

Zoning Board of Appeals Decisions Decisions for: 04-28-2016

[Close Window](#)

FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

SPECIAL PERMIT NO: 025-16

APPLICANT/OWNER(S): JOHN W. KELLEY & LAURA W. KELLEY of North Easton, MA

SUBJECT PROPERTY: 471 Old Barnstable Road, East Falmouth, MA
Assessor's Map: Map 20, Section 01, Parcel 011, Lot 000A

DEED/CERTIFICATE: Book 29234 / Page 251

SUMMARY: Special Permit Granted with Conditions

PROCEDURAL HISTORY

1. Under a date of February 25, 2016, the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-3 and 240-3 A. of the Code of Falmouth to have the Town acknowledge that two separate dwelling units existed prior to May 19, 1959 and to allow the raze and reconstruction of the two pre-existing nonconforming dwellings on subject property known as 471 Old Barnstable 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 April 28, 2016.
4. The public hearing was terminated on April 28, 2016, wherein the Board consisting of Vice Chairman Kenneth Foreman sitting as Acting Chair, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate Gerald Potamis sitting as voting member, made a decision to Grant the Special Permit with conditions. Minutes from the hearing are on file in the Board of Appeals.
5. The applicant was represented at the hearing by Thomas J. Bunker, PLS with BSS Design Inc. who reviewed and discussed proposed plans with the Board. Applicant was also present.
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)

2/24/2016 Thomas J. Bunker, PLS with BSS Design, Inc. submitted application, fee, authorization, plans – existing and proposed, affidavit and information relative to application.

2/24/2016 Attached to application package submitted is an Affidavit of Dominick D'Agostino regarding subject property, notarized on September 25, 2015 was submitted to the file. Mr. D'Agostino was the previous owner of subject property.

2/24/2016 Submitted with application package are two Maps one from 1960 and one from 1950 showing subject property and two structures.

2/24/2016 Submitted with application package are old Assessors' field cards showing main dwelling and

pickers cabin existing prior to May 1959.

2/24/2016 Photos of existing two dwellings on subject property to be razed through proposal.

4/5/2016 E-mail from Tom Bunker of BSS Design, Inc. to Zoning Administrator Budrow regarding comment from Engineering Department on driveway relocation to Bacardi Lane. E-mail states applicant does not possess any rights to Bacardi Lane – noted how Bacardi Lane was created through an ANR plan and photos submitted by Engineering from 1950 and 1960 pre-date the creation of Bacardi Lane.

Letters/Referrals/E-mails from Town Departments

2/29/2016 Referral submitted to the file by Town Planner Currie with no comment.

2/29/2016 Referral submitted to the file by Environmental Marine Services with no comment.

2/29/2016 Referral submitted to the file by Conservation Commission staff with no comment.

3/1/2016 Referral submitted to the file by Falmouth Fire Rescue Department with no comment.

3/3/2016 Referral submitted to the file by Building Commissioner Gore with no comment.

3/3/2016 Referral submitted to the file by the Engineering Department with several comments (see file). Comments suggested that one proposed driveway be located onto Bacardi Lane (abutting private road) or combining two driveways on Old Barnstable into one driveway; suggested pervious material on driveway for drainage or Engineering will recommend drainage to be installed; and that aerial photos from 1950 exist in Engineering Department and the 1950 aerial looks the same as the 1960 aerial with two visible buildings and parking areas.

3/10/2016 Referral submitted to the file by Board of Health Agent Carignan that states: The site plan in the file shows a septic system layout, but there is no detail sheet. The plans provided are not sufficient for septic permitting, but suggest that a suitable septic system can be constructed to serve two dwellings with two bedrooms each.

4/20/2016 Updated referral submitted to the file from Engineering Department regarding revised plan of April 4, 2016 and comments from Engineering that were addressed (see file).

Plans submitted by Applicant/Applicant's Representative

4/6/2016 "Plot Plan – Existing Conditions" prepared for John Kelley 471 Old Barnstable Road East Falmouth, MA – drawing 1 of 3 by BSS Design, Inc. dated January 5, 2016 stamped and signed by Thomas J. Bunker, PLS with a Board date 'received' stamp of April 6, 2016;

"Plot Plan – Proposed Houses and Subsurface Sewage Disposal System" prepared for John Kelley 471 Old Barnstable Road East Falmouth, Massachusetts – Drawing 2 of 3 'Proposed Site Plan' by BSS Design, Inc. dated February 17, 2016 revised on April 4, 2016 stamped and signed by Thomas J. Bunker, PLS with a board date 'received' stamp of April 6, 2016;

