

## Zoning Board of Appeals Decisions Decisions for: 11-06-2014

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DECISION OF FALMOUTH ZONING BOARD OF APPEALS

SPECIAL PERMIT NO: 81-14

APPLICANT/OWNER: STEPHEN J. RUDY and MARGARET M. RUDY  
of East Falmouth, MA

DEED/CERTIFICATE: Book 7697 / Page 267

SUBJECT PROPERTY: 175 Sandwich Road, East Falmouth, MA  
Map 34, Section 04, Parcel 007, Lot 000

Under a date of September 18, 2014 the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-3 E. of the Code of Falmouth to allow the continued use of two dwellings in a structure since 1968 on subject property known as 175 Sandwich Road, East Falmouth, Massachusetts.

A public hearing was opened on November 6, 2014. Notice was duly given as required by Section 11 of Chapter 40A, M.G.L., as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the Board's discretion, relevant and appropriate testimony was heard.

Board Members sitting: Chairman David Haddad, Vice Chairman Kenneth Foreman, Clerk Kimberly Bielan and Member Matthew McNamara

Clerk Bielan read the Notice of Public Hearing into the record.

Attorney Kevin P. Klauer II with Ament Law Firm was present on behalf of the applicant and reviewed the subject property that has a structure with two dwelling units – one on the main floor and one on the lower level. He explained that the two units have existed over twenty (20) years and the applicant lives in the main level unit. Attorney Klauer reviewed Section 240-3 E and its criteria and briefly explained information he submitted to the file: three affidavits - one of the affidavits is from applicant's certified public accountant stating that the applicants have consistently reported income from the apartment [lower level unit] rental and two affidavits are from individuals who at one time occupied the lower level unit; three leases from 2011 to 2013 showing \$900 to \$950 as rent; and a letter from Building Inspector Gary Stubbins of Falmouth Building Department pursuant to the criteria of Section 240-3 E. of the Code of Falmouth listing deficiencies that need to be corrected to bring the unit into compliance with the current building code. Attorney Klauer noted that he had submitted a draft deed restriction for the Board's review that would restrict the use of subject property to the two existing units. He further explained that the amount of rent is within the HUD guidelines for affordable houses as the 80% of median income in Barnstable County is \$44,744.00 and 30% of that income would mean that an affordable unit cannot have a rent of more than \$13,400.00 a year; the current rent is \$950.00 a month/\$11,400 a year, which is less than what can be charged. Attorney Klauer reviewed Section 240-216 of the Code of Falmouth and stated that the subject property meets all criteria except for item J. as that is not applicable under this filing for amnesty.

Clerk Bielan read the Town Department referrals into the record.

Referrals submitted by the Building Department, the Engineering Department and the Planning Department had no comment (Engineering had standard comments that do not effect this filing).

Clerk Bielan read an e-mail from the Board of Health Agent David Carignan to the Zoning Administrator regarding the amount of bedrooms on subject property that meet the criteria as a bedroom and the existing septic system.

Board Questions:

Member Foreman asked if there had to be changes to the floor plan of the lower level through the Building department's comments.

Attorney Klauer stated there are no changes in floor plans but an egress has to be created, new firewall in a portion of the basement near storage space, an egress window for lower level unit, handrail on stairs and at top of the stairs a new wall to separate kitchen from egress.

Member Bielan asked how many parking spaces are available for the two units.

Attorney Klauer stated four – two rows of two cars each.

Chairman Haddad asked if the utilities are separate.

Attorney Klauer stated no.

Member Foreman asked going forward from this point will there be a mechanism of maintaining rent as an affordable unit.

Attorney Klauer stated that the applicant [property owner] has to report to the Board of Appeals on a yearly basis as to tenant income and amount of rent charged.

Chairman Haddad asked if anyone present would like to speak in favor or opposition.

There was no public comment.

Member Foreman made a motion to close the hearing. Member McNamara seconded the motion. Motion carried 4 - 0.

Chairman Haddad closed the Hearing.

