

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
OCTOBER 27, 2008

The Board consisted of:

Jeffrey P. Klofft, Chairman
Nancy G. Rubenstein, Acting Clerk
Jonathan G. Gossels
Stephen A. Garanin
Jonas D.L. McCray, Associate

Notice of the hearing was published in the Middlesex News on October 10 and 17, 2008, posted, mailed and read at this hearing.

Mr. Klofft, Chairman, explained that this is an appeal under M.G.L. 40A, Section A of a Determination of the Building Inspector denying a building permit because of insufficient frontage and access. The property is shown as Lot 4, Hillside Place and is zoned Residential A-1.

This was previously heard on October 6, 2008 as Case 08-27 for a Use Variance. That Use Variance was subsequently withdrawn without prejudice and resubmitted as an Appeal of the Building Inspector's Determination.

The Board was in receipt of a letter dated October 21, 2008 from Michael D. Myerow, 79 Pokonoket Avenue, abutter, which expressed his opposition to overturning the Building Inspector's decision.

Building Inspector James Kelly said he received a building permit application to build a new home on Lot 4. The permit was denied because there was no frontage on the lot. He said around 1976 a similar building permit application was requested and that Building Inspector denied it because of lack of frontage. Again in 2004 or 2005 there was a similar request. In 2003 there was a letter from then Building Inspector John Hepting – Mr. Kelly didn't think there was a building permit application associated with it. In that letter Mr. Hepting wrote that Clifton Avenue has never been constructed and therefore a plan must be presented to the Planning Board under the Subdivision Control Law to construct the road over the 25-foot right of way. Mr. Kelly said at this time there is no road so the frontage can't be measured.

Mr. Kelly said *Shea v. the Towne of Lexington* case law assisted him in his decision as it seemed to be similar. There was no way to build a road and the court found for the Building Inspector of Lexington that there was no frontage.

Attorney Robert Dionisi said there were some issues raised at the October 6th hearing from the board as to the 25-foot right of way that exists over the Myerow property. He submitted a copy of the deed highlighting the language in that deed that shows the 25-foot easement for purposes of access and egress to Lot 4. Also submitted was a plot plan of the

Myerow property with the 25-foot portion which is reserved as the 25-foot right of way highlighted as well as two other copies of the 1959 plan

Mr. Klofft asked whether the right of way reserved for the construction of Clifton Avenue.

Mr. Dionisi said it was not. It was just for purposes of access and egress of Lot 4. He pointed out the radius of Clifton Avenue which borders on Lot 4 noting that the right of way goes across the Myerow property, into Clifton Avenue, onto the property.

Mr. Klofft asked, given that if Clifton Avenue was actually a public way, why would there be this need for this right of way.

Mr. Dionisi replied that there are a number of reasons. He didn't believe there had been any discussion on October 6th that Clifton Avenue was a public way.

Mr. Klofft said the highlighted portion of the deed says "said right of way for the construction of a road, maintenance of same, for the laying of utilities and the maintenance of same whether they be above ground or under ground, for any and all rights that streets and roads may be used in the Town of Sudbury" – then in writing, not of the same typeface. "said right of way is for the benefit of Lot 4".

Mr. Dionisi said the right of way which is reserved in that deed is for the purposes of access and egress to Lot 4. The 25-feet can be used for all purposes that streets and ways may be used in the Town of Sudbury, including the installation of utilities above and below ground.

Mr. Dionisi said he indicated to the Board at the October 6th hearing that as a result of the 2003 meeting before the Planning Board, the applicant, Mr. Hall went before the Town Engineer and received, as a result of an appeal to Superior Court, a plan which brings access and egress from Pokonoket Avenue, down Hillside Place and up this 25-foot easement, for all purposes for which the Town Engineer deems appropriate – emergency vehicles or for vehicular access to Lot 4.

Mr. Klofft said he recalls the slope as being rather steep.

Mr. Dionisi agreed the topography is very steep. He said the purpose of the appeal was to challenge Town Engineer's decision not to grant a waiver.

Mr. Klofft said that was for a driveway which is not necessarily a public way for emergency vehicles. It was a very different argument.

Mr. Dionisi said the Town Engineer didn't grant a waiver. He said this driveway, across Lot 4 for all purposes is designed for the Town Engineer's purposes to deem it safe for vehicular traffic.

