

Zoning Board of Appeals Decisions Decisions for: 05-27-2015

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

APPEAL NO: 30-15

APPELLANT(S): RICHARD W. MACKIN, TRUSTEE, MACKIN REALTY TRUST

DEED/CERTIFICATE: Certificate 143051, Lot 150 – Plan 11210-Q

SUBJECT PROPERTY: 12 Nichols Road, East Falmouth, MA
Assessor's Map: Map 32, Section 21, Parcel 013A, Lot 150

SUMMARY: Granted Appeal – Overturning the Building Commissioner's Determination

PROCEDURAL HISTORY

1. Under a date of April 1, 2015 the appellant's attorney, Kevin P. Klauer, II filed an appeal with the Falmouth Town Clerk pursuant to Section 240-202 of the Code of Falmouth and MGL Ch 40A, section 8 and 15 regarding the Building Commissioner's denial under Section 240-13 of the Code of Falmouth to issue a building permit for construction of an addition to an existing dwelling located at 12 Nichols Road, East Falmouth, MA.
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 May 14, 2015.
4. The public hearing was terminated on May 14, 2015 wherein the Board consisting of Chairman Kenneth Foreman, Vice Chair Kimberly Bielan, Clerk Terrence Hurrie, Member Van Keuren and Associate John Sutherland made a decision to Grant the Appeal, overturning the Building Commissioner's determination.
5. The appellant was represented at the hearing by Attorney Kevin P. Klauer, II.
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 Appellant/Representative(s)

5/12/2015 Letter from representative [Klauer] as narrative of appeal with attached Exhibits: 1) Application to ZBA, 2) Publication Notice for hearing of 89-14, 3) referral from the Building Commissioner submitted to the file for Special Permit 89-14, 4) Special Permit Decision for 89-14, 5) Letter of March 3, 2015 from Building Commissioner denying building permit and 6) Plan showing area of addition to dwelling within Velocity Zone.

5/13/2015 Copies of case law submitted by representative [Klauer]: 1) David D. Dowd, Administrator vs. Christopher J. Morin & others, 2) Richard K. Bendetson, Trustee vs. Building Inspector of Revere, 3) Francis W.R. Capone & another vs. ZBA of Fitchburg & others, 4) Kennard C. Kobrin vs. Board of Registration in Medicine, 5) Michael F. Iodice, Trustee, vs. City of Newton & another, 6) Advanced Development Concepts, Inc. vs. Town of Blackstone, 7) Carla Heacock vs. Gregg Heacock and 8) Janet T. Hebb vs. Allan Lamport & another, trustees

5/14/2015 Copy of case law submitted by representative [Klauer] at hearing: Robert W. Fahey & another vs. Rockwell Graphic Systems, Inc. & another

Letters/Referrals/E-mails from Town Departments

None

Note: A copy of the plans from Special Permit 89-14 [Mackin] were submitted to the file by the Board of Appeals staff – shows Velocity Zone on plot plan and area of new build on architectural plans in Velocity Zone

Hearing:

Attorney Kevin P. Klauer with Ament Law Firm reviewed the history of Special Permit 89-14 and the subsequent denial of a building permit by Building Commissioner Gore. He explained that the special permit application for the appellant was submitted with a plot plan and architectural plans as required by the ZBA; the application was noticed for a public hearing properly, referrals sent out to Town departments as required by MGL Ch. 40A, §11 [cited 35 day referral requirement] and the Town bylaws, Section 240-219 and a public hearing opened on December 4, 2014 wherein the Board members took testimony, reviewed the plans and asked questions of the representative, Michael Borselli, P.E. who signed the "Certified Plot Plan" for subject property and proposed additions to existing dwelling. The Board reviewed the referrals submitted to the file, which included a referral signed by Building Commissioner Gore that had no comment. The Board approved the special permit, the decision was drafted and submitted to the Town Clerk on December 17, 2014. After the 20 day appeal the special permit was filed with Barnstable Land Court Registry on January 16, 2015 with a letter from the Town Clerk that stated: "no Notice of Appeal on this vote was received during the twenty days (20) next after such receipt and recording of said vote." There was no appeal of the Board's decision filed by any aggrieved party, municipal officer or Board.

Attorney Klauer then reviewed the bylaw Building Commissioner Gore cited in his letter of denial dated March 3, 2015, Section 240-13 "Definitions" - 'Substantial Improvement' For the purposes of this definition, "substantial improvements" in Velocity V zones also includes any addition, improvement, alteration or combination thereof to a structure that would add more than 200 square feet of gross floor area. He stated that Mr. Gore's denial was made with regards to the Zoning Bylaw – not the building Code. He then cited MGL Ch. 40A §17 – Any person aggrieved by a decision of the board of appeals or any special permit granting authority...concerning any appeal, application or petition within the required time....whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situation... by bring an action within twenty days after the decision has been filed in the office of the city or town clerk. Attorney Klauer cited case Iodice v. Newton a SJC case that states appeal process is set forth in Ch. 40A, §17 and legislation intended that affected parties should be able to rely on the decisions of Boards of Appeals and special permit granting authorities which have not been challenged within a limited time period and that the regulations apply to any person whether, including a Building Commissioner. He explained that one of the reasons for the referral process is to identify potential issues with plans submitted in connection with a special permit so than an applicant may rely on the issuance of that permit.

