

## Zoning Board of Appeals Decisions Decisions for: 08-20-2015

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

SPECIAL PERMIT NO: 65-15

APPLICANT(S)/OWNER: PAUL J. MACDONALD & CAROL A. MACDONALD, TRUSTEES of  
The Paul J. MacDonald Revocable Living Trust  
of Falmouth, MA

DEED/CERTIFICATE: Certificate 141251 – Lot 29, 30 & 31, Plan 4286-A (Plate 5)

SUBJECT PROPERTY: 91 Priscilla Street, Teaticket, Massachusetts  
Assessor's Map: Map 39A, Section 15, Parcel 000, Lot 030

SUMMARY: Granted Special Permit with Conditions

PROCEDURAL HISTORY

1. Under a date of July 15, 2015, the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-66 C. (3) ad 240-66 C. (4) of the Code of Falmouth to construct a single-family dwelling on the vacant lot known as 91 Priscilla Street, Teaticket, Massachusetts.
2. 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.
3. A duly advertised public hearing was opened on August 20, 2015, wherein the Board consisting of Chairman Kimberly Bielan, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate Mark Cool.
4. The public hearing was terminated on September 10, 2015. Minutes from the hearing are on file in the Board of Appeals.
5. The applicant was represented at the hearing by Attorney Robert H. Ament of Ament Law Firm who reviewed and discussed proposed plans with the Board.
6. The Board received documents and information prior to and during the public hearing that are on file in the office of the Board of Appeals at Town Hall, as set forth below:

Letters/E-mails from Abutters/Interested Parties

None

Letters/E-mails/Information from Applicant/Representative(s)

7/27/2015 Attorney Ament submitted a letter dated July 27, 2015 to the Board of Appeals Zoning Administrator regarding the filing of the application and submitted a copy of Land Court Certificate #141251, registered owners Paul J. MacDonald and Carol A. MacDonald, Trustees of the Paul J. MacDonald Revocable Living Trust, as well as a copy of the plan of land prepared in 1980.

9/8/2015 Letter from Attorney Ament regarding issues from 8/20/2015 hearing with a copy of one special permit and three court cases

Letters/Referrals/E-mails from Town Departments

7/20/2015 Referral submitted by the Planning Department with no comment.

7/22/2015 Referral submitted by the Building Commissioner with no comment.

7/24/2015 Referral submitted by the Water Superintendent with no comment.

7/28/2015 Referral submitted by the Fire Department with no comment.

8/10/2015 Referral submitted by the Board of Health Agent, David Carignan with the following comment: This property is not now served by Town sewer. The Health Department will only be able to sign off on a building permit for this property if a suitable site and septic plans is submitted with the building permit application, unless the building permit application is submitted after the town sewer becomes available to this lot.

8/18/2015 Referral submitted by the Engineering Department (Scott Schluter) with standard comments and the following: The plans appear to be a septic system plan from the 80s, are these the most current plans? Any connections or alterations to public utilities would require permission from the appropriate Town Department. The project must not direct any stormwater runoff to public property, abutters or right of way.

8/21/2015 ZBA staff submitted to the file copies of five (5) application decisions that were forwarded to the Board and Attorney Ament for review.

9/8/2015 ZBA staff submitted to the file a copy of Paul Cornell vs. Board of Appeals of Dracut & another 453 Mass. 888

Plans submitted by Applicant/Applicant's Representative

8/10/2015 "Certified Plot Plan for 91 Priscilla Street Falmouth, Mass" drawn by Warwick & Associates Inc. stamped, signed and dated 8/7/2015 by Gary Labrie, P.L.S. and with a Board date 'received' stamp of August 10, 2015.

Hearing:

Attorney Robert H. Ament was present on behalf of the applicant and reviewed the vacant lot and the request to build a single-family dwelling on the lot under Sections 240-66 C. (3) and (4) of the Code of Falmouth. He explained that the applicant owns the subject lot and an abutting lot on Oak Street where they have a single-family dwelling. The lots are separate with separate certificates of title. The subject lot will eventually be hooked to Town sewer with a betterment assessed. The subject lot on Priscilla Street was granted special permit #2156 in 1968 to construct a dwelling on subject property; and again in 1980 applicant applied for special permit 38-80 to erect a dwelling on subject lot and was given approval - special permit was filed in Barnstable Land Court Registry on June 6, 1997. The dwelling was not constructed and the special permit lapsed. Attorney Ament explained that the applicant does not want to construct a dwelling now, but does have to pay a betterment fee for the Town sewer, which if the Board deems the property 'buildable' then the applicant will pay the betterment fee. He said that the applicant would like to be able to have this lot buildable for future family generation, but not have to build within two years. He stated that the subject lot is used for agricultural purposes (gardens) which is a by right and that the gazebo existing on subject property is used as accessory to the primary use of a garden (to store gardening equipment and materials). He stressed that the gardening use on subject lot is not accessory to the abutting lot (90 Oak St.) where the McDonalds reside. Attorney Ament asked if the Board could extend the two-year permit period to be in perpetuity as the applicant wishes not to build on subject lot now, but reserve the right to allow future family generation(s) to build.