Mr. Klofft asked whether he was correct in understanding that this right of way is to construct a driveway not a public way.

Mr. Dionisi said it is not a public way. It doesn't have the requisite width.

Mr. Dionisi described the highlighted section of the right of way as it traverses the Myerow property and the description in that deed that refers to Lot 100. He pointed out Lot 100 as shown on the 1924 plan.

Commenting on Mr. Kelly's presentation which refers to the Shea v. Lexington case, Mr. Dionisi said that case is distinguishable from the facts in this matter because the Lexington case revolved around an 81P plan. What the court decided in that case was that the 81P endorsement (ANR approval not required) did not elevate the lot to the status of a subdivision plan. He said that was what the Lexington case turned on. It's completely distinguishable from the facts here because they have a lot that's shown on the subdivision plan approval.

Mr. Dionisi also referred to the October 6th hearing where there was some discussion with regard to the assessment of the lot.

Mr. Klofft said the Board decided it was not relevant to the issue. However, with regard to the easement, he had some question concerning the change in typeface from typeface to handwriting.

Mr. Dionisi said that handwritten notation reserved for Lot 4 was not put on subsequent to recording. That handwriting is on the deed as recorded.

Mr. Klofft said he found it strange that it references Lot 100, but also references Lot 4, and the two lots weren't the same because at the time that Lot 4 was created, Lot 100 wouldn't have existed anymore because the Myerow property would have joined into one lot.

Mr. Dionisi said Lot 100 did exist on the 1924 plan.

Mr. Klofft said the easement is dated 1978. By 1978 Myerow would have owned his property and Lot 100 would have ceased to exist.

Mr. Dionisi said Lot 100 still existed.

Mr. Klofft suggested leaving this issue for now. He felt the Board had a greater concern about Clifton Avenue and its existence and whether or not it was abandoned.

Mr. Dionisi said he was quoting from the October 6th minutes which say there are two points – (1) whether or not that part of the cul de sac still exists and (2) whether or not there truly is access across the Myerow property.

Mr. Klofft said both parts can be discussed and then decided together.

Mr. Dionisi said one of the misconceptions of Clifton Avenue is that there are people who still think that portion of Clifton Avenue which gives the 180 foot frontage to Lot 4 has been abandoned. He said it has not.

Mr. Klofft said the question would be whether the road itself has been abandoned when basically the lower portions of Clifton Avenue were given away leaving that segment essentially without access to any other public way. He asked whether he was correct in his understanding that Mr. Dionisi was asking the Board to approve a public way to a driveway to another public way.

Mr. Dionisi said he is asking the Board to determine whether or not Mr. Kelly is right in his most recent decision or whether Mr. Hepting is right in his decision of a few years ago. Mr. Dionisi said his position and the position of the applicant is that Mr. Hepting is right in his decision.

Mr. Klofft said the Board is only dealing with Mr. Kelly's decision. He said he understood that Mr. Hepting made reference to that in his letter; however, he wanted to know whether Mr. Dionisi was suggesting to go from a public way to what is essentially, potentially a private way, which is Hillside Place, to a driveway, to a public way which is Clifton Avenue.

Mr. Dionisi said the issue with Hillside Place has never come up in Mr. Kelly's letter or discussions. What he had was the Planning Board through the Town Engineer's approval to go from Pokonoket Avenue, across Hillside Place, up the 25-foot right of way to Lot 4.

Mr. Klofft said if there is no road there is no frontage. He said from a theoretical point of view Mr. Dionisi is still talking about going from public way to essentially, potentially what could be a private way - Hillside Place, to a driveway, to a public way, to Lot 4.

Mr. Dionisi said leaving out Hillside Place for a moment because he was not sure whether it's public or private or not, they have the plan to go across Hillside Place and feel they have the right to do so as well. It may be subject to a title problem. However, those are issues which would come up at a later time. He felt the purpose of the applicant's discussion tonight is to convince this Board that there is frontage on a way that's been laid out on a plan – even though it's not constructed, nor does it need to be constructed. Although Clifton Avenue is not constructed, it does have the right to get vehicular access to it.

