

## Zoning Board of Appeals Decisions Decisions for: 02-26-2015

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

APPEAL NO: 105-14

APPELLANT(S)/OWNER: GSTVS, LLC – Francisco Tavares, Inc. & Gary S. Tavares  
of East Falmouth, MA

DEED/CERTIFICATE: Book 25513 / Page 184

SUBJECT PROPERTY: 25 Crocker Road, East Falmouth, MA  
Assessor's Map: Map 28, Section 07, Parcel 008, Lot 002

SUMMARY: Board Upheld Determination of Building Commissioner

PROCEDURAL HISTORY

1. Under a date of December 31, 2014 the appellant's representative, Attorney Laura Moynihan, filed an Appeal with the Falmouth Town Clerk pursuant to Section 240-202 of the Code of Falmouth appealing the determination of the Building Commissioner in issuance of a 'cease and desist' of the use of a Contractor's Yard on subject property known as 25 Crocker Road, East Falmouth, 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 February 5, 2015 wherein testimony and public comment was heard. The Board voted 4 – 0 to continue the hearing to February 26, 2015 at 5:30 PM in the Selectmen's Meeting Room.
4. The public hearing was terminated on February 26, 2015 wherein the Board rendered a decision.
5. Board members sitting on this Appeal hearing were Vice Chairman Kimberly Bielan, Clerk Terrence J. Hurrie, Associated Member Mark Cool (sitting as voting member) and Associate John Sutherland (sitting as voting member).
6. The Appellant Gary S. Tavares of GSTVS, LLC is being represented by Attorney Laura Moynihan of Falmouth, Massachusetts.
7. The Board received documents and exhibits prior to and during the public hearing which 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

2/5/2015 Copy of referral with note of complaint of subject property from John Corrway, 30 Lodengren Road

2/5/2015 Letter from Larry Jacobson of 10 Bonito Avenue stating comments on Appeal

2/5/2015 Letter from Randy Rapoza of 15 Crocker Road stating concerns and support of Upholding Building Commissioner's determination for 'cease and desist'

2/26/2015 Written comments from Larry Jacobson of 10 Bonito Avenue regarding subject property

## Letters/E-mails/Documents from Applicant/Representative(s)

12/31/14 Attorney Moynihan submitted to the file a copy of a "Notice of Filing Pursuant to GL c. 40A, sec 17" filed with Land Court [GSTVS, LLC vs. Falmouth Planning Board et al]

12/31/14 Attorney Moynihan submitted to the file a copy of the "Complaint" filed with Land Court [GSTVS, LLC vs. Falmouth Planning Board et al.]

12/31/14 Attorney Moynihan submitted to the file a copy of a "Decision" for request of modification of Special Permit from the Planning Board dated September 17, 2014 relative to subject property

12/31/14 Attorney Moynihan submitted to the file a copy of the "Decision" for Special Permit from the Planning Board dated September 8, 2004

12/31/2014 Attorney Moynihan submitted to the file a copy of a December 5, 2014 letter to GSTVS, LLC and Gary S. Tavares regarding 3 complaints since 9/9/14 from Eladio Gore, Building Commissioner

2/4/2015 Letter from Attorney Moynihan dated February 3, 2015 with attached copy of Falmouth vs. Nick Haddad & another, 369 Mass. 452, (1976)

2/5/2015 Copy of U.S. Court of Appeals case Charles Freeman and Daniela Freeman vs. Town of Hudson Conservation Commission, Police Department and others submitted by Attorney Moynihan

2/5/2015 List of matters/cases in the Town of Falmouth submitted by Attorney Moynihan and cited during hearing

2/9/2015 E-mail from Attorney Moynihan to ZBA staff regarding clarification of cases cited

2/17/2015 Letter from Attorney Moynihan dated February 13, 2015 in response to Town Counsel opinion on 'cease and desist' authority (original letter rec'd 2/19/15)

## Letters/Referrals/E-mails from Town Departments

2/3/2015 ZBA submitted to the file a copy of "Determination of Administrative Completeness and Final Approval with Conditions" issued by Department of Environmental Protection [DEP] relative to subject property

2/3/2015 ZBA submitted a copy of a letter from Appellant to a tenant of 25 Crocker Road dated March 30, 2013 – letter was regarding complaint of activity on subject property with acknowledgement in form of e-mail to Zoning Enforcement Officer that tenant was notified

2/3/2015 ZBA submitted a copy of a July 29, 2013 letter to Eladio Gore, Building Commissioner from Attorney Moynihan notifying Mr. Gore she is representing Gary Tavares in application for modification of Special Permit to the Planning Board

2/3/2015 Copy of a letter from Gary Tavares to three tenants of 25 Crocker Road regarding use of property – submitted by ZBA

2/3/2015 Copy of a letter dated January 31, 2014 from Assistant Zoning Enforcement Agent to Attorney Moynihan – submitted by ZBA

2/3/2015 Copies of Violations issued for subject property – submitted by ZBA

2/3/2015 ZBA submitted copies of e-mails between appellant, Attorney Moynihan and Zoning Enforcement Agent(s)

2/6/2015 E-mail to Town Counsel from ZBA staff requesting on behalf of the Board opinion on 'cease and desist' authority relative to zoning bylaw

2/12/2015 E-mail response from Town Counsel as 'Opinion' relative to 'cease and desist' authority

2/20/2015 E-mail from Town Counsel regarding Attorney Moynihan's response and comment

Note: All submittals from ZBA to file were copies attained from Building Department file.

