

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

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

Comprehensive Permit No: 35-07 – Modification #117-13

Applicants: PF FALMOUTH, LLC of Boston, MA

Property Address: 637 Gifford Street, Falmouth, MA

Assessor's Map: Map 34, Section 01, Parcel 007, Lot 001

Date of Hearing(s): January 9, 2014, February 12, 2014 and March 27, 2014

Summary: Granted with Conditions

Zoning: Agricultural B

Groundwater Overlay: Water Resource Protection Overlay, Great Pond Coastal Pond Overlay, NHESP – Estimated and Priority Habitat and the front portion of lot (minimal) is within the Wildlife Corridor

PROCEDURAL HISTORY

1. On November 27, 2013, PF Falmouth, LLC submitted a request to modify the plans for the approved Comprehensive Permit 40B Development previously known as Forest Cove/Abby Real Estate Development and now known as PF Falmouth, LLC. The 40B Development located at 637 Gifford Street in Falmouth was originally approved and filed with the Town Clerk on November 16, 2007. On December 12, 2013 during a duly posted Open Meeting of the Board of Appeals the Board discussed the request from PF Falmouth, LLC outlining changes to Site Design, Architectural Design, Specifications and Cost Certification Process. The Board discussed with PF Falmouth, LLC's attorney Laura Moynihan the extent of the proposed changes. The Board determined by a vote of 3 – 2 that the changes are substantial. A Public Hearing for modification of the 40B Development at 637 Gifford Street in Falmouth was then advertised for January 9, 2014 with Notices sent to abutters.

2. Board Members Voting: Chairman David Haddad, Vice Chair Kenneth Foreman, Acting Clerk Matthew McNamara and Member Patricia Johnson.

3. A duly advertised public hearing was opened on January 9, 2014 with Attorney Laura Moynihan representing the applicant. The hearing was continued from January 9, 2014 – after testimony and public comment – to February 13, 2014 with a change in counsel to Peter Freeman – testimony and public comment was heard and then the hearing was continued to March 27, 2014. At the March 27, 2014 hearing after testimony and public comment the Board voted 4 - 0 to close the hearing.

4. The public hearing was closed on March 27, 2014 with the Board giving direction to the Zoning Administrator to draft an affirmative Decision based on Board's comments and to send draft to Board members and applicant's attorney for review and in preparation of an Open Meeting to be scheduled on April 17, 2014 at 6:00 PM for possible vote.

5. The Board received documents and exhibits during the public hearing which are on file in the office of the Board of Appeals at Town Hall, as set forth below:

Letters from Interested Parties and/or Abutters

1/6/2014 From John Sutherland, resident of Forest Cove – he submitted a copy of e-mail(s) dated November 26, 2013 between Developer and Zoning Administrator with his comments.

1/7/2014 From John/Carole Sutherland, resident of Forest Cove – submitted materials for members of ZBA to review that include 1) Primary Concerns, 2) Argument About the "Need to Reduce Costs" and 3)

Existing Conditions of the Development.

2/10/2014 From John/Carole Sutherland, resident of Forest Cove, dated Feb. 13, 2014 (continued hearing) – submitted material for members of ZBA to review that include 1) Response to claim of unpaid condo fees, 2) Suggested modifications that do not entice owners to add bedrooms and 3) Conflicting information.

2/10/2014 From Donna L. Brennan, resident of Forest Cove – submitted letter with 6 Exhibits that include 1) Letter for MV Associates Inc. (high voltage line), 2) PF Falmouth LLC Certificate of Organization, 3) HOA Appendix 10H, case law and letter from Dept. of Treasury, 4) Condo law's treatment of affordable units clarification, 5) Forest Cove's Insurance Binders and 6) PF Falmouth LLC's Condo Developments and Condominium Developments in Falmouth.

3/24/2014 From John/Carole Sutherland, resident of Forest Cove, dated March 27, 2014 (continued hearing date) submitted material for members of ZBA to review that include 1) Interior photos supporting suggested modification and 2) Safety concerns and PF Falmouth's responsibility to existing homeowners.