Mr. Klofft read from a document by a Chicago title insurance company with regard to various municipalities in Massachusetts which states that since abandonment is a question of intention of the easement holder to never make use of the easement again – in order to apply there must be acts by the ownership of the dominant estate conclusively and unequivocally manifesting either a present intent, or to relinquish the easement for a purpose inconsequent with further existence.

Mr. Klofft said there is a deed for one of those pieces that's essentially saying that the intent of Mr. Hall's father, or grandfather, was to abandon the road. The road was being abandoned. At that point, all of Clifton Avenue became abandoned at that point.

Mr. Dionisi questioned why, if a portion of Clifton Avenue is abandoned, all of it abandoned.

Mr. Klofft said because there is no other access to it from any other place.

Mr. Gossels said Clifton Avenue has never been constructed.

Mr. Dionisi said they can construct it.

Mr. Gossels said it wouldn't connect to anything.

Mr. Klofft said you would end up with a landlocked segment. He could not see how there was ever any intent in any zoning bylaw to allow a segment of a road to be accessed via a private driveway that has no other access from any other place.

Mr. Dionisi felt the Board was confusing Chapter 40A and Chapter 41. He said the Subdivision Control Law only deals with efficient vehicular access to the lot.

Mr. Gossels said he was not confused.

Mr. Dionisi felt the Board was mixing the two with the comment that the Clifton Avenue which exists as 180 feet of frontage is landlocked. He said it's not landlocked.

Mr. Klofft felt this to be the point in dispute – does that segment even exist or was the road abandoned.

Mr. Dionisi did not feel the Board could make a decision as to whether or not that portion of Clifton Avenue as shown on the 1959 plan was abandoned. He said there has been no evidence that it has.

Mr. Klofft said if that were the case, there is no need for this appeal. There would be no discussion as to whether or not Clifton Avenue existed; therefore there would be frontage. He said the Board is not disputing the amount of frontage. What is in dispute is whether or not Clifton Avenue exists.

Mr. Dionisi said the dispute lies with the Zoning Enforcement Agent. One says it has legal frontage, the other says it doesn't.

Mr. Gossels interpreted Mr. Hepting's letter as saying there is legal frontage if the road were to be built.

Mr. Dionisi felt that to be a mischaracterization of Mr. Hepting's letter.

Mr. Gossels said the letter says it needs subdivision approval.

Mr. Dionisi read a portion of Mr. Hepting's letter dated December 1, 2003 which says "therefore a plan must be presented to the Planning Board under Subdivision Control Law to construct the road over the 25-foot right of way so designated in the deed dated November 6, 1978 and referred to in my letter." He said they have done this – they have gone across the 25-foot right of way.

Mr. Gossels said this Board is acting on the current Building Inspector's letter.

Mr. Dionisi said he was responding to Mr. Gossels comment, and that has been taken care of.

Mr. Klofft said the Board has before it an appeal of Mr. Kelly's decision, not Mr. Hepting's decision. He felt there to be some potential disagreement about exactly what was said in the letter without Mr. Hepting being here to clarify it.

Mr. Dionisi said he was responding to Mr. Klofft's comment as to why do they would have to come before the Board if there is 180 foot of frontage on an existing way which is shown on a subdivision plan.

Mr. Klofft said he made that comment because Mr. Dionisi said that that wasn't a point of discussion in this particular area – the point of discussion was the 25 feet. Therefore, the point was that given that the Building Inspector was saying there is no frontage, then the issue of Clifton Avenue is before this Board.

Mr. Dionisi said if the issue of Clifton Avenue is before the Board, he has demonstrated by way of a plan that shows that Clifton Avenue does exist.

Mr. Klofft said there is also information which basically says that the lower parts of Clifton Avenue are abandoned when the lots on Indian Ridge were there. And there is some case law that talks about abandonment of a paper road when the explicit rights to maintain that right of way aren't maintained over all those lots.

Mr. Dionisi said he thought there was an abandonment of one half of Pokonoket Avenue below Hillside Place; therefore, would the rest of Pokonoket Avenue be abandoned?

