

Zoning Board of Appeals Decisions Decisions for: 03-27-2014

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DECISION OF FALMOUTH ZONING BOARD OF APPEALS

APPEAL NO: 21-14

APPLICANT: THOMAS F. ARNOLD, TRUSTEE of East Falmouth, MA

OWNER: Liberty Realty Trust, Thomas F. Arnold Trustee

DEED/CERTIFICATE: Book 17965 / Page 142

SUBJECT PROPERTY: 255 Sandwich Road, East Falmouth, MA
Map 27, Section 06, Parcel 016, Lot 003A

Under a date of February 14, 2014, the applicant applied to the Zoning Board of Appeals for a Variance pursuant to Section(s) 240-203 of the Code of Falmouth to continue the use of an existing one bedroom detached accessory dwelling unit on subject property known as 255 Sandwich Road, East Falmouth, Massachusetts

A public hearing was held on March 27, 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, Acting Clerk Matthew McNamara, Member Patricia Johnson and Associate Kimberly Bielan

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

Attorney Kevin P. Klauer, II was present on behalf of the applicant/owner [Mr. Arnold] who was also present. Attorney Klauer reviewed the property that is over an acre in size, zoned Agricultural B and has a single-family dwelling, a detached accessory structure and a detached garage structure. The lot coverage by structures is 4.17%. The detached accessory structure was built as a garage in 1955, changed to a commercial laundry building in 1966 and then the applicant converted it to a one bedroom dwelling unit in 2004 without building permits and zoning relief. The utilities to the detached accessory structure were existing (underground from dwelling to accessory structure) prior to applicant purchasing the property. Attorney Klauer said they were applying for a variance under Section 240-203 to allow the apartment (accessory structure dwelling unit) to remain and become a legally existing apartment as he believes it meets the criteria of Section 240-38 I. of the Code of Falmouth - 'One accessory apartment per lot added to or created within a single-family dwelling under the following standards and requirements.', except that it is not attached to the primary dwelling.

Attorney Klauer said the apartment structure is 24 feet from the dwelling; the apartment is structurally sound and has substantial value. Removal of the utilities or connecting the apartment to the primary dwelling would create a substantial hardship; the only derogation from Section 240-38 I. is the separation from the main dwelling. The number of bedrooms on the property will remain the same and the apartment is 24.28% of the total floor area of the dwelling. The apartment will not be rented seasonally or as a commercial accommodation. Attorney Klauer noted that there are 30 letters in support of the accessory apartment remaining.

Clerk McNamara read the Town Department referrals into the record.

A referral submitted from the Conservation Commission Agent Mark Kasprzyk states: ConComm has concerns with change in use (garage to bedroom) in terms of septic. Wetland located on property.

A referral submitted from the Board of Health Agent David Carignan states: My interpretation of the plans of the project is that there will be no increase in bedrooms. The lot is over an acre and the wetland identified on the plan is sufficiently remote that it appears there is adequate area to replace the existing septic system if the need arises.

Referrals submitted from the Engineering Department, Planning Department and Water Department had no comment.

Clerk McNamara noted that there are 31 form letters in the file in support of the requested variance.

Board Questions:

Board Members asked questions regarding how the property and structure meets the criteria of a Variance.

Attorney Klauer referred to his addendum stating that if the apartment structure was moved and attached to the primary dwelling or connected that zoning noncompliance would be rectified; but the structures are 24 feet apart and between the two are gas and water utility lines, a septic line, the bulkhead access and paved parking, thus moving the accessory structure to the primary dwelling would be extremely costly and a financial hardship to the applicant. Attorney Klauer cited Johnson v. Bd. Of Appeals of Wareham (1972) and Arrigo v. Planning Board of Franklin (1981) in his addendum attached to application and discussed the Johnson v BOA of Wareham with the Board.

Member Foreman asked about topographic hardship.

Attorney Klauer stated a number of utilities between the primary dwelling and accessory structure is the topographic issue – financial hardship with relocating all the utilities and septic.

Member Bielan asked what makes the structure unique.

Attorney Klauer stated that the utilities are in the area where we would need to build; the building has value; this doesn't affect the district as a whole.

Member Bielan asked how the topographic conditions different from the district.

Attorney Klauer said you will not have another lot in the general area similar with two structures on the lot that need to be attached – that is what makes it unique.

Member Bielan asked why the applicant did not receive relief prior to the conversion or change to accessory apartment.

Attorney Klauer stated he does not know.

Member McNamara asked if the accessory apartment is a separate dwelling.

Attorney Klauer stated yes.

Member McNamara asked what about a variance for two dwellings on a lot.

Attorney Klauer said this deals with the specific location of the utilities, which distinguishes this property from other properties – there is a substantial hardship.

Member McNamara commented that MGL states substantial hardship goes with land.

Attorney Klauer stated Town bylaws stated appellant or petitioner.

Member McNamara asked what is topographic concern.

Attorney Klauer stated topographic is physical location of structures.

Member McNamara asked if building is structure and topo is service lines.

Attorney Klauer said correct.

Member McNamara commented that the properties in the area have accessory buildings and asked why

this lot is unique.

Attorney Klauer stated they do not know what is on other lots.