The Board discussed the application with Attorney Ament and asked for clarification on how Section 240-66 C. (4) reverts back to Section 240-66 C. (3) to allow a dwelling to be constructed via a special permit. The Board asked Attorney Ament for any known special permits or case law that allowed for the special permit to grant more than two years or to be in perpetuity.

Chairman Bielan asked for any public comment in support or opposition of the proposed additions.

There was no public comment.

The Board discussed the need for further information regarding clarification on Attorney Ament's reasoning to request relief under Section 240-66 C. (4) and (3); information on previous special permits or case law allowing extension of timeframe for a special permit.

Member Cool made a motion to continue the hearing to September 10, 2015 at 6:30 PM. Member Hurrie seconded the motion. Motion carried 5 - 0.

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Continuation: September 10, 2015

#65-15 - MacDonald, 91 Priscilla Street, Teaticket, MA

Members sitting: Clerk Terrence Hurrie acting as Chairman, Member Ed Van Keuren, Member Paul Murphy and Associates Mark Cool (Acting Clerk) and John Sutherland sitting as voting member.

Chairman Kimberly Bielan is absent, Clerk Hurrie will Chair the hearing and Associate Sutherland who was present at the previous hearing will participate.

Attorney Ament is present on behalf of applicant and reviewed information the Board requested at previous hearing. Attorney Ament stated and explained that the Board's question on request for relief under Sections 240-66 C. (3) and (4) is that a similar situation [Robert and Kathleen Hall - #154-05] was previously approved by the Board's determination that 240-66 C. (4) applies to Section 240-66 C. (3). On the second question the Board asked if Attorney Ament had any evidence through case law or previous special permits that the Board could allow a condition that the special permit be in 'perpetuity' or extended for longer than the standard two year timeframe, Attorney Ament said he recalled that in one or more cases either the Planning Board or the Board of Appeals conditioned that the recording of the special permit would constitute 'substantial use', but that he had been unable to locate or specifically identify such cases. He also stated that the payment of the betterment fees for the Town sewer could be considered an improvement thereby creating a 'substantial use'. Attorney Ament opined on the intent of Section 240-66 C. to protect lots that consist of 7,500 or 7,200 square feet of land. He further explained that the 'lapse' provision in Section 240-221 allows the special permit granting authority, for good cause, to extend beyond two years the time in which substantial use of a special permit must commence. He stated that the applicants had relied on the approval of Special Permit 38-80 wherein the Board granted approval for the subject property to be buildable. [It was noted that the Special Permit 38-80 was not filed with the Registry of Deeds until 1997.]

The Board discussed 'good cause' and reasoning of Section 240-66 C. (3) and (4) with Attorney Ament.

Member Cool made a motion to close the hearing. Member Van Keuren seconded the motion. Motion carried 5 - 0.

Acting Chair Hurrie closed the hearing.

The Board members discussed and agreed that the application is properly before the Board and meets criteria of Section 240-66 C. (3) and (4). The Board members had concerns regarding a condition to extend the two-year time frame for substantial use of the special permit; and noted that currently there is no good cause to extend the special permit beyond the two-year requirement noted in M.G.L. Chapter 40A, Section 9.

## 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 91 Priscilla Street in Teaticket contains 7,200 square feet of Residential C zoned land that is located within the Great Pond Coastal Pond Overlay District. The applicant applied under Section(s) 240-66 C. (3) and (4) of the Code of Falmouth to construct a single-family dwelling on the subject vacant lot. This application is essentially to prove that the lot is buildable under said sections. The applicant owns and resides on abutting lot known as 90 Oak Street and in 2000 was granted a special permit by the Board of Appeals to raze and reconstruct the existing dwelling at 90 Oak Street. The applicant has used the subject lot (91 Priscilla Street) for horticulture and agricultural uses (gardening)