Mr. Klofft replied that the portion of it that was paper – potentially. He said Mr. Dionisi was saying there was a part that existed. However, there is none of Clifton Avenue that exists. There were lots below Clifton Avenue. There were lots below this lot and south of this lot where Clifton Avenue continued. The right of way for those was abandoned at least on one of the lots that the Board is seeing that connected to Indian Ridge. From Mr. Klofft's reading of the materials in front of him, it essentially says that because that portion was abandoned, then

effectively that portion of Clifton Avenue that connected is gone. He said what Mr. Dionisi and Mr. Hall are asking is that the Board accept that they can have the remaining portion of Clifton Avenue existing even though the rights of the rest of it were not maintained. He had difficulty in accepting that it would have ever been the intent of any zoning structure that would have been put together.

Mr. Dionisi asked whether it was Mr. Klofft's position that if Clifton Avenue cannot be constructed to get to that portion of Clifton Avenue on which they have a lot, then Clifton Avenue doesn't exist because there is no frontage on a way.

Mr. Klofft said "yes."

Mr. Dionisi replied that his analogy for that is that there are lots which exist in town over which there may be frontage or frontage on a paper street for that matter, but access to those lots are arrived at through other means like rights of way as shown here in this particular case.

Mr. Klofft said he would be interested in seeing if Mr. Dionisi could present an example of one in town which goes from a public way to a deeded right of way back to another public way where there isn't another public way to get into. It seemed to him to be a rather unique set of circumstances.

Mr. Dionisi said there is another public way. He said his position for the sake of argument that Pokonoket is a public way and so is Hillside Place.

Mr. Klofft replied but then he is connecting those public ways with Clifton through this private easement over private property.

Mr. Dionisi said this was correct.

Mr. Klofft said he was suggesting that that is a unique set of circumstances – ones that he was not aware of that exist anywhere else in town, where there are two public ways with the only interconnection between them being deeded access across private property.

Returning to Mr. Gossels' previous comments, Mr. Dionisi felt 40A is designed to preserve those lots which were buildable at one time to be considered lots again. His position is that it was a legal lot in 1959 and it's a legal lot in 2008.

Mr. Gossels said it was a legal lot under the subdivision plan, but Mr. Hall chose to abandon all access to that lot.

Mr. Hall said the subdivision of Lot 4 is not the same as the King Philip Heights subdivision approval. The only part of Clifton Avenue that shows on Lot 4 is the turnaround.

Mr. Gossels said it's landlocked – there's no way to go.

Mr. Hall said the intention of his grandfather was in selling off – but as was mentioned at the October 6th hearing, at the time everybody sold off to the midline of the road because the law said everybody in the subdivision had the right to use the road. In this case they sold to the other side of the road. He said his grandfather never intended to make it so that you couldn't ride on the road. He was trying to assure Jean Copp, an abutter, as well as other people living next to her on down the road that he wasn't going to build a house in their back yards.

Mr. Klofft said the only way they would have built a house there was if Clifton Avenue had been constructed.

Mr. Hall agreed. He said his grandfather was not saying that he wasn't going to build a house – that was not the issue. The issue was the houses on Indian Ridge. This lot was never considered part of that issue. Those were the lots on King Philip Heights that he was trying to protect.

Mr. Gossels said he understood this; however, by discontinuing that potential to develop the road, it landlocked the cul de sac.

Mr. Hall replied that that was why the easement exists across the Myerow property and why it was written into the deed.

Mr. Klofft said if that was the case, he could not imagine the Planning Board, had they been a party to that decision, would have thought that was acceptable. He said if it had been a short road to another short road, that would have made more sense.

Mr. Hall said he supposed that would have required a whole other subdivision. They would have had to do a whole road plan across Lot 100. At the time it was deemed sufficient to have a right of way. Apparently things have changed. In those days it was okay to do that so that's the way it was done.

Mr. Dionisi asked what would be the purpose of having Clifton Avenue connect to another public way.

Mr. Klofft replied for access for emergency vehicles.

Mr. Hall said they have that via the 25-foot easement. It's in the plans that were brought to the Town Engineer.

Mr. Dionisi said Mr. Klofft was invoking Chapter 40A but felt he was invoking it incorrectly. He said the purpose of 40A is to determine whether this is a legal lot. It's not a question of whether there is sufficient vehicular access.

Mr. Klofft said whether it's a legal lot or not is whether Clifton Avenue exists, adding that from his interpretation, as it currently stands, he did not believe that section of Clifton Avenue exists – the cul de sac section that the plan shows.

Mr. Hall asked who owned it.

Mr. Klofft said it is owned by Lot 4.

