval would be required in spite of having multiple tax parcels. If there are separate deeds, it would have to have been separate deeds historically. Tax parcels do not come into this Board's analysis. Therefore, even if these were separate tax parcels, if there were a single deed than by the passage of Town of Day law, subdivision approval would be required.

Old Business: None.

Correspondence: Letter from National Grid regarding gas lines which are not applicable in the Town of Day.

CDRPC Local Government Planning & Zoning Workshop to be held on June 20th at Hudson Valley Community College in Troy. There was no interest in attending.

Secretary's Report: None.

Public Participation: None

Motion by Dick Traeger, seconded by Board Member Vaillancourt to adjourn the meeting at 7:45 p.m. Ayes: Cox, Mirczak, Vaillancourt, Brennan, Traeger. Carried: 5-0.

Respectfully submitted,

Diane R. Byrne
Secretary