Plans submitted from Applicant

None

February 5, 2015 Hearing:

Attorney Laura Moynihan, on behalf of GSTVS, LLC [Gary S. Tavares] reviewed the history of the subject property noting the Special Permit issued by the Planning Board in 2004 granting the storage of non-agricultural materials and equipment in the rear portion of the property (see decision dated September 8, 2004 with list of materials allowed) with conditions for fencing, screening, hours of operation and number of deliveries to site. Starting in February of 2013 complaints from abutters were made regarding noise and activity on subject property; the Enforcement Agent notified Mr. Tavares. In April of 2014 after repeated complaints (see file for complaints) the Assistant Zoning Enforcement Agent conducted a site visit on subject property and notified Mr. Tavares of her findings and determination that the property is operating as a Contractor's Yard and that a modification of the Special Permit from the Planning Board is required (see letter dated April 3, 2014 from Olive Fitzpatrick, AZEO to Mr. Tavares). In June of 2014, GSTVS, LLC applied to the Planning Department for a modification of the 2004 Special Permit. On September 16, 2014 the Planning Board voted to deny the application of GSTVS, LLC for a new special permit and to modify an existing special permit granted in 2004 – the decision lists the findings by the Planning Board. GSTVS, LLC then filed an Appeal of the Planning Board's decision with the Land Court on October 3, 2014. On December 5, 2014 the Building Commissioner issued a letter to remove all equipment from 25 Crocker Road that is unrelated to the by right nursery use and remove all materials unrelated to the nursery and not allowed in the special permit within seven (7) days and to 'cease and desist' use of property as a Contractor's Yard.

Attorney Moynihan explained the basis of the current Appeal before the Board is that the determination by the Building Commissioner ordering a 'cease and desist' is quite narrow and the question is the legality of the order as the zoning bylaws in Sections 240-179 through 184 do not authorize the Building Commissioner to issue a cease and desist order. Also the order is not specific to which portion of the lot is under the cease and desist order. She further noted that complaints were made regarding woodworking activities conducted on subject property and stated that under Section 240-37 woodworking mill is allowed by right in an Agricultural zoned district. The order does not state who or what portion of the lot is in violation and under the cease and desist order. Attorney Moynihan reviewed Sections 179 – 184 of the Town zoning bylaws that states the Building Commissioner is responsible for the enforcement of the chapter by withholding permits for construction, moving of any building and that no permit shall be granted for a new use of a building or land which would be in violation of the chapter; and that the remedy stated is by penalizing through noncriminal disposition method of enforcement according to the statute [MGL C.40, sec 21D] that provides for fines or court action.

Attorney Moynihan said she believes the cessation of use on subject property is 'selective enforcement', citing Freeman vs. Town of Hudson. She said that normally in the Town of Falmouth when there is a review by a regulatory board or an appeal, the 'violation' or 'activity' on a parcel is in a 'stay' mode and not cited in violation. However in this case, the Planning Board denied the application for modification on subject property, an appeal with Land Court was filed and the Building Commissioner issued a 'cease and desist'. She cited Town of Falmouth vs. Nick Haddad, an SJC case that states a party shall be afforded "reasonable opportunity to correct violation". In that case the court held that it will allow "time as may be reasonably necessary in which to apply for and obtain such building permits, special permits and other official authorizations required for such use or uses and in which to modify ....".

The Board asked questions of Attorney Moynihan regarding timing of the complaints and action taken by the Building Commissioner, number of tenants on subject property, what is parallel between woodworking mill (producing lumber) vs. firewood and wood chipping, enforcement methods understood or practiced in the Town of Falmouth and what are the uses on subject property.

Attorney Moynihan stated that the timeline of complaints from 2013 is confusing as it is difficult to determine what the complaints are directed at as there are by-right uses on the property and allowed uses via a special permit from the Planning Board and one from the Zoning Board of Appeals. She stated

there are three tenants on subject property. Regarding the enforcement methods, she stated that the Building Commissioner usually does not take action when there is pending permit approval or pending litigation (see matters submitted by Attorney Moynihan noted herein).