And, Mr. Hall said, it's on a subdivision plan approved by the town.

Mr. Klofft said it was his contention is that Clifton Avenue was abandoned.

Mr. Hall said a section of Clifton Avenue was deeded, but the rights to pass or re-pass as a public road were never deeded because they were never owned. That's part of the subdivision plan.

Mr. Klofft said that again gets to the point of coming from a public way across a private access to another public way because it's not Mr. Hall's intention to build this cul de sac circle. The intent is to essentially use that land for part of its lot.

Mr. Gossels said building out the cul de sac isn't the issue. It doesn't go anywhere – there is nothing to connect it to.

Mr. Dionisi said that is not the purpose of the zoning statute which is to determine whether it's a legal lot – whether or not it has frontage on an approved way.

Mr. Klofft said two Board members (himself & Mr. Gossels) agree believe that the actions of the applicant's grandfather by deeding away a portion of Clifton Avenue have effectively abandoned the road (all the way down to Pokonoket Avenue) because there is no way to build that cul de sac portion.

Mr. Dionisi said that is a 41A problem.

Mr. Gossels said it was not, because that road has essentially been made meaningless. While it is on a subdivision plan, it's a plan that can never be implemented in a meaningful way. This was done by the applicant's own action and is a self-caused hardship.

Mr. Dionisi said the discontinuance of Clifton Avenue south of this cul de sac by Mr. Hall's grandfather deeded the property to the abutters. What he didn't do is reserve the right to pass and cross it. That was a mistake made back in the 1950s. What needs to be demonstrated to this Board, and which Mr. Dionisi felt has been done, is that they do have a portion of Clifton Avenue which is shown as an approved way, and according to the bylaws of this town is considered frontage on an approved way.

Mr. Klofft said the question that this Board may decide is whether or not Clifton Avenue is an approved way or whether or not it was abandoned in its entirety at the point where it was made this road segment.

Mr. Dionisi said the Bylaw states “a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law.”

Mr. Klofft said the subdivision was never implemented.

Mr. Dionisi said it was never constructed but is shown on a plan as recorded in the Registry. It’s an approved way on a plan, although it’s not a public way and has never been accepted by the town.

Mr. Gossels said the Planning Board never approved this particular landlocked segment of road.

Mr. Klofft said if this Board ruled against the Building Inspector, why would the applicant not have to go back to the Planning Board under subdivision control.

Mr. Dionisi said they have a legal lot and have access to it

Mr. Klofft said even though there’s been a substantial change to the plan that was submitted.

Mr. Dionisi said there is no change to the plan. They have frontage on Clifton Avenue that has access and egress.

Mr. Klofft said there has been substantial change to the subdivision that Clifton Avenue was part of.

Mr. Hall replied that that is a different subdivision from Lot 4.

Mr. Klofft said it seems to be a bit of an odd technicality that they have a lot in a subdivision that’s only accessed by a road that’s part of another subdivision.

Mr. Hall said the only part of Clifton Avenue that is relevant to the subdivision in which Lot 4 lies is the turnaround which was an extension of the original King Philip Heights subdivision and Clifton Avenue. There is no change to Lot 4.

Mr. Klofft asked for comments from other members of the Board.

Mr. Garanin said the applicant’s argument is that a piece of property internal to this property gives them the right to call that frontage. Since Clifton Avenue will never be built, the frontage is internal to the property. He felt that would allow anyone to say their property has frontage and that they should be able to build a house on it.

Mr. Dionisi agreed – if they obtain Planning Board approval.

Mr. Klofft said Mr. Garanin's point is that the plan was fundamentally changed. Theoretically, they laid down a road, created frontage, then basically sold off all the other land and while still maintaining there is frontage even though the rest has been given up.

Mr. Dionisi said not only that but they have retained a 25-foot right of way for access and egress.

Mr. Hall said every single lot in every subdivision gets its frontage internally. The land is subdivided and roads are created within it.

Mr. Klofft said but those roads are then turned over to the town.

Mr. Garanin said he could agree with Mr. Hall if this was a public road to a public road and not some potentially may or may not be in existence right of way.

Mr. Klofft said there has to be frontage on an approved road.

Mr. Dionisi said he felt there was. He referred to Mr. Hepting's letter of 2003.