E-mail Messages from Interested Parties and/or Abutters

1/14/2014 E-mail from John Sutherland, resident of Forest Cove regarding issue with lights at subject property.

Letters – E-mails from Applicant

12/23/2013 Letter from P Falmouth, LLC dated November 22, 2013 (letter submitted 11/27/13 as modification request) requesting modification of Comprehensive Permit #35-07 with two attachments dated October 15, 2013 1) 'Design Feature (Affordable Units) and 2) 'Design Feature (Market Units).

2/4/2014 E-mail from applicant to Zoning Administrator (response) regarding information to submit.

2/13/2014 Letter from Attorney Freeman (applicant's representative) dated February 12, 2014 informing the Board that he is representing the applicant and comments regarding letters sent to Board by unit owners, comment on project financials citing Avalon Cohasset, Inc. v. Cohasset Zoning Board of Appeals and with attached letter of February 12, 2014 to the Board from PF Falmouth LLC (applicant) that narrates revisions made to their previous request for modification with certain pages of the Master Deed and copy of 760 CMR 56-02 regulations.

3/20/2014 E-mail from applicant's representative (Attorney Peter Freeman) to Zoning Administrator regarding Board member's request for consideration of applicant in modification.

3/21/2014 Letter from Attorney Peter Freeman (applicant's representative) dated March 19, 2014 regarding Board member's suggestion regarding modification – letter had attached plans dated March 19, 2014 showing original approved plans and proposed modifications by the applicant (2 pages) and page 8, 11, 12, 19 and unnumbered page of the development's Master Deed.

Letters/E-mails from ZBA staff

12/23/2013 Memo to the file regarding Preliminary Meeting of Town Departments reviewing proposed modification of the originally approved plans for Forest Cove Development.

3/20/2014 An e-mail sent to applicant regarding a Board member's consideration to the applicant regarding modification proposed. (Response from applicant noted above as 3/20 and 3/21/2014.)

2/13/2014 ZBA staff submitted Original approved plans from 2007 Comprehensive Permit for Forest Cove Condominiums drawn by Adams & Smith, LLC consisting of Drawings A-1 through A-7 showing proposed floor plans, basement plans, elevation plans and cross sections (as comparison to proposed).

Letters from Outside Departments

11/27/2013 E-mail from Robert D. Smith of Mass Housing dated 10/8/13 to Zoning Administrator regarding new requirements of posting surety bonds with Mass Housing and not a requirement through Boards of Appeals. Duplicate copy submitted to file 12/23/2013.

Referrals from Town Departments/Boards

1/6/2014 Referral from the Conservation Commission Agent Mark Kasprzyk regarding proposed modification of originally approved plans for Forest Cove. The referral memo noted debris and dumped material on-site beyond the proposed limit of work within Conservation jurisdiction and the request to remove said material and replant with native species if considerable damage to the buffer was done.

Plans/Information submitted by Applicant

12/23/2013 "Forest Cove Condominiums" - 'Rendered Site Plan' dated November 20, 2013 - Pizzuti Development

12/23/2013 "Forest Cove Condominiums" - 'Permitted Site Plan' dated November 20, 2013 for Pizzuti Development drawn by BSS Design, Inc. dated April 4, 2008 Sheet 1 of 17

12/23/2013 "Forest Cove Condominiums" - 'Proposed Front Building Elevation', 'Proposed Side Building Elevation' and 'Proposed Rear Building Elevation' dated November 20, 2014 by Pizzuti Development

12/23/2013 "Forest Cove Condominiums" - 'Permitted Typical First Floor Plan' and 'Proposed Typical First Floor Plan' dated November 20, 2013 by Pizzuti Development

12/23/2013 "Forest Cove Condominiums" - 'Permitted Typical Basement Plan', Proposed Typical Basement Plan', Permitted Typical First Floor Plan' and 'Proposed Typical Second Floor Plan' dated November 20, 2013 by Pizzuti Development