On the question from the Board (Member Cool) regarding parallel between woodworking mill vs. firewood and wood chipping [use] – Attorney Moynihan did not address.

#### Public Comment:

Randy Rapoza of 15 Crocker Road stated support of the Building Commissioner's determination of a 'cease and desist' order as there are three tenants on subject property and the noise and disturbance of the peace has increased.

Larry Jacobson of 10 Bonito Avenue stated opposition to the delay in the 'cease and desist' order and commented on the activity on subject property that is disruptive to the neighborhood and not allowed by zoning. He believes the appeal to be a stall tactic so that activity can continue without enforcement.

Vicky Giaquinto of 42 Bonito Avenue stated opposition to the appeal.

#### Board discussion:

Member Bielan stated it is clear there are ongoing zoning violations on subject property as Attorney Moynihan admitted that some ongoing uses occurring on the property are in violation of the zoning bylaws. She said she does not agree that this is 'selective enforcement' and commented on the matters submitted by Attorney Moynihan noting two were agreements to stay enforcement and two are pending court cases. She stated that the correct action would be for appellant to file an injunction with Land Court. She further stated that an opinion from Town Counsel on authority of enforcement by the Building Commissioner may be necessary.

Member Cool agreed with Member Bielan in that it does not appear to be 'selective enforcement'; testimony shows that there are ongoing violations on subject property and the Building Commissioner saw fit to order a cease and desist. He would agree with an opinion from Town Counsel and cease and desist enforcement.

Member Sutherland agreed.

Member Hurrie referred to Section 240-184 B. "...using the noncriminal disposition method of enforcement..." and agreed with request for Town Counsel opinion on this.

Member Cool made a motion to continue the hearing to February 26, 2015 at 5:30 PM in the Selectmen's Meeting Room. Member Sutherland seconded the motion. Motion carried 4 – 0.

#### February 26, 2015 Hearing (Continuation):

Note: The Board requested Town Counsel's opinion on the authority of the Building Commissioner to order a cease and desist. Town Counsel responded on February 12, 2015 – in summation opinion states: The Building Commissioner has authority to issue cease and desist orders when he observes a violation of the zoning bylaw. The fact that s. 240-184 of the zoning bylaw does not explicitly state authority to issue cease and desist orders is not determinative. The power is inherent in the office, implied by other sections of the bylaw and affirmed by the courts. Further in his opinion he stated: Clearly the power to hear and decide appeals from an order or decision of the Building Commissioner is premised on the existence of inherent power of the Building Commissioner to issue them in the first instance. Where there is a violation of the town's zoning bylaw, issuance of a cease and desist order is an acceptable and common enforcement practice among municipal officials charged with enforcing zoning bylaws. .... In the Oakham Sand and Gravel case, the Appeals Court also noted that a "town zoning officer did not overreach his authority by issuance a cease and desist order."

Attorney Moynihan said she reviewed Town Counsel's opinion and stated that there is no express authority in the Town bylaw and she believes Town Counsel's opinion agrees with that; the Building Commissioner has no express authority for the issuance of this cease and desist order. She said the legal remedy pursuant to our bylaw is the commencement of civil or criminal proceedings in court – it is a logical

procedure so that the property owner has an opportunity to defend himself in that criminal proceeding and Town Counsel Duffy confirms this in his recent opinion that judicial review is the right way to go. Attorney Moynihan cited M.G.L. Chapter 40, sec. 21D that states: .....any city or town bylaw may provide for non-criminal disposition of violations of any ordinance or bylaw or any rule or regulation of any municipal officer, Board or department the violation of which is subject to a specific penalty. She asked that the Board overturn the Building Commissioner's determination as the Town bylaw lacks enforcement authority to issue a cease and desist order.

Member Cool asked Attorney Moynihan what action she believes the Building Commissioner can take if a bylaw is violated.

Attorney Moynihan said a legal complaint can be filed at the District Court with a fine, civil complaint or injunction.

Member Hurrie stated that Section 240-179 of the Code of Falmouth gives a broad grant of power to the Building Commissioner and asked Attorney Moynihan if she disagrees.

Attorney Moynihan stated she does disagree as under Section 240-184 A. and B. that gives the power – you will see there is no cease and desist power.

Member Bielan asked Attorney Moynihan her opinion concerning language under Section 240-202 A. (2) – what "order" does this refer to?

Attorney Moynihan said it could be to remove a structure or any order to do with a building.

Public comment:

Larry Jacobson of 10 Bonito Avenue stated opposition to the Appeal and spoke on issues with activity on subject property.

Member Cool made a motion to close the hearing. Member Hurrie seconded the motion. Motion carried 4 – 0.

Vice Chairman Bielan closed the hearing.