Mr. Garanin said Mr. Hepting's letter is not before the Board. What is before the Board is Mr. Kelly's determination.

Mr. Dionisi said he is trying to convince this Board that there's a compelling argument not the least of which is a prior decision of a Building Inspector of the town. The basis of Mr. Hepting's argument is the basis for the argument they are presenting tonight. It has frontage on an approved road – albeit it's not constructed and never will be. He said it certainly could be constructed.

Mr. Gossels said there is no way to access it and there is no way to construct that road.

Reading from the deed, Mr. Klofft had some question as to the location of the right of way which was mentioned vs. the location highlighted on the plan. Following further discussion, this issue was clarified by Mr. Hall.

Attorney Robert Landry was present on behalf of Diane Blumenson and Paul Cook, 73 Pokonoket Avenue, abutters on the corner of Hillside Place and Pokonoket Avenue. He submitted a brief dated October 27, 2008 noting that most of the information contained in his brief was also submitted at the October 6th hearing, except that this is based on the appeal instead of a variance.

Mr. Landry said the applicants' contention that they have a right to build because they have a lot on an approved subdivision plan even though the road is not constructed defeats the Subdivision Control Law. He said when there is an approval of a plan, the only way it can be read, and the way the courts read it and interpreted it, is with the understanding that the roadways are constructed. He said there are different roadways that were constructed back when this plan

was first approved as King Philip Heights. There was an extension granted in 1959, but just dealing with that piece of it seemed to him that the only logic that could be used to explain how a Planning Board would approve an extension of a roadway is that it would be with the understanding that the roadway that was being extended had to be constructed. Mr. Landry said there is no way that the original Clifton Avenue in the King Philip Heights plan could ever be constructed. It's been deeded away – no rights have been retained, or there are limited rights of portions, but there is no way the actual roadway could ever be constructed.

Mr. Landry said in 1959 when the Clifton Avenue extension was approved, the original Clifton Avenue had already been abandoned. There are no records to indicate what happened back then. However, he said the current zoning allows for driveway access, but it's still a public hearing process. On its face he said there is an extension of a roadway and he could not see how it could be interpreted any other way than to say that the roadway had to be constructed and the extension had to be constructed.

In terms of the frontage situation, Mr. Landry felt the courts have been very clear that the right of way can't act as frontage. He said there might be some limited decisions where a right of way does, but it actively existed on the ground over a considerable period of time and another property owner wanted the right to build on the right of way and it was deemed the equivalent of a town way. He said that isn't the case here. There is a right of way and a roadway that exists on paper which has never been constructed and has never been approved.

In terms of the access, Mr. Landry said there is inadequate access to this property. There is no way that is approved by the Planning Board for vehicular access for safety issues, and there is a very steep roadway which is certainly going to create hazards given the degrees of the pitch. The amount of excavation that would be required would be incredible, and it would certainly have to be established whether they have any rights to do that.

Mr. Klofft said after reading Mr. Hepting's letter again, he would interpret it as saying that Lot 4 basically does have 40,000 s.f. and, as it's on the plan, has 180 feet of frontage. The "however" in his opinion says that Clifton Avenue hasn't been built so therefore it isn't a road and basically you have to go back to subdivision control.

Mr. Dionisi said, unless there's an easement.

Mr. Klofft said he felt it to be more than that. Referring to Mr. Landry's comments, the lot and the frontage as approved was when Clifton Avenue was conceived as an entire way. Once the lower half is gone, you almost need to revisit the whole plan.

Mr. Dionisi said he thought he heard Mr. Landry say the cul de sac on Lot 4 was approved after they abandoned the lower part of Clifton. Mr. Dionisi said the deeds were already deeded out.

Mr. Landry said he was not saying the Planning Board had knowledge of that since they don't go down and look at deeds.

Mr. Dionisi said with the current Planning Board regulations you have to do a title examination. He would assume at that time the Planning Board did have some knowledge.

Mr. Klofft said that might not necessarily be the case since that was 30 years ago and things might have been different then. He was not aware of what the rules were then.

Mr. Dionisi said one can't assume one way or the other. His said his point is that the Planning Board approved it without any notation or description that the plan would be built. They gave Lot 4 frontage.

Mr. Klofft asked whether Mr. Dionisi was claiming that the bulb of the cul de sac didn't exist prior to or was created at the time of conveyance of the right of way of the lower lots.