12/23/2013 "Forest Cove Condominiums" - 'Permitted Front Building Elevation' and 'Proposed Front Building Elevation' dated November 20, 2013 by Pizzuti Development

12/23/2013 "Forest Cove Condominiums" - 'Permitted Rear Elevation', Permitted Side Elevation', 'Proposed Rear Elevation' and 'Proposed Side Elevation' dated November 20, 2013 by Pizzuti Development

2/13/2014 "Forest Cove Condominiums" - 'Permitted Typical Basement Plan', Proposed Typical Basement Plan', 'Permitted Typical Second Floor Plan' and 'Proposed Typical Second Floor Plan' - Sheet dated February 13, 2014 by Pizzuti Development - plans submitted at hearing by applicant

2/13/2014 "Forest Cove Condominiums" - 'Permitted Typical First Floor Plan' and 'Proposed Typical First Floor Plan' - Sheet dated February 13, 2014 by Pizzuti Development - plans submitted at hearing by applicant

2/13/2014 Information sheet submitted at hearing by applicant showing 'Financial Comparison' and 'Construction Cost Comparison'

3/21/2014 "Forest Cove Condominiums" - 'Permitted Typical First Floor Plan and 'Proposed Typical First Floor Plan' by Pizzuti Development dated March 19, 2014 with a Board date 'received' stamp of March 21, 2014

3/21/2014 "Forest Cove Condominiums" - 'Permitted Typical Basement Plan', Proposed Typical Basement Plan', 'Permitted Typical Second Floor Plan' and 'Proposed Typical Second Floor Plan' by Pizzuti Development dated March 19, 2014 with a Board date 'received' stamp of March 21, 2014

Testimonies and Discussions through hearing process:

December 12, 2013 Open Meeting: Board discussed proposed changes as to 'substantial' vs. 'insubstantial'. Vote was 3 - 2 [McNamara, Haddad and Johnson voted substantial - Cool and Zylinski voted insubstantial] that the changes are substantial.

Basis by applicant of request: to reduce costs for interior framing (pitch of interior ceiling), other interior design changes and reduction in pouring of concrete. Attorney Moynihan stated that construction costs are too high. Also applicant is requesting to modify Condition 13 of original approval regarding escrow fund held until cost certification process is complete.

Basis of determination: The applicant is proposing to wall off an area on the second level that could easily be created into a bedroom; there was a storage room on second level of all units and in some units there was possibility for two additional bedrooms (two storage areas 2nd floor). The applicant further proposed to eliminate all basement areas from the affordable units and no decks for affordable units. The elimination of a bulkhead for basement, basement and decks would be distinguishable and create capacity for additional bedrooms that would impact this very sensitive area (Water Resources, Coastal Pond and Conservation Restricted area on site).

Modification hearing was publicized for January 9, 2014 at 6:00 PM: Attorney Moynihan was present on behalf of the applicant. She informed the Board that the original project was not feasible economically.

She stated that the applicant received transfer through Mass Housing with budget approved as financially viable. The applicant purchased the project/property through a bank; the project is existing with four units constructed and sold with residents on site. Attorney Moynihan stated that there are extra costs involved like the wastewater system, association in trouble with not enough funds to cover insurance and obligations. They need additional funds to clean the site and remove existing foundation for third building that was not constructed. She explained that the cost certification process has changed since inception of this project and submitted a letter from Mass Housing (e-mail).

Walter Kucharski, Architect reviewed plans and noted eliminating the basement, bulkhead and crawl space would be 2 pours [concrete] vs. 3 pours, extra framing in ceiling and loft design drove costs up so garage will have dormer; interior reorganization removed wall at kitchen and second floor close off loft space to create a den or study; and the previous storage room will be unfinished with a cost to owner to finish. He said the second storage space also unfinished unless owner wants it finished - will make it more marketable.

Attorney Moynihan explained that customization of a unit is important to being able to market them.