which is an allowed use under Section 240-21 A. of the Code of Falmouth. Testimony by the applicant's representative, Attorney Robert Ament, was that the gazebo on the subject lot was used to store gardening tools and therefore is accessory to the primary use of gardening. In 1968 the applicants applied for and received a special permit (#2186) to construct a single-family dwelling on subject lot. Special permit 2186 was never activated. In 1980 the applicants sought and was granted a second special permit (38-80) with conditions to allow construction of a dwelling on subject lot (91 Priscilla Street). This special permit (38-80) was not filed with the Registry of Deeds until 1997. The applicant did not approach the Board of Appeals for an extension of the two-year timeframe for 'good cause' (see Section 240-221 of the Code of Falmouth). The subject lot is scheduled for hook up to the Town sewer with a betterment fee assessed to the applicant, which is the impetus for this special permit request.

The Board finds through testimony by Attorney Ament that the applicants have paid taxes on subject lot as a buildable lot since 1977.

The Board finds that based on Attorney Ament's clarification of Section 240-66 C. (4) which states: "Any lot held in common ownership with such adjoining lots, vacant as of 1 January 1981, may be treated as not held in common ownership if, as of 1 January 1981, a dwelling was in existence on all the other commonly held, contiguous lots..." applies to Section 240-66 C. (3) that states: "Any lot not held in common ownership with adjoining land as of 1 January 1981 not protected by Section C. (1) and (2), [see C. (4)] may apply to the Zoning Board of Appeals for a special permit to construct a single-family residence, if the lot has at least 7,200 square feet of area." and that the Board may approve the subject lot as buildable. The Board further finds that the subject lot is 7,200 square feet in size and that the contiguous lot owned by the applicant (90 Oak Street) did have a single-family dwelling on said lot prior to 1 January 1981 and therefore meet the criteria of said section(s). Furthermore, the Board finds that the subject lot [91 Priscilla Street) is considered 'vacant' and that the gazebo does not represent a 'structure' that is accessory to the use of the single-family dwelling on abutting lot known as 90 Oak Street.

The Board finds through the referral from the Board of Health Agent that the subject lot is on schedule in the near future to be on Town sewer and if a dwelling is to be built prior to Town sewer, then a suitable plan for a septic system will be required prior to issuance of a building permit for a dwelling.

The Board finds through testimony by the applicant's representative, Attorney Ament, that there is no intent by the applicant to construct a dwelling at this time or in the near future and requests that the Board condition that payment of the betterment fee for the sewer hookup be considered 'substantial use' of the special permit; or that the Board could condition the approval to be in perpetuity and eliminate a two-year timeframe so that the special permit does not lapse and future generations of the applicant may build on subject lot as deemed buildable through this special permit.

The Board finds that no case law or previous special permits relevant to this application was submitted that would allow the Board to consider extending the two-year timeframe for lapse of special permit at this time. The Board further finds that it is beyond their authority to allow a special permit for a building lot to be conditioned in perpetuity.

Member Cool made a motion to Grant the Special Permit with conditions. Member Van Keuren 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 5 – 0 to Grant the Special Permit to Paul J. and Carol A. MacDonald, Trustees (herein referred to as Applicant) under Section(s) 240-66 C. (3) and (4) of the Code of Falmouth to construct a single-family dwelling on subject property known as 91 Priscilla Street, Teaticket, Massachusetts. This special permit is subject to the following conditions:

1. Any single-family dwelling constructed on subject lot (91 Priscilla Street) shall meet all requirements set forth in Sections 240-19, 240-68 A. and B. and Section 240-69 of the Code of Falmouth.
2. If construction of a single-family dwelling commences prior to the lot being connected to Town Sewer, the applicant shall have a suitable septic plan design in place and approved by the Board of Health prior to issuance of a building permit.

3. The applicant shall insure that the plans for a single-family dwelling on subject lot meets all Town Department requirements (i.e. Water Department, Engineering Department, Board of Health, etc.).

4. 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.)

5. 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: 65-15

Applicant: PAUL J. MACDONALD & CAROL A. MACDONALD, TRUSTEES

Subject Property: 91 Priscilla Street, Teaticket, Massachusetts  
Map 39A, Section 15, Parcel 000, Lot 030

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 Grant the Special Permit as represented to the Board, based on the Findings stated herein and with the above stated Conditions.

\_\_\_\_\_  
Terrence J. Hurrie, Acting Chairman, Board of Appeals

\_\_\_\_\_ 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 65-15 / MacDonald, Tr / Filed w/ Town Clerk 9/18/15