#### Findings:

The Board of Appeals, after carefully considering all of the facts and evidence submitted at the hearing, makes the following findings:

The subject property located at 175 Sandwich Road in East Falmouth contains 7,500 square feet of Agricultural B zoned land that is located within the Great Pond Coastal Pond Overlay District. The subject property was subject of an appeal of the Building Commissioner in 2013 which was withdrawn previous to this hearing. The applicant applied under Section(s) 240-3 E. of the Code of Falmouth to allow the existing two dwelling structure to be established as a lawful nonconforming use on subject property. At the 2014 Spring Town Meeting, the Town voted to adopt Section 240-3 E., which allows an applicant to apply within three years of the approval of the bylaw to the Board of Appeals for amnesty for more than one dwelling on a lot that has been in existence for no less than twenty (20) years [that otherwise would not be allowed according to zoning]. The applicant had to meet criteria set forth in said sub-section E. as well as follow through with the procedure for the residential use amnesty set forth by the Building Commissioner before coming before the Board of Appeals. According to an affidavit submitted to the file by the applicant's attorney, the subject property has been used as a main dwelling with three bedrooms and a 'basement' apartment with one bedroom since at least 1991; the apartment being rented out since 1991. The information submitted to the file shows eight (8) individuals who have rented out the basement unit and what year(s). The applicants requested a building inspector to inspect the dwellings, which according to a letter dated August 21, 2014 from Gary Stubbins, CBO with the Falmouth Building Department was done with deficiencies stated in said letter that the applicant will be required to repair.

Section 240-3 E. of the Code of Falmouth allows the Board of Appeals to approve a special permit within the next three (3) years to establish that an existing lot with more than one dwelling unit that has been in existence since at least January 1, 1994 may be a lawful nonconforming use and a decision by the Board shall be based on a preponderance of credible evidence that said noncompliance has existed during this time frame and has been continuously used without any lapse for a period of two years or more.

The Board finds that the applicant submitted information to the file that has a list of tenants of the

basement apartment beginning in 1991 through the present time. The Board further finds that two of the tenants – one being tenant from 1991 to 1998, submitted an affidavit to the file stating time of residence and description of the one-bedroom basement apartment. Furthermore, the Board finds that the applicant has submitted 'credible preponderance' of information substantiating existence of two dwellings on subject property for more than twenty (20) years without lapse of two (2) or more years including leases and income verification resulting from rental of the basement apartment.

The Board finds that the applicant had requested the building department do an inspection of both units pursuant to Section 240-3 E. (1). The Board further finds that the building department responded [see letter dated August 21, 2014] with deficiencies that need to be corrected to bring the units into compliance with the state building code.

The Board finds that the subject property does have an on-site septic system as required under Section 240-3 E. (2) (a) and will verify to the Board of Health in a manner suited to the Board of Health that the existing septic system is appropriate for the use approved herein or it shall upgrade the system as recommended by the Board of Health. The Board further finds that the applicant has submitted a draft of a Deed Restriction as required by Section 240-3 E. (2) (b) and said draft includes that the property owner shall provide to the Board of Appeals documentation certifying the income level and rent paid by tenant on a yearly basis. Furthermore, the Board finds that the applicant understands that Section 240-3 E. (2) (c) and (d) shall be conditioned herein and that subject property will maintain compliance with said subsections.

In addition to the above findings, the Board finds that the proposed use will be in harmony with the general purpose and intent of this chapter and does include consideration set forth in Section 240-216 of the Code of Falmouth as follows:

- A. The site is adequate in terms of size for the proposed approval for two existing units – one three-bedroom unit and one one-bedroom unit on subject property as the units have existed for at least twenty (20) years without complaints of neighbors, there is no change in the existing footprint, no increase in the nonconforming side yard setback of 5'6" and no increase in lot coverage by structures that is in compliance with Section 240-69 E. of the Code of Falmouth.
- B. The site is suitable for the proposed use of the property that is zoned Agricultural B and allows a single residence by right, which is herein amended based on the amnesty bylaw Section 240-3 E. of the Code of Falmouth.
- C. There will be no impact on traffic flow and safety as there is no increase in the number of bedrooms on the property and there is no change in the location of the existing driveway on site.
- D. The visual character of the subject property will be unchanged and there does not appear to be any impact on the neighborhood's visual character; and there is no impact on any view or vista from the roadway or abutting properties.
- E. The sewage disposal system is in place and shall be approved as capacity for existing four bedrooms on this property by the Board of Health prior to repairs commencing as required by the building department through this bylaw and its process.
- F. There are adequate utilities to subject property by virtue of an existing dwelling on site.
- G. The approval of this application as discussed and represented herein will add one unit to the supply of affordable housing in Falmouth; however it will not be counted on the subsidized housing inventory.
- H. There was no Site Plan Review required by the Planning Board and the referral submitted to the file from the Planning Department had no comment.
- I. The application is within compliance of all applicable sections of the zoning bylaws as represented, except for the nonconformities stated herein.
- J. The approval of this special permit does not include any affordable housing under 760 CMR 56.00. This application is pursuant to the three-year (3 year) amnesty bylaw voted by Town Meeting in April of 2014 and not subject to this requirement.