Board asked questions and stated concerns: Concern with basement plan being offered to market only and eliminating basement from plan on affordable units and constructing them on slab; eliminating loft and closing in space makes it possible for bedroom to be added without permit – the two-bedroom units have two spaces on second level that could be finished and used as bedrooms; affordable units have no storage capability for bikes, outdoors toys, gardening tools, patio furniture – if garage used for storage then parking will be done in drive through. What is hardship?

Attorney Moynihan stated hardship is not being able to move forward with project; the applicant inherited additional site cleanup costs and development costs.

Board: What is cost differential for changes?

Architect stated that the costs are not separated out – total cost savings.

Board: Attorney Moynihan you stated it will be uneconomical if Board does not approve changes, as you say the budget is not in our purview – and yet you say the Board's determination can make it uneconomical? What can the Board go by - can you give us answers on cost savings?

Architect: Approximately \$70,000 per building (2 units) which includes all tie-ins.

Attorney Moynihan: Bottom line is a per unit cost to build is \$250,000 is estimated; times 36 units is \$9 Million – four units have been built ; if you sell 27 units at \$350,000 the affordable units are sold at a loss. The acquisition costs are \$800,000 – there is no profit for the developer.

Board: \$9 Million projected costs for the entire project? \$9.4 Million didn't include affordable units – profit about \$1.26 Million? Would like a breakdown of what the changes save the Developer.

Attorney Moynihan: We will give you breakdowns.

Motion made to continue hearing to February 13, 2014 at 6:30 PM. Motion carried 5 – 0.

February 13, 2014 Continuation of hearing (Chair of the Board transferred to Member David Haddad): Attorney Peter Freeman was present on behalf of the applicant (authorization from applicant for Attorney Freeman submitted 2/5/2014 and notice from Attorney Moynihan that she will no longer be acting as counsel for applicant 2/5/2014).

Attorney Freeman stated Applicant wants two things – to make the project more marketable and cost savings. He hopes to show that making the project more marketable and more affordable will benefit everyone. Concern with bedrooms being increased – condo docs have bedroom limits stated in two places; the Trustees have an obligation and enforcement rights to any changes made.

Architect reviewed changes: optional bulkhead, 5 x 5 patio with option for deck; re-designed bedroom on 2nd floor for more space; storage space if finished must remove door and have cased opening. He gave square footage of units: 2 bedroom proposed is 1,602 with total 'finished' space of 1,761 not counting basement and garage; and three bedroom is 1,761 square feet with 2,086 if storage spaces 'finished'. He

reviewed construction costs and the changes proposed save costs and increase the marketability (see cost comparison submitted 2/13/2014).

Board: The approved optional improvements would not be supplied to affordable units.

Attorney Freeman: Correct – there is a certain formula they can use to make certain improvements in the future. He noted that the standard is ‘not distinguishable from the exterior of a dwelling’ – it does not include interior design elements.

Board: It was stated a previous hearing that \$75,000 would be required for site cleanup – that money is not shown on comparison.

Attorney Freeman: It is within the projections – this does not show every single expense or line item.

Board: Concerns with wastewater treatment as the property is located within a Coastal Pond Overlay, Water Resource Protection Overlay, a Wildlife Corridor and both estimated and priority Native Heritage Endangered Species Program. What about outstanding issues with paving, stop signs, rain gardens – any corrections? Is stop sign back up, are lights fixed is dump site removed?

Architect stated there are issues on the site and they cannot remediate until they know they can go forward.

Board: How many affordable units are built to date, does it have a full basement, deck, and bulkhead?

Architect: There is one affordable unit existing – sold, it does have a basement, it does have a deck and it does have a bulkhead.

Board: Is the site plan the same.

Architect: No proposed changes. Wastewater treatment is being monitored [All Cape Environmental] because lot is not fully developed the pumps may burn out and need to be replace so we have set aside money for that.

Attorney Freeman: Condition 13 of original Comprehensive Permit approval says that funds shall be held in escrow until the cost certification process has been completed. Mass Housing believes that is not appropriate as new case law and regulations require the developer to post a bond or surety with Mass Housing to insure cost certification. We are looking for Condition 13 to be eliminated.

