

Zoning Board of Appeals Decisions Decisions for: 07-17-2014

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DECISION OF FALMOUTH ZONING BOARD OF APPEALS

SPECIAL PERMIT NO: 93-13

APPLICANT: RICHARD DIPIETRO, TRUSTEE of Lynnfield, MA

OWNER: Richard and Kerry DiPietro

DEED/CERTIFICATE: Certificate 180361, Lot H2, Plan 7534-F (Sheet 2)

SUBJECT PROPERTY: 8 Riverway, North Falmouth, Massachusetts
Map 02A, Section 06, Parcel 040, Lot 002H

Under a date of September 25, 2013 the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-3, 240-69 E. of the Code of Falmouth to permit work already completed to repair and replace farmer's porch at front of dwelling and add staircase at rear of dwelling on subject property located at 8 Riverway, North Falmouth, Massachusetts.

A public hearing was opened on November 21, 2013. 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.

Reconsideration was requested on May 2, 2014 by applicant, Board approved on June 5, 2014. Public hearing was scheduled for July 17, 2014 at 6:30 PM was advertised on June 20, 2014 and June 27, 2014 and notice mailed to abutters.

Board Members sitting: Chairman David Haddad, Clerk Scott Zylinski, Member Patricia Johnson, Associate Kimberly Bielan and Associate Mark Cool [both sitting as voting members]

November 21, 2013: Clerk Zylinski read the Notice of Public Hearing into the record.

At the November 21, 2013 hearing the applicant's representative requested a continuation to December 5, 2013. Board voted 5 - 0 to continue the hearing to December 5, 2013 at 6:30 PM - there was no testimony given.

At the December 5, 2013 hearing the applicant's representative requested a continuation to January 23, 2014. Board voted 4 - 0 to continue the hearing to January 23, 2014 at 6:30 PM - there was no testimony given.

At the January 23, 2014 hearing the applicant's representative requested a continuation to March 6, 2014. Board voted 5 - 0 to continue the hearing to March 6, 2014 at 6:30 PM - there was no testimony given.

At the March 6, 2014 hearing testimony was given and the Board voted 5 - 0 to continue the hearing upon applicants' representative's request to May 1, 2014 wherein the hearing was closed. The Board voted 4 - 1 to deny the application (see below for vote).

March 6, 2014 Hearing:

Attorney Laura Moynihan was present on behalf of the applicants, Mr. and Mrs. DiPietro, and explained that this is 'an after-the-fact' approval for a special permit to repair and replace a farmer's porch with windows and sidewalls and to construct a stairway. She said the house is circa 1900 and the structure was in bad shape and needed to be upgraded; Mr. DiPietro invested \$200,000 and has completed all the work himself. Work on house has been ongoing since 2012. She said the screen porch has no heat and is substantially in the same layout with about a four foot difference. She further explained that there is not an existing conditions plan; no lot coverage tally before the work was done, although the lot coverage now exceeds the 20% maximum at about 22%. Attorney Moynihan stated that the application was

amended to request relief under Section 240-69 E. of the Code of Falmouth allowing the lot coverage to exceed 20% up to 25% in this Residential B zoned district. She believes that the work done is in keeping with the neighborhood and has submitted GIS maps and photos of the homes and abutting properties. She said the work done is a substantial improvement.

Attorney Moynihan stated that there was a question of whether a Variance should be requested due to the stairway construction at the rear of the property to the second level deck and she has submitted a decision on the "Gale" case law where a variance is not required to extend a nonconformity and suggested that the Board can approve the increases by special permit with the finding that the change is not substantially more detrimental.

Clerk Zylinski read the Town Department referrals into the record.

A referral submitted from the Conservation Commission states: No filing yet through ConCom – located in Flood Zone A.

There were referrals submitted to the file from the Building Department, Engineering Department, Planning Department and the Water Department that had no comment.

Member Bielan asked Attorney Moynihan what setbacks were prior to construction of stairway on west side and expansion of the farmer's porch on southeast side and if stairway to second deck had been there.

Attorney Moynihan stated setbacks were same as existing; not more nonconforming; and the stairs to the upper deck are part of this application.

Member Bielan asked if Attorney Moynihan had any comparisons with other properties in the area relative to lot coverage.

Attorney Moynihan referred to the map and said she had no comparisons but might be able to get them.

Member Johnson asked, since there is no 'existing conditions' plan, how were previous setbacks determined.

Attorney Moynihan said the Assessors' cards were used.

Member Johnson asked if the stairs on the west side and the farmer's porch were an extension of a nonconformity.

Attorney Moynihan stated yes, but not more nonconforming.