Board discussion:

Member Cool said he feels the word 'may' in Section 240-184 B. gives the Building Commissioner an option to enforce the bylaw with a cease and desist order and that he interprets Town Counsel's opinion to say that it is a clear empowered authority. He said he feels that the activity ongoing on subject property reflects a Contractor's Yard and is in violation of Town code and that the Building Commissioner is empowered to order a cease and desist.

Member Hurrie stated he agrees with Town Counsel's opinion and that authority to issue a cease and desist is an inherent power of the Building Commissioner.

Member Sutherland agrees and stated that 'inherent powers' are affirmed by the courts.

Member Bielan said she too agrees and she is persuaded by Town Counsel's opinion and that the prudent route was for appellants to file an injunction. She further commented that she believes there is no 'selective enforcement' by the Building Commissioner; that there is ongoing activity in violation of the bylaws on subject property and that the appellant's attorney acknowledged such in her presentation.

## 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 25 Crocker Road in East Falmouth contains 6.65 acres of Agricultural A zoned land that is located within both the Bournes Pond and the Green Pond Coastal Pond Overlay District. The appellant, pursuant to Section 240-202 of the Code of Falmouth and MGL Chapter 40A, Sections 8 and 15, appealed the Building Commissioner's determination for a 'cease and desist' order. The subject property was used as a nursery – Planning Board decision of September 17, 2014 determined, based on testimony by the property owner, that no portion of the subject property is being used as a commercial nursery – and has a Special Permit from the Board of Appeals, #68-08, for boat storage on the middle 2.6 acres of the property and a 2004 Special Permit from the Planning Board for storage of non-agricultural materials on the eastern 1.2 acres of the property. In June of 2014 the appellant applied to the Planning Board for a new special permit and to modify the existing permit from 2004. In September of 2014 the Planning Board denied the application and the appellant filed an Appeal with Land Court.

The Building Commissioner received complaints from abutters of subject property and determined that the activity on the subject property is in violation of the Town zoning bylaws and issued a 'cease and desist' order which included removing all equipment and materials not related to the by right use of a nursery on said property. The appellant's attorney, on behalf of the appellant, filed an appeal to be heard by the Board of Appeals regarding the Building Commissioner's determination in issuing a cease and desist order – citing the validity of authority to issue said order and that said order is 'selective enforcement'.

The Board finds that the Zoning Enforcement Officer(s) attempted to work cooperatively with the Appellant without monetary penalties or any type of order for approximately two (2) years through complaints and violations in order to remedy the zoning violations on the subject property and by permitting the appellant to file for a modification of existing special permit on subject property. The Board further finds that this time frame was 'reasonable' time in which to correct violations and or modify the special permit. Furthermore, the Board finds through statements by the appellant's attorney that the appellant is aware that the property is being used in violation of the Town zoning bylaws.

The Board finds that there was no 'selective enforcement' as stated by Attorney Moynihan as the records show that the Zoning Enforcement Agent(s) did consistently communicate and work with the appellant over a two-year period to bring the subject property into compliance. The Board further finds that the appellant's attorney acknowledged that there is continued activity on subject property that is in violation of the Town zoning bylaws; the continued activity in violation of the zoning bylaws on said property is not an apparent issue in the matters submitted by Attorney Moynihan noted above as the matters listed did not acknowledge violation of the bylaws, but rather the belief that they met zoning, except possibly for the case of Funfar vs. Town of Falmouth (nuisance bylaw).

The Board finds that under Section(s) 240-179 that states: The office of the Building Commissioner is responsible for the enforcement of this chapter.; and Section 240-184 B. which states: In addition to the foregoing, the Building Commissioner or his designee may penalize by using the noncriminal disposition method of enforcement as outlined in Chapter 1 'General Provisions', Article I 'Penalties', sec. 1-2, and MGL C. 40, sec 21D. the Building Commissioner has an 'inherent' power to issue a cease and desist order as a method to enforce the zoning bylaws. The Board further finds that due process was afforded to the appellant by the Building Commissioner as the Zoning Enforcement Officer.

Member Cool made a motion to Uphold the Building Commissioner's determination in ordering of a cease and desist and denying the Appeal by GSTVS, LLC. Member Sutherland 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 Uphold the Building Commissioner's Determination and Deny the Appeal by GSTVS, LLC (herein referred to as Appellant) under Section(s) 240-202 the Code of Falmouth in the issuance of a 'cease and desist' order on subject property known as 25 Crocker Road, East Falmouth, Massachusetts.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: 105-14

Appellant: GSTVS, LLC – Francisco Tavares, Inc. and Gary S. Tavares

Subject Property: 25 Crocker Road, East Falmouth, Massachusetts  
Map 28, Section 07, Parcel 008, Lot 002

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 Uphold the Building Commissioner’s Determination and Deny the Appeal based on the Findings stated above.

\_\_\_\_\_  
Kimberly Bielan, Vice 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:**

GSTVS Appeal of BC Decision filed w/Town Clerk 3/11/15