Public Comment: John Sutherland of Unit 1B, 637 Gifford, Falmouth explained his suggestions that were submitted to the file regarding cost savings, affordable unit’s need for basement, a bulkhead and windows in basement are safety requirements – not luxuries, leave loft on second floor and keep deck as it is a selling feature.

Chairman Haddad stated that the Board needs revised plans showing exactly what has been proposed.

Member Zylinski stated that the safety concerns that the Zoning Administrator has contacted developer for over an 8 month period need to be addressed [stop sign, lighting at existing units, trash/dump site cleaned, gate at Trotting Park Road to eliminate cut through]

Member Foreman said he needed time to review information and suggestions for modifications.

Motion made by Member Foreman to continue the hearing to March 27, 2014 at 6:30 PM. Member McNamara seconded the motion. Motion carried unanimously.

March 27, 2014 Continuation of hearing: Attorney Peter Freeman was present with Architect Walter Kucharski and Tina Brzezinski [applicant]. Attorney Freeman spoke on his letter to the Board regarding Board’s suggestion of eliminating 2 dwelling units thus making up for the possible increase of bedrooms due to revised second floor designs [Board’s suggestion: to insure compliance with the bedroom limit and meet the requirements of the applicant we can propose reducing the number of units by 2 (1 building) and bedrooms by six; keeping the decks and basements for the affordable units – insuring that all units are indistinguishable as required by 40B statute (and in keeping with adequate storage space for those that may really need it). Keeping the bulkheads is a public safety issue for egress and should be kept in

plan.]. Attorney Freeman stated that reducing the number of units in the project is simply not financially feasible – it would make the project uneconomical. “The loss of two market units would reduce the profit to approximately 8.67%, which is not feasible.” He further spoke on the role of the association to insure no increase in the number of bedrooms. He said they will locate the bulkheads on all buildings so all appear the same – there will be one bulkhead that will service both unit’s basements except for those that are affordable and will not have a basement – but appearance remains the same. The exterior decks will be change to on-grade patios on all of the units and owners will have the option of upgrading to a deck. Eliminate Condition 13 of original decision. Attorney Freeman said the changes are desirable and marketable and the developer has made a sincere attempt to improve. He said the proposed plans are innocuous and economical.

Member Johnson asked where the heater that was proposed in basements will be located with elimination of basement in the affordable units.

Architect: They will be located in a closet on the second level.

Member Johnson addressed Attorney Freeman and asked about the reference in his letter to “does not need to defend budget” and also cited the “Avalon Cohasset vs. Cohasset Board of Appeals” case where on page 12 of said case, it discusses the ‘return on total costs’ – has that been taken into consideration?

The Board discussed the cost analysis submitted by applicant [dated 2/13/14] that showed, with reduction of 2 units [1 building] as suggested by a Board member, would cause profitability of project to be no more than 8.67% which applicant considers uneconomic. However, the applicant cited ‘Avalon Cohasset vs. Cohasset Board of Appeals’ which states that a ‘return on total costs’ should be approximately 2 ½ percent above the current yield on 10 year Treasury notes and is an adequate compensation for capital investors. Although Attorney Freeman stated during the hearing, that this case pertains to rental projects, the Board wonders if this formula is appropriate considering that the development has four existing dwelling units built, partial infrastructure completed, Master Deed and covenants in place, etc. - the current Treasury note is 2.7% and with a return of 2.5% above the current yield return would be approximately 5.2%. Based on this the 8.67% return figure that the applicant has projected exceeds the criteria for minimum profitability and may not render the project uneconomical.

Attorney Freeman said no as “Avalon Cohasset vs. Cohasset Board of Appeals” was a rental project. Guidelines for profitability, he said, is 15% - anything below is uneconomical. With the changes requested the profitability will be 11 – 12% - with the loss of two units return will be barely 8% - changes are not approved by this Board then it is a break even for the developer.

Member McNamara asked what the savings would be for the basement elimination on affordable units.

Architect: Comparison to marketable from previous plan, there is less form work, less concrete – it would be in excess of \$10,000 per affordable unit.