Member Johnson asked how much larger is the enclosed porch area.

Attorney Moynihan said based on Assessors' cards from the 1950's and the current plot plan it is 409 square feet; the property owner has been doing all the work and did not measure – it scales out about 4.9 feet on that side.

Attorney Moynihan reviewed the square footage of the structures on subject property existing and prior to work completed.

Member Johnson commented it appears 25% larger.

Attorney Moynihan stated that lot coverage includes decks.

Member Zylinski asked how the addition is not more nonconforming when adding to a nonconformity.

Attorney Moynihan submitted the "Gale" case and explained that a pre-existing nonconforming property cannot be forced by a municipality to get anything other than a special permit [MGL 40A, sec 6] – if you have a residential structure that does not meet setbacks and the setback is extended, the court says the Zoning Board can grant a special permit – commercial building requires a variance.

Member Zylinski asked why the farmer's porch was increased and enclosed.

Attorney Moynihan stated that the applicants wanted to enclose and make it a three season room and keep out dust.

Member Cool asked if a building permit was pulled for porch windows.

Attorney Moynihan stated no – this is 'after-the-fact' request.

Member Cool asked if a building permit was pulled for exterior stairway.

Attorney Moynihan stated that the building department gave a building permit this past January (2014).

Member Cool asked whether Attorney Moynihan could explain how this meets a special permit under Section 240-3 of the Code of Falmouth.

Attorney Moynihan said that according to Section 240-3 of the town code and MGL 40A sec 6 what is shown on photos and Assessors' cards show nonconformity was pre-existing nonconforming before the work was done by the owner; it is not substantially more detrimental and the extension of setbacks is minor. The house was built in the 1900's and Town information from 1950 shows that it was nonconforming [Assessors' card] so you have a lawfully pre-existing nonconforming structure.

Chairman Haddad asked if there are any drawings or plans that shows what existed prior to changes made by the home owner.

Attorney Moynihan stated no and that the Building Commissioner issued a permit – the photos from Assessors show what was there.

Member Bielan asked Attorney Moynihan that according to "Gale" case, that if substantially detrimental, then do you agree it is a variance.

Attorney Moynihan said then the special permit would not issue and you would need evidence.

Administrator Budrow asked Attorney Moynihan if she was relying on the issuance of a building permit for evidence.

Attorney Moynihan stated no, they also have letters in support saying this is not substantially more detrimental.

Administrator Budrow commented that a building permit does not make structure legal; there has to be something to show that the setback where stairway is now did not encroach further into the setback.

Member Bielan asked if the building permit was for the landing [west side] or for the stairs to second floor.

Attorney Moynihan stated not for the stairs to the second floor deck. She said that if the Board feels that more information is needed, they will try to get that for the Board. She explained the owner is an electrician and he has done this in his spare time as a homeowner.

Member Zylinski asked how all work that has been done without a building permit been tracked.

Attorney Moynihan stated that the applicant has confirmed work done.

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

There was no public comment.

Board Discussion:

Member Johnson stated she needs more time; she said there was no evidence submitted to support what was nonconforming and what was extended. She said she feels sensitive to bulk and possible increase

into setback; and there is no evidence of what lot coverage was.

Member Zylinski said he is not convinced by the case law submitted. He said there has been no evidence submitted to support applicant's request for a special permit. The Board has adamantly requested to have information on the area when lot coverage increase above maximum allowed. He said he wants a timeline of when work was done and lot coverage information. The Board does not know what existed prior to the changes.

Member Cool said it is a good project – looks nice. He has concern with 'lawful'; there is no documentation or evidence of what was there before. Giving benefit of doubt to applicant you have to lean on case law.

Chairman Haddad read from Section 240-3 C. (1) (b): The change or alteration of the structure or use may be allowed as maintaining or lessening any nonconformity without having to meet existing dimensional requirements. However, the extension of a structure may be considered a detriment after the Board of Appeals considers whether the extension extends or creates a new dimensional nonconformity, impairs views or vistas or does not reasonably conform to the average dimensions found in the neighborhood. Is this more detrimental – the burden of proof is on the applicant and there has not been any evidence submitted supporting this.

Member Bielan stated that the testimony is that the structure was nonconforming in 2006 – but the Board has no proof of what the nonconformities are – if and where they have increased. She said "Gale" case law – it is applicant's burden to supply evidence for Board's determination; in the case law it notes 'intensification' – increase into setback could be intensification; and she would like to see plans as well.

Attorney Moynihan stated that there is a lot of information in the file but we will see what more we can give the Board. She said that intensifying a use or a structure is okay as long as it is not more detrimental.