Member McNamara said there are no soil issues and no shape of land issue. Member McNamara stated that the Town bylaws say no more than one dwelling on a lot except for those that existed on a lot prior to May 19, 1959 [Section 240-3 A. of the Code of Falmouth].

Attorney Klauer said he believes it is a case by case issue.

Chairman Haddad asked if the property owner resided on subject property.

Attorney Klauer stated not at this time.

Administrator Budrow asked Attorney Klauer if there is any proof of the bedroom that was removed from the primary dwelling and relocated to the accessory structure dwelling.

Attorney Klauer stated he does not have proof and that there was no building permit pulled for work done.

Administrator Budrow asked Attorney Klauer if his citing of case law took into consideration issue of being self-imposed.

Attorney Klauer stated that the structure and utility lines pre-date the purchase of the property by the applicant. The argument we are making today would be the same argument prior to construction in 2004.

Administrator Budrow said that you [Attorney Klauer] stated that the applicant created the accessory apartment.

Attorney Klauer stated yes but the variance request is not based on the interior of the structure but by the fact that the structure cannot be moved to attach to the primary dwelling due to utility lines and paving.

Administrator Budrow noted that the interior of the structure and its use is what brought the applicant to request a variance.

Chairman Haddad asked if anyone present would like to speak in favor or opposition. There was no public comment.

Member McNamara made a motion to close the hearing. Member Foreman seconded the motion. Motion carried 5 - 0.

Chairman Haddad closed the Hearing.

The Board discussed at length.

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 255 Sandwich Road in East Falmouth contains 45,600 square feet of Agricultural B zoned land that is located within the Great Pond Coastal Pond Overlay District. The applicant applied for a Variance pursuant to Section(s) 240-203 of the Code of Falmouth to continue use of an accessory structure being converted to a dwelling unit.

History: According to applicant and his representative Attorney Kevin P. Klauer, II and Assessors' records submitted to the file, the dwelling and garage existed in 1957 and in 1966 a laundry building was added and then it was expanded in 1970 [noted on Assessors' records]. The laundry operated for about 30 years and in 2003 the applicant purchased the subject property with three structures on it: dwelling, detached accessory structure with laundry facility within and a detached garage. The applicant converted the

detached accessory structure from a laundry building to a one-bedroom dwelling unit without benefit of building permits or zoning relief. He [applicant] has rented the accessory dwelling unit since 2004.

The applicant's representative feels there is a hardship that meets the criteria of a variance as the two structures [primary dwelling and accessory dwelling structure] cannot be connected due to existing 24' gap between the structures that has gas line, water line and septic connection within the 24' gap area and to relocate these utility lines would be a financial hardship. He believes the structures are the topographical issues; and that the property is unique in that there may not be a dwelling and accessory structure on a lot within the general area that cannot be connected due to utility lines being an obstruction.

Section 240-203 of the Code of Falmouth "Conditions for granting variances." Sets forth criteria that mirrors MGL C. 40A, section 10 in the granting of a Variance.

The Board finds that the request for a variance to allow the continued use of a second dwelling/accessory apartment detached from primary dwelling does not meet the criteria necessary to approve a variance. The Board further finds that there are no circumstances relating to the soil conditions, shape or topography of subject property or structures that would allow relief under a variance; there is no substantial hardship based on the information and testimony given by the applicant's representative. Furthermore, the Board finds that the subject property and conditions on said property are not unique to the general area as a lot of properties have dwellings, detached garages and detached accessory structures.

The Board finds that a second dwelling was created by the applicant without proper building permits and zoning relief. The Board further finds that the zoning district that subject property is located in does not allow two dwellings on a lot unless the dwellings were created prior to May 19, 1959 and has substantial evidence that they existed and have been used consistently since May 19, 1959.

The Board finds that Attorney Klauer's statement that 'zoning noncompliance could be rectified if the apartment structure were moved so as to be attached to the main house or if the two structures were connected' is inaccurate as the attaching of the accessory to the primary would require relief from zoning which the property cannot meet at this time [property has to be owner occupied]; and no evidence was submitted that it would then meet all other criteria of Section 240-38 I. of the Code of Falmouth.

The Board finds that the variance requested herein is self-imposed and the testimony and information submitted lacks evidence for a general finding that the requested variance does not derogate from the purpose of zoning.

Member McNamara made a motion to DENY the Variance request. Member Foreman seconded the motion. Motion carried 5 – 0.

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 5 – 0 to Deny the Variance requested by Thomas F. Arnold, Trustee (herein referred to as Applicant) under Section(s) 240-203 of the Code of Falmouth to allow continued use of a one-bedroom detached dwelling unit on subject property located at 255 Sandwich Road, East Falmouth, Massachusetts.

Decision of the Falmouth Zoning Board of Appeals Continued:

Variance Number: 21-14

Applicant: THOMAS F. ARNOLD, TRUSTEE

Subject Property: 255 Sandwich Road, East Falmouth, MA
Map 27, Section 06, Parcel 016, Lot 003A

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

Vote: 5 – 0 to Deny the Variance Request as represented to the Board, based on the Findings stated herein.

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:

Variance 21-14 Arnold / 255 Sandwich Rd / Denied posted to web 4/7/14 mm