Member Foreman made a motion to Grant the Special Permit with conditions. Member McNamara seconded the motion.

NOW THEREFORE

BE IT RESOLVED, that the Board of Appeals (herein referred to as Board) being of the opinion aforesaid and acting under the provisions of the Code of Falmouth voted 4 – 0 to Grant the Special Permit to Stephen J. and Margaret M. Rudy (herein referred to as Applicant) under Section(s) 240-3 E. of the Code of Falmouth to establish the existing two dwelling structure as a lawful nonconforming use on subject property known as 175 Sandwich Road, East Falmouth, Massachusetts. This special permit is subject to

the following conditions:

1. The use of the existing structure shall be maintained as discussed and represented to the Board and as shown on plans submitted and reviewed by the Board entitled as follows:

- "Plot Plan of Land" located in Falmouth – Mass. Prepared for Stephen and Margaret Rudy drawn by Ferreira Associates with a stamp and signature by Christopher Costa on October 8, 2010 and with a Board date 'received' stamp of September 17, 2014; and
- Hand drawn floor plans of existing basement apartment and main floor dwelling unit (2 pages) and proposed floor plan with repairs as stated herein (2 pages) with a Board date 'received' stamp of November 5, 2014.

2. There shall be no more than four bedrooms and two dwelling units on subject property as existing with three bedrooms in the main level dwelling and one bedroom in the basement apartment.

3. The applicant shall submit a draft deed restriction for subject property according to criteria of Section 240-3 E. of the Code of Falmouth prior to issuance of a building permit. The Zoning Administrator shall forward the draft deed restriction for subject property to Town Counsel for approval and Town Manager's signature. The deed restriction shall be filed with the Registry of Deeds after appropriate individuals sign the document and a copy of the filed deed restriction for subject property shall be submitted to the Board of Appeals forthwith and prior to final sign off of the building permit noted in condition 4 below.

4. This special permit approval shall be contingent on the applicant following through with all repairs and requirements set forth in the August 21, 2014 letter from Building Inspector Stubbins as follows:

- Fire separation between the first and second floor – it appears that the first floor joists are insulated.
- Second means of egress – if using the basement stairs for egress a handrail will be required;
- Emergency egress window from the bedroom;
- Smoke detector in the bedroom; and
- Smoke detector and CO2 outside of bedroom.

The applicant shall repair items and maintain compliance with Section 240-3 E. in its entirety. All repair items noted above shall be completed prior to final sign off of the building permit.

5. Any deviation, no matter how minor, from plans submitted and approved, orally or in writing, by this Board, shall be submitted to the Board for approval prior to implementation of said change. Minor changes may be administratively approved by the Zoning Administrator.

6. This permit shall not take effect until a copy of the decision bearing the certification of the Town Clerk that 20 days has elapsed after the decision had been filed in the office of the Town Clerk with no appeal being filed, or an appeal has been filed within such time, is recorded in Barnstable Registry of Deeds. (Any person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.)

7. This permit shall lapse two years from the date on which this decision is filed in the Town Clerk's office if a substantial use of the Special Permit has not sooner commenced except for good cause as determined by the Board of Appeals.

Decision of the Falmouth Zoning Board of Appeals Continued:

Special Permit Number: 81-14

Applicant: STEPHEN J. and MARGARET M. RUDY of East Falmouth, MA

Subject Property: 175 Sandwich Road, East Falmouth, MA  
Map 34, Section 04, Parcel 007, Lot 000

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: 4 – 0 to Grant the Special Permit as represented to the Board, based on the Findings stated herein and with the above stated Conditions.

\_\_\_\_\_  
David Haddad, Board Chairman

\_\_\_\_\_ Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Falmouth Town Clerk.

**Notes:**

SP #81-14 Rudy - 175 Sandwich Rd / 240-3E Amnesty posted 11/18/14 mm