

**Kennebunkport Zoning Board of Appeals
32 North Street, Village Fire Station
July 22, 2013 @ 7:00 P.M.**

A meeting of the Kennebunkport Zoning Board of Appeals was held on Monday, July 22nd, 2013. The meeting convened at 7:00 p.m. in the North Street Fire Station.

1. Attendance

Members Present: Mr. Mark Messer (Chair), Herb Cohen, Christopher Perry, Paul Cadigan, Wayne Fessenden

Others Present: Brian Shaw, Wayne Adams

2. Approval of minutes from the May 20, 2013 meeting, as well as any minutes not previously approved. Mr. Perry made a motion to accept the minutes from the May 20, 2013 meeting. Mr. Cadigan seconded the motion and the vote was unanimous.

3. **Michael J. & Natalie R. DeCristofaro / Bergen & Parkinson, Authorized Agent** – request for approval of functional division of land known as 136 Kings Highway, Map 33, Block 3 and Lots 31 and 31A, respectively, in the Goose Rocks Zone.

Mr. Messer introduced the Agenda item and acknowledged receipt of a memo received from Brian Shaw.

Attorney Wayne Adams addressed the Board, representing Natalie and Michael DeCristofaro of 136 Kings Hwy. Mr. Adams explained the property was conveyed to Mr. DeCristofaro from his father in 1974 at which time there were already two houses on the property originally built in 1947 and 1954. Mr. Adams also stated he is before the Board requesting them to confirm the fact there is a functional division of this property with no violation of the Land Use Ordinance.

Mr. Messer asked if this would make the properties any more non-conforming. Mr. Adams responded no, the properties have been the same use for the past 50 years.

Mr. Brian Shaw addressed the Board stating this Administrative Appeal is a vehicle for the Applicant to come before this Board. Historically these properties had not been granted any approvals from any town Board or court as two separate parcels, and so Mr. Shaw added he had no choice but to deny the functional division. Mr. Shaw concluded his presentation by stating he does not have the authority to approve such a division of property.

Mr. Perry stated it was in 2001 when the deed was filed for a non-conforming lot with 2 dwellings and conveyed one of those dwellings to one owner; and asked if there is a correct procedure for dividing a non-conforming lot into two smaller lots. Mr. Shaw said that could be accomplished through this Board and the court system.

Mr. Perry questioned whether this Board has the authority to take a non-conforming lot and divide it into 2 smaller non-conforming lots.

Mr. Messer cited a section of Article 8.7c which states “If two (2) or more contiguous lots are in a single or joint ownership of record as of March 12, 1985, if all or part of the lots do not meet the dimensional requirements of this Ordinance or a subsequent amendments, and if a principal use or structure exists on each lot, the non-conforming lots may be conveyed separately or together...”

Mr. Shaw noted that if you look on the survey, the two houses were built primarily on one lot. Mr. Shaw also noted in 1999 there was an application for improvement to the main house and treated the lots as one parcel in order to comply with the 20% expansion requirement.

Mr. Fessenden asked if there were separate sewers, electric, and water utilities for each house. Mr. Shaw responded he did not know.

Mr. Cadigan asked the Applicant if there was something in the Land Use Ordinance that allows this division or are they basing it strictly on the Saco River district ruling. Mr. Adams replied the he does not know of any part of the Land Use Ordinance that directly relates to this; however the deeds for each parcel have been on record since 2001 and have been separately taxed since 2001.

Mr. Perry asked the Applicant if there is any paragraph that gives the Zoning Board of Appeals the ability to make this judgment. Mr. Adams responded "No, I think you're relying on case law." Mr. Perry replied he has read the case law and does not know what the court was relying on in their decision. Mr. Adams added he believes the court was relying on common sense when they said no zoning purpose is served by maintaining a single ownership when the lot has been functionally divided. Mr. Perry stated the map the Board was given shows 1 lot prior to 2001. Mr. Adams pointed out that the Assessor's cards were prepared as 2 separate lots.

Mr. Messer asked Mr. Adams to discuss the term functional division. Mr. Adams replied it is a parcel of land with two completely separate functions used separately for separate purposes.

The Board discussed at length the Board's jurisdiction in hearing this Application.

Mr. Messer opened the Public Hearing. There no comments or questions from the public. Mr. Messer closed the Public Hearing.

Mr. Adams clarified they are not asking the Board to divide or create a substandard size lot, but asking the Board to acknowledge what has been existing which is a grandfathered functional division.

Mr. Cadigan offered his opinion this division that occurred in 2001 seems to be a title division, not a functional division and questioned whether this Board was the correct venue to make this decision.

The Board members continued their discussion of whether they had jurisdiction or if the Applicant was better off to go to Superior Court and get a summary judgment based on case law. Mr. Adams argued the Board is simply dealing with a factual determination; acknowledging the property is grandfathered and not in violation.

Mr. Shaw explained there may not be any specific language in the Land Use Ordinance about a functional division, but the Board does have the authority to approve undersized lots.

Mr. Perry made a motion to uphold the Code Enforcement Officer's denial of recognition of a functional division in his letter of June 20th, 2013. Mr. Fessenden seconded the motion. A vote in favor of the motion is a denial of the Application. Mr. Perry voted in favor of the motion; 4 opposed. The motion was denied. Mr. Messer stated he would generate a Findings of Fact acknowledging the Zoning Board of Appeals has overturned the Code Enforcement Officer's denial of a functional division.

Adjournment: A motion was made to adjourn, it was seconded and the vote was unanimous.

Submitted by: Patricia Saunders, Recording Secretary