

Summary of Legal Advice

Regarding Above Ground Utilities for Lot 11:14C

15 Feb 22

Issue:

Owner of Lot 11:14C would like to install above ground utilities when underground utilities are required.

Background:

Lot 11:14 was subdivided in 1988. Resulting lots underwent Lot Line Adjustments (LLA) in 1992 and 2017. Madbury Subdivision Regulations include LLAs and required underground utilities from 1992 on.

In 2022, the owner was denied above ground utilities by the Building Inspector (BI) who cited the subdivision regulations requirement for underground utilities. The owner appealed this decision to the ZBA as an appeal of an administrative decision. The owner also met with the Planning Board (PB) for a Preliminary Consultation of a possible PB waiver of subdivision regulations.

Summary of Legal Advice:

- **Given that this was a subdivision regulation requirement, was the BI's disapproval okay?** Yes.

- **What's the ZBA's authority in this situation?** Per RSA 674:33, the ZBA only has authority to hear appeals regarding Zoning Ordinances. Accordingly, since this is a regulation and not zoning issue, the ZBA does not have authority to hear and decide this appeal.

- **While underground utilities weren't required at the time of subdivision, is the owner subject to the underground utility requirement based on the LLA?** Yes. Though abbreviated, LLAs are considered subdivisions and are subject to all subdivision regulations. At the time of the LLA, the subdivision regulations required underground utilities so they are required for this property.

- **To be applicable, did the LLA decision need to explicitly address the requirement for underground utilities?** No. The implicit assumption is that LLA approvals meet all regulation requirements unless the PB approved a waiver.

- **How does an owner request a change to an existing subdivision/LLA approval, if the appeal period for has passed?** The PB can issue waivers to the subdivision regulations only on an active application. There is not a mechanism to reopen a completed subdivision/LLA application. As such, the owner should open a new subdivision/LLA application.

- **If an owner opens a subdivision/LLA application just to receive a waiver, do new plan sets, etc. need to be provided and recorded?** Not necessarily. The PB would need to decide what documents would be sufficient. An explanation that the only change to the existing plan is the waiver and a subsequent Notice of Decision indicating that may be sufficient.

- **What does an applicant need to do to receive a PB waiver?** The applicant must prove the elements of Subdivision Regulations, Article III, Section 2. When considering the hardship element of this section, the PB is not required to use the ZBA's statutory definition of hardship.

Bottom Line: The ZBA cannot provide the owner's with relief from the subdivision regulations requirement for underground utilities; but, the owner can make a new application to the PB for a waiver.