Attorney Moynihan asked for a continuation and said they would agree to an extension.

Member Zylinski made a motion to amend application to include Section 240-69 E. [lot coverage] of the Code of Falmouth. Member Cool seconded. Motion carried 5 – 0.

Member Zylinski made a motion to continue the hearing to May 1, 2014 at 6:00 PM. Motion carried 5 – 0.

Continuation: May 1, 2014 – 6:00 PM, Selectmen's Meeting Room

#93-13, DiPietro, 8 River Way, North Falmouth, MA

Board Members sitting: Chairman David Haddad, Clerk Scott Zylinski, Member Patricia Johnson, Associate Kimberly Bielan and Associate Mark Cool

Attorney Laura Moynihan was present on behalf of applicants, Mr. and Mrs. DiPietro who were present.

Attorney Moynihan reviewed the site and information submitted to the file previously and said that the work performed on site is in keeping with the neighborhood. She said there are additional letters submitted to the file from individuals that attest that the steps and deck on the west side of the structure are in same location as original steps. She further stated that the owner now has building permits allowing for the repairs and so it was determined that they are non-conforming and replaced.

Chairman Haddad asked Attorney Moynihan if the fact that building permits were recently issued for work that was already completed meant that all was okay.

Attorney Moynihan said yes – they were reconstructed in same location. She said we are also asking for the construction of a set of stairs to the upper roof deck and reconstruction of the farmer's porch. She reiterated that this request is 'after-the-fact' and that the homeowner's spent \$200,000.00 upgrading the structure themselves.

Member Bielan commented that the steps to ground on the west side are hidden by the fence [no vision of steps that allegedly existed] and not visible to determine what existed.

Member Zylinski asked why there is nothing in writing from Commissioner Eladio Gore regarding the issues.

Attorney Moynihan said that a building permit was issued – it's approved.

Chairman Haddad said that isn't an official letter of understanding – work was started and completed without any permits.

Administrator Budrow said that there has been no plan or photographs submitted showing what steps were off the landing from westerly egress and which direction steps went [north or west] – what was setback compared to now with construction of a stairway to the second floor deck that did not exist previously.

Member Zylinski stated he needed more information from Commissioner Gore.

Attorney Moynihan stated that she could get a letter; the Board has not asked for a letter.

Chairman Haddad stated that the Board has asked for some form of proof from the beginning.

Member Cool stated there are letters from neighbors, the Assessors' cards say deck is 6' wide; Warwick & Associates show that it is 8.4'.

Attorney Moynihan stated that the Assessors' card does not show step.

Member Johnson asked how many square feet were added by the farmer's porch becoming an enclosed porch and the extension of the steps off the landing.

Attorney Moynihan stated that the deck and farmer's porch added 520 square feet.

Administrator Budrow asked if the figures were off Warwick and Associates review of site in 2013.

Attorney Moynihan stated yes, and that she came up with the calculations.

Chairman Haddad said he has a concern in that the Board does not have a plot plan (existing prior to increase of structure done by homeowner) or any pictures of the back landing. The photos in the file from the Town's information shows no stairway on west side and we cannot see the landing due to the fence.

Attorney Moynihan stated she has asked about photos – no one has any; and the Mortgage plot plan does not show steps. She said regardless, the deck is a nonconforming structure.

Member Zylinski made a motion to close the hearing. Member Cool seconded the motion. Motion carried 5 – 0.

Board discussed:

Member Bielan stated there isn't sufficient proof of what previously existed and feels the letters are not convincing since they are all a form letter – we cannot determine if more detrimental.

Member Zylinski stated there is not any proof for the Board to make a determination.

Member Johnson said it is a more intense addition – the structure has been increased. She said she is having a hard time determining if it is more detrimental.

Member Bielan suggested the Board cannot make that determination as they do not know what previously existed and the extent of any increase.

Chairman Haddad commented that the burden is on the applicant to submit proof and the Board has no

proof of what the setback was prior to a stairway being constructed to the second floor that did not previously exist, the building permit for work completed was issued a year after the work was done.

Attorney Moynihan requested the Board to re-open the hearing. The Board voted 4 – 1 (Chairman Haddad opposed) to re-open for discussion.

Attorney Moynihan said they would like to continue the hearing to get a letter from Eladio Gore.

Chairman Haddad said we would like to see an existing condition plot plan or photos of what did exist at the west side of structure.

Member Zylinski stated that the Board has asked for information throughout the hearing process and nothing new has been submitted.

Member Bielan stated this was filed in 2013 and nothing new has been submitted.

