

## Abutters who didn't appeal ZBA decision can't block project

*Waited 8 years to file zoning enforcement action*

By: Eric T. Berkman December 13, 2017



Truro residents who appealed a permit to build a nonconforming single-family home but did not challenge the Zoning Board of Appeal's subsequent decision to uphold it could not bring a zoning enforcement action against the property owners eight years later, a Land Court judge has ruled.

During the eight-year period between the initial appeal and the present action, the home — known locally as the "Kline House" — was completed. Meanwhile, abutters who did appeal the original

ZBA decision took their case to the Appeals Court and secured a revocation of the permit and an order to demolish the house. But the town ultimately agreed to allow the owners to live there in exchange for a \$468,000 mitigation fee and a \$2.5 million charitable gift paid over 10 years.

After the settlement, the new group of plaintiffs filed their enforcement action pursuant to Chapter 40A, §7 to revive the appeal they had abandoned eight years earlier.

The defendant property owners pointed to the Appeals Court's 2008 decision in *Gallivan v. Zoning Bd. of Appeals of Wellesley*. *Gallivan* said an aggrieved party that fails to appeal a building permit in a timely manner under Chapter 40A, §§8 and 15 cannot subsequently challenge the permit via a Chapter 40A, §7 enforcement action. The property owners said that extended to Chapter 40A, §17 appeals of zoning board decisions, too.

Judge Howard P. Speicher agreed.

"There is no logical distinction between a plaintiff who has failed to file an appeal to a board of appeals within thirty days as required by G.L.c. 40A, §8, and one who, having received an adverse decision from the board of appeals, has failed to utilize the exclusive remedy of G.L.c. 40A, §17 to appeal that adverse decision within twenty days," Speicher wrote in granting the defendants' motion to dismiss. "In either case, the alternative remedy provided by G.L.c. 40A, §7, is no longer available."

The 17-page decision is *Barkan, et al. v. Brown, et al.*, Lawyers Weekly No. 14-099-17. The full text of the ruling can be ordered at [here](#).

### Nuances stripped away

Jonathan W. Fitch of Boston, who represented the defendant trust that owns the Kline House, could not be reached for comment before deadline.

But Boston attorney Jonathan Silverstein, who represented the members of the Truro ZBA, also named as defendants, called the decision a "fair ruling" that gives property owners predictability and finality in land use permitting decisions.

"More broadly, the decision serves to reinforce what the case law established in different contexts, particularly in *Gallivan* — that a party needs to move expeditiously to pursue and see through its legal remedies if it's going to challenge a land use decision by a local board or permitting official," Silverstein said.

Daniel P. Dain, a Boston real estate litigator, agreed, pointing out that courts have strictly enforced the statutory requirement that a party appeal an adverse zoning board decision within 20 days.

"The courts [have held] in some cases that even being a few minutes too late deprives the court of jurisdiction," Dain said. "In *Barkan*, opponents who not only had notice but participated in the local process waited eight years. Certainly *Gallivan* stands for the proposition that a zoning enforcement action cannot be used to circumvent the direct appeal process, at least by someone with notice."

Boston lawyer Gary P. Lilienthal, who has 15 years of experience serving on zoning boards in two different towns and has represented clients in appeals from ZBA orders, said zoning cases are all about "turning square corners."

"History makes this case very confusing, but Judge Speicher stripped away all the nuances and confirmed what I believe, which is that you have a finite number of days to appeal an order of the building commissioner and the decision of a zoning board," he said. "Without that, there would be really bad uncertainty in the zoning part of the land use field."

Plaintiffs' counsel Robert J. Shapiro of Jamaica Plain said his clients plan to appeal.

"We believe the *Gallivan* opinion, in interpreting the Chapter 40A rights of abutters, merely held that an abutter cannot later collaterally challenge a building permit that went unchallenged at the time of the issuance of the permit," Shapiro said, adding that not only was the Kline House building permit challenged, it was ultimately revoked as a result of a 2011 Appeals Court decision in a challenge brought by different plaintiffs than the ones here.

James G. Wagner, a civil litigator in Boston who represents owners, developers and abutters, said the facts of the case "smack of private money being used to buy zoning nonconformity."

He also said the decision's characterization of the plaintiffs as seeking a "second bite at the apple" applies equally to the owner.

"When our courts ruled that the building permit was not valid, that should have been the end of that permit," he said. "There should not have been a second avenue to 'revive' a building permit that was adjudicated to be a nullity."

Meanwhile, Wagner said, the decision could cause unnecessary appeals.

"Abutters now will feel the need to participate in appeals simply to keep their oar in the water based on the risk that a future settlement worsens a development that was acceptable [at] first blush," he said.

### **Cape controversy**

In 2008, the Truro building commissioner issued building permits to Donald Kline, beneficial owner of property held in trust at 25-27 Stephens Way.

The permits allowed a pre-existing nonconforming home to be converted into a habitable studio and the construction of a new 8,300-square-foot single-family home, the Kline House.

Other property owners on Stephens Way, including the plaintiffs in the present case, appealed to the ZBA, arguing that the project added to the nonconformity of the existing structures. The ZBA upheld the permit.

Some of those abutters appealed the ZBA's decision to the Land Court, but the plaintiffs in the present action did not participate. Meanwhile, Kline continued with construction despite a warning from the court that he proceeded at his own risk.

Litigation over the permit cycled back and forth between the town, the Land Court and the Appeals Court over the next few years, and in 2012, in response to judicial rulings, the building commissioner revoked the permits.

In December 2016, with more appeals pending, the Kline House's new owners agreed to pay a \$468,000 mitigation fee and make a \$2.5 million charitable gift to the town in return for a certificate of use and occupancy.

Speicher entered the settlement as a judgment.

The plaintiffs in the present case then filed a zoning enforcement action to block the certificate. The commissioner and the board rejected their claim and they appealed to the Land Court.

Defendant Benjamin Zehnder, trustee of the nominee trust that owned the Kline House, moved to dismiss.

### Untimely action

Addressing the plaintiffs' claims that the Kline House remained in violation of zoning laws, Speicher noted that the violation had existed at least since May 2008 when the permits issued.

"There was nothing precluding the plaintiffs from protecting their rights and following through with an appeal of the Board's decision upholding the issuance of the building permit, pursuant to G.L.c. 40A, §17, as [other neighbors] did, instead of resurfacing eight years later and seeking judicial review arising out of the same violation that they allege existed when they first complained of it in 2008," he said.

Just as *Gallivan* requires an aggrieved party with adequate notice to challenge a building permit within 30 days of its issuance in order to prevent a party from "springing onto the scene" years later to challenge the existence of a zoning violation, Chapter 40A, §17 requires an aggrieved party to appeal a ZBA's adverse decision for the same reason, Speicher said.

"The failure to utilize this exclusive remedy precludes an aggrieved party, like the plaintiffs, from appearing again years down the road to pursue an enforcement action," the judge concluded, dismissing the plaintiffs' claim.

**THE ISSUE:** Could abutters who appealed the issuance of a permit for the construction of an allegedly nonconforming single-family home — but who did not participate in a challenge to the ZBA's subsequent decision to uphold the permit — bring a zoning enforcement action against the property owners eight years later?

**DECISION:** No (Land Court)

**LAWYERS:** Robert J. Shapiro of Jamaica Plain (plaintiffs)

Jonathan Silverstein and A. Alexander Weisheit, of KP Law, Boston; Kate C. Billman-Golemme and Jonathan W. Fitch, of Fitch Law Partners, Boston (defense)

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