In summation Attorney Klauer stated the special permit was granted, the 20 day appeal period expired and final judgment is binding upon the parties. The applicant submitted application to the ZBA, referrals were sought thereby making the building department a party to the prior adjudication. Attorney Klauer further commented on the Building Commissioner's interpretation of "Substantial Improvement" and the language of Section 240-13 "Definitions", suggesting that the location of a small portion of the dwelling being in the Velocity Zone had a 140 square foot addition – not more than 200 square feet which would include additions outside of the Velocity zone (see plans, Section 240-13 and Attorney Klauer's letter of May 12, 2015).

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

The Board discussed appeal with Attorney Klauer, discussed the reading of the definition of "Substantial Improvement".

Board discussed:

Member Hurrie said he is bothered that the Building Commissioner didn't weigh in on the referral and he felt the appellant's attorney did a good job in substantiating the appeal. He questioned if this project should be vetted twice or the process stands – he is leaning in favor of overturning the Building Commissioner.

Member Bielan said she is torn; thinks the Building Commissioner is within his rights to deny the building permit with a valid interpretation of the definition; she also thinks the Building Commissioner and appellant's interpretations are both reasonable. Ms. Bielan said if the Building Commissioner had a better reasoning in the denial than just the definition of Town code, it would have been helpful – as well as commenting on a referral relative to the velocity zone. She said she is inclined to overturn the Building Commissioner's decision.

Member Sutherland said he could interpret substantial improvement, has issue with the Building Commissioner making a judgement on the zoning bylaw and not the building code. He said he would overturn the Building Commissioner's decision.

Chairman Foreman said the issue is the velocity zone was not brought up in the hearing for the application by the representative and the Board did not review under Section 240-82 B. of the Town code.

Member Van Keuren stated as an engineer he read the bylaw and agrees with appellant's interpretation of addition in the velocity zone only of less than 200 feet.

Attorney Klauer said the applicant wouldn't have applied under Section 240-82 of the bylaws as the plans show it is not a 'substantial improvement' in the velocity zone – therefore 240-3 was applied under. He said this project has been vetted by Conservation Commission and approved with same plans – velocity zone was identified and was the addition within the velocity zone.

Thomas J. Bunker, RLS with BSS Design, Inc. in Falmouth stated that the issue is definition (240-13) and Section 240-82, he reads it as 200 square feet in a Velocity zone and he has drawn plans to the effect [not author of plans submitted]. He said Conservation Commission has the same '200 foot' regulation in their bylaws as well and they reviewed the same plans and approved them; the same plans that the Board of Appeals later approved under special permit.

Chairman Foreman said he believes the bylaw is ambiguous and the Building Commissioner didn't comment on the referral and issue with the addition in the velocity zone [Commissioner's interpretation]; application was made to the Board of Appeals with plans, advertised hearing, referrals sent to Town departments, hearing held and approved according to MGL and Town bylaws; the plans showed velocity zone and addition within it – we should not penalize the applicant.

Member Hurrie stated the bylaw is 'grey'.

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

Chairman Foreman closed the hearing.

Member Bielan made a motion to overturn the Building Commissioner's decision of not issuing a building permit due to the definition of substantial improvement in a velocity zone is subject to dual interpretations. Member Van Keuren seconded the motion. Motion carried 5 – 0.

FINDINGS

The Board of Appeals, after carefully considering all of the facts and evidence submitted at the hearing, makes the following findings:

The Board finds that the referral submitted to the file by the Building Commissioner [signed by Eladio Gore] stated no comment. The Board further finds that Commissioner Gore should have noted his opinion of the addition in the velocity zone. Furthermore, the Board finds that the plans approved under Special Permit 89-14 are the plans reviewed by Commissioner Gore wherein he denied a building permit.

The Board finds that the project for Special Permit 89-14 was properly before the Board and processed according to M.G.L. Ch 40A, §9 and §11 and the Town bylaws. The Board further finds that a unanimous decision by the Board approved the application for Special Permit 89-14 which includes the "Plot Plan for #12 Nichols Road" prepared for Claudia and Richard Mackin in Falmouth, MA, Sheet 2 of 2 dated September 22, 2014 as drawn by Falmouth Engineering, Inc. with a Board date 'received' stamp of October 17, 2014 and "Addition/Renovation Design" architectural plans for Mackin Residence 12 Nichols Road East Falmouth, MA drawn by Architecture by SPB consisting of Drawings A1, A2 and A3 all dated 10/14/2014 with a Board date 'received' stamp of October 17, 2014. Furthermore, the Board finds that the plans noted herein are the same plans [showing velocity zone] that were reviewed by the Building Commissioner for his denial of a building permit.

The Board finds that according to the plans reviewed by this Board for Special Permit 89-14 the addition within the velocity zone is 140 square feet, which is less than 200 square feet as stated in Section 240-13 "Definitions" for 'substantial improvement'.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: 30-15

Appellant: RICHARD W. MACKIN, TRUSTEE, MACKIN REALTY TRUST

Subject Property: 12 Nichols Road, East Falmouth, MA
Map 32, Section 21, Parcel 013A, Lot 150

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 Overturn the Building Commissioner’s Decision and Grant the Appeal as stated by the findings noted above.

Kenneth Foreman, 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:
#30-15 - Mackin - Overturn BC