Member Bielan made a motion to close the hearing. Member Zylinski seconded the motion. Motion carried 5 – 0.

Member Zylinski made a motion to deny the application. Member Cool seconded the motion. Motion carried 4 – 1 with Member Johnson in opposition of the denial.

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 – 1 to Deny the application for Special Permit to Richard DiPietro (herein referred to as Applicant) under Section(s) 240-3, 240-204 through 208, 240-69 E. and 310-3.5.2 of the Code of Falmouth to allow work already completed to repair and replace farmer's porch to allegedly the same layout and add new exterior stairway at the rear of the single-family dwelling to a second floor deck on subject property known as 8 Riverway, North Falmouth, Massachusetts.

RECONSIDERATION

Reconsideration was requested from the Applicant's representative, Attorney Laura Moynihan on May 2, 2014 stating: "...I discussed with the applicant the possibility of other avenues for information on the history of the dwelling. There may be other avenues that arise from those efforts, and the applicant is merely seeking additional time through a continuance of the process or alternatively, authorization to withdraw without prejudice to facilitate reapplication with new information. I estimate that perhaps 6 to 8 weeks should be sufficient".

On June 5, 2014 the Board discussed the request. Member Cool made a motion to approve the request for Reconsideration. Member Johnson seconded the motion. Members Cool, Johnson and Zylinski voted in favor of the motion; Members Haddad and Bielan opposed the motion.

Board discussed policy and non-public hearing voting. Motion carried with a majority vote of the Board with a 3 – 2 vote to allow the Reconsideration. The Board directed the Zoning Administrator to advertise a public hearing for said reconsideration.

July 17, 2014 – Public Hearing: Under Reconsideration

Board Members sitting: Chairman David Haddad, Clerk Kimberly Bielan, Member Patricia Johnson and Associate Mark Cool (Scott Zylinski is no longer a member of the Board)

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

Chairman Haddad reviewed the previous proceedings leading to the request for Reconsideration. The applicant's representative signed a waiver that was filed with the Town Clerk to extend the two week timeframe for filing of a decision for this application with the Town Clerk to July 21, 2014 (see file).

It was noted that Attorney Moynihan submitted a request for 'withdrawal without prejudice' on July 10, 2014. - Note: The request dated May 2, 2014 from Attorney Moynihan for reconsideration was for 'withdrawal without prejudice'; not to reconsider decision.

Attorney Laura Moynihan was present on behalf of the Applicant Richard DiPietro.

Attorney Moynihan explained that the applicant would like to withdraw without prejudice to allow the applicant time to propose a plan of alteration that will address the concerns discussed by the Board in the previous hearings regarding subject property. She said that they could also continue this hearing for about 90 to 120 days to allow the applicant time to propose said alterations.

Member Bielan asked if the new application would be for a Variance or a Special Permit.

Attorney Moynihan stated it would be a Special Permit as she does not believe criteria for a Variance could be met.

Member Johnson stated concern with the fact that the applicant may not reapply.

Attorney Moynihan stated that there is an enforcement action on file with the Building Department; they will re-apply as they want to re-design to be able to apply for a Special Permit.

Member Bielan stated she was against the reconsideration and is inclined to deny this request as nothing has changed. There has been no proof that this is a Special Permit and not a Variance. She still believes the application should be for a Variance and not a Special Permit as the burden of proof for the Special Permit was not submitted and according to the Applicant cannot be submitted (no documentation).

Member Cool agreed with Member Bielan.

Member Johnson stated that she understands based on what Attorney Moynihan is saying is that they [applicant] want the opportunity to eliminate a possible variance by making alterations.

Member Bielan made a motion to close the hearing. Member Cool seconded the motion. Motion carried 4 - 0.

Board discussed issues with application and the burden of proof, question for Reconsideration and possible action.

Member Johnson made a motion to deny the withdrawal request and follow-through with the Board's denial originally voted on May 1, 2014. Member Cool seconded the motion. Motion carried 4 - 0.

Decision of the Falmouth Zoning Board of Appeals Continued:

Special Permit Number: 93-13

Applicant: RICHARD DIPIETRO of Lynnfield, MA

Subject Property: 8 Riverway, North Falmouth, Massachusetts
Map 02A, Section 06, Parcel 040, Lot 002H

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

Vote: Member Johnson made a motion to deny the withdrawal request and follow-through with the Board's denial originally voted on May 1, 2014 based on Findings noted herein. Member Cool seconded the

motion. Motion carried 4 – 0.

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 93-13 DiPietro / 8 Riverway / Denial posted to web 7/22/14 mm