Member McNamara commented that market units will now have full basement with no crawl space.

Architect: Correct – to equal out slab grade with attached affordable unit on grade.

Member McNamara commented on Attorney Freeman’s comments regarding association’s [Homeowner’s Association – HOA] responsibility to enforce if a ‘not permitted’ bedroom was created; if the association had to enforce, what is anticipated cost.

Attorney Freeman: It would probably be disposed quickly in court; possibly a few thousand dollars (lien created, notice, opportunity to cure). The HOA docs state that lender would be notified which may cure issue expeditiously.

Chairman Haddad asked how the safety concerns discussed previously by the Board, be addressed [stop sign, lighting at existing units, gate, and trash].

Attorney Freeman said stop sign is back up; solar lights are not working at front of existing units and he is not familiar with the gate. Lights will be addressed when project starts as there will be an excavator on site then.

Architect Kucharski stated that there is no requirement for the gate – it will be put up when project moves forward.

Member Foreman stated he is still bothered by the fact that market and affordable units differ and asked if there is any way the affordable units can have a partial basement.

Attorney Freeman stated the difference does not rise to being 'distinguishable'.

Chairman McNamara asked what the profit would be at 11%.

Attorney Freeman stated approximately just over \$1 Million.

Public Comment:

Donna Brennan resident at 637 Gifford Street, had questions regarding the gate at Trotting Park that existed until June of 2012 or 13; asked if patios will be on sides of unit instead of on the back of a unit; how HOA will monitor bedrooms; and lights need to be hard wired.

Attorney Freeman explained how the HOA would enforce.

Architect stated that the decks default back to the original site plan – he believes it is about a 50/50 split on sides and backs of units.

Board Discussion:

Member Johnson has some concerns – not sure if changes are tipping point of 'not-profitable'.

Member Foreman asked what the criteria were defining economical vs. uneconomical. Attorney Freeman stated that DHCD guidelines set forth criteria.

Member McNamara said the possible increase of bedrooms is a real concern as the site is within a Water Resource Protection Overlay District. If this were a 40A project with unfinished attic space the Board would put restrictions on that space and I think we can do it in this case regardless of it being a 40B project. One way to protect is to condition as unfinished and then give Zoning Administrator administrative approval authority for additional habitable space that does not meet criteria of a bedroom. He said he is concerned about eliminating the storage from the affordable unit. If the garage is used for storage then we have a parking problem – this is a driveway through the development – not a road. To give option of upgrade to all is one thing, but to take away the basement from affordable units only is an issue. He said it was stated at first hearing that cost of basement was \$3,800 – now it is \$10,000. Mr. McNamara said that he is concerned with safety issues not being addressed and will not be addressed until project moves forward. The gate at Trotting Park can be a chain to deter people from using the driveway of this development as a cut through to Gifford Street. The lighting was with previous developer but still needs to be addressed as a matter of safety for the existing residents. The trash and drainage have not yet been addressed and he said he feels these are not substantial costs to the developer and should be fixed prior to issuance of a building permit. He said the increased habitable space on the second floor and basements for market rates are to make these more marketable which is a benefit to the developer and that his suggestion is asking the developer to make a payment to the association as a restricted fund to create funds strictly for the enforcement of the covenants regarding increased bedrooms based on proposed changes; this removes the burden of costs from association [as this was benefit to developer]. Also, a million dollar profit for the developer, less \$30,000 to \$40,000 to construct the basements of the affordable units as approved originally and a \$50,000 payment to the association for enforcement is less than \$100,000. If we impose our typical restrictions – we don't have to make it burdensome. He said he believes \$40,000 for basements for affordable units as approved is not uneconomical.

Member Haddad said he agrees and he still has a problem with eliminating the basements on the affordable units as well. He said he would feel better about the patios for all and upgrade to decks for all. He said everyone wants this project to move forward; the monies from the developer for association enforcement is reasonable; and we need to safeguard the septic system.

Member Foreman said the density is an issue as this is sensitive area within Coastal P