Mr. Dionisi said it was created after Clifton Avenue was created – in the 1959 subdivision plan.

Mr. Klofft asked for the date of the subdivision plan that had the other portion of Clifton Avenue.

Mr. Dionisi said he believed it was 1924.

Mr. Klofft asked when the lots that were conveyed that removed the lower portion.

Ms. Rubenstein said the plan was signed in 1950.

Mr. Klofft said there is no way of knowing whether the Planning board would have known those deeds were conveyed and that Clifton Avenue below that didn't exist.

Mr. Dionisi said he would assume that those abutters were there.

Mr. Gossels said he would not make that assumption. He felt they would not have approved a subdivision plan for frontage on a road that did not exist.

Mr. Dionisi said he thought what Mr. Hepting was concerned about was that they may have a legal lot but would have to go back to the Planning Board to get access. He said they would have to develop that 25-foot right of way so that the Planning Board is satisfied. He added that the applicant has done that.

Mr. Klofft said that may be Mr. Hepting's opinion. But this is an appeal of Mr. Kelly's opinion, which is different, and is the one before this Board.

Mr. Dionisi felt the limited scope of this Board's discussion should be whether or not this is a legal lot.

Mr. Klofft disagreed. He said the decision is whether there is frontage. The only way the Board can determine whether there is frontage or not is if there is a road. The question is – is there a road or not.

Mr. Dionisi said even more narrowly defined – is there frontage on a way shown on an approved plan. That is the definition in the zoning bylaw.

Mr. Klofft said the problem with this approved plan is that it doesn't have the rest of Clifton Avenue.

Mr. Dionisi said that is the plan.

Mr. Klofft said what isn't clear is whether or not this plan that was approved had enough information to show that the Planning Board believed Clifton Avenue was going all the way through.

Mr. Dionisi did not feel this Board could resurrect a 50-year old subdivision plan and try to speculate as to what the Planning Board had in front of them

Mr. McCray read from the section in the zoning bylaw on the definition of a street. Item 4 reads "a way in existence as of January 1, 1954 having in the opinion of the Planning Board sufficient width, suitable grades and adequate construction to accommodate the vehicular traffic anticipated by reason of the proposed use of the land abutting thereon or served thereby and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. A public or private way shall not be deemed to be a street as to any lot of land that does not have rights of access to and passage over said way. It appeared to Mr. McCray that they have given away the rights of passage.

Mr. Dionisi said public or private ways shall not be deemed to be a street to any lot that does not have rights of access to passage over said way. He said they have access to the rights of passage over the public way.

Mr. Gossels added that by abandoning the lower portions of that road there is no way to get to it.

Mr. Dionisi said the 25-foot right of way gives access to the portion of Clifton Avenue on which they have frontage.

Mr. Gossels said Clifton Avenue doesn't have those rights.

Mr. Dionisi said that depends upon which Clifton Avenue Mr. Gossels was talking about. He said the Clifton Avenue on which they have frontage does have rights of access and passage.

Mr. Klofft asked whether there any new input or further comments from the Board or audience. There was none. Mr. Gossels commented that he respected the amount of effort Mr. Dionisi has put into this appeal and his patience with the Board during the hearing process.

The public hearing was closed.

The following motion was placed and seconded:

MOTION: “To uphold the determination of the Building Inspector denying a building permit because of insufficient frontage and access, property shown as Lot 4, Hillside Place, Residential Zone A-1.”

VOTED: In favor: unanimous Opposed: 0

REASONS: Relying on the information submitted, including oral testimony by all parties, the Board finds that insufficient evidence has been presented to demonstrate that Lot 4 contains sufficient frontage and access to be granted a building permit for construction of a single-family dwelling. It is the determination of this Board that Lot 4 does not have 180 feet of frontage on a public way as defined in the bylaw due to the abandonment of the lower portion of Clifton Avenue, which has resulted in the remaining portion of Clifton Avenue being landlocked and without access. Therefore the decision of the Building Inspector to deny a building permit is upheld.

Jeffrey P. Klofft, Chairman

Nancy G. Rubenstein, Acting Clerk

Jonathan G. Gossels

Stephen A. Garandin

Jonas D.L. McCray, Associate