"Plot Plan – Proposed Houses and Subsurface Sewage Disposal System" prepared for John Kelley 471 Old Barnstable Road, East Falmouth, Massachusetts – Drawing 3 of 3 'SSDS Profile and Details' dated March 29, 2016 not stamped, with a Board date 'received' stamp of April 6, 2016;

"Proposed Custom Home Kelley Residence 471 Old Barnstable Rd. E. Falmouth MA" drawn by SPB Designs consisting of the following drawings all with a Board date 'received' stamp of February 24, 2016:

- Drawing Number A1 dated 12/14/2015 showing proposed front, left and rear elevation;
- Drawing Number A2 dated 12/14/2015 showing first and second floor plan;
- Drawing Number A3 dated 12/14/2015 showing foundation and right elevation;
- Drawing Number A4 and A5 are framing plans dated 12/14/2015;
- Drawing EX – four pages showing existing buildings (2) elevation and floor plan dated 2/23/016

Hearing:

Thomas Bunker reviewed the existing site conditions and plans to raze the existing two dwellings and construct two new dwellings that will comply with setbacks and lot coverage. The two dwellings will both have two bedrooms and be two-story structures. Mr. Bunker reviewed information submitted to the file relative to the age of the two dwellings on subject property; he reviewed old Assessors' cards submitted showing a dwelling and a 'pickers' cabin. He reviewed the Affidavit from previous owner (D'Agostino) since 1969 he confirmed two dwellings known as "front" and "rear" houses on the property and that each dwelling had two bedrooms and the fact that both units have either been rented or occupied by family since his ownership in 1969 until October 2014. Mr. Bunker reviewed the request by Engineering regarding driveway off Bacardi Lane noting that it is a private road and the applicant has no rights to it. He further explained that the grading off Old Barnstable of subject property is such that separate driveways need to be created and maintained; he noted sight distance and the fact that some trees will be removed by the Town who is marking area for sidewalks to be installed along Old Barnstable. Mr. Bunker reviewed the plan noting the removal of two cesspools and a new 'shared' Title V septic system proposed to service both dwellings. The dwellings are proposed at 28.4' which is well below the 35' height allowed by Town code.

The Board discussed plans with Mr. Bunker and Mr. Kelley. All concerns and questions were addressed.

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

Erick Johnson of 460 Old Barnstable Road stated he was happy to see the improvements to the site and said he has always known the property to be rented out since he purchased his property in 1991.

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

Board discussed and noted that application meets criteria of 240-3 A. in so much as evidence was submitted as to the existence of two dwellings on the property prior to May 19, 1959 and that the dwellings have been occupied through the years without any evidence of abandonment. The Board discussed the two driveways, one for each dwelling and noted site distance improvement with the removal of trees and installation of sidewalk by the Town

Chairman Foreman closed the hearing.

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 471 Old Barnstable Road contains 25,454 square feet of Agricultural A zoned land that is located within the Bournes Pond Coastal Pond Overlay District and partially within a Wildlife Migration Corridor. The applicant applied under Section(s) 240-3 and 240-3 A. of the Code of Falmouth for acknowledgement that both dwellings existed prior to May 19, 1959 and have been used without abandonment; and to raze and reconstruct both dwellings on subject property eliminating some nonconformities. The two dwellings existed on a much larger lot that was sub-divided in 1963; both dwellings remained on the now existing lot. Old Assessors' card shows the 'front' house to be circa 1923 and the 'rear' house known years ago as 'picker's' cabin was later constructed and clearly seen on a 1950 aerial map submitted to the file. Currently the dwelling known as the 'rear' house has a nonconforming setback to the rear property line of 6.7' that requires a 10' setback pursuant to Section 240-68 B. of the Code of Falmouth; and the 'front' house has a nonconforming setback of 17.3' to the front property line off Old Barnstable Road that requires a 25' setback pursuant to Section 240-68 A. of the Code of Falmouth. The 'front' house also has a nonconforming setback of 21.5' to Bacardi Lane that is a private road and created will after the existence of the dwellings on subject property. Both dwelling units have two bedrooms and will maintain two bedrooms through this special permit; both dwellings have cesspools that will be eliminated and a shared Title V septic system installed; and both dwellings will have their own driveway with curb cut off from Old Barnstable Road. Both dwellings will meet are required setback requirements and Title V regulations. There is no proposed increase in the number of bedrooms existing on subject property.

Section 240-3 of the Code of Falmouth – "Preexisting structures and uses." – Sub-section A. requires that

the residential use of two or more dwellings on a lot may be deemed preexisting nonconforming if commenced prior to May 19, 1959 and may be altered or modified by special permit provided the Board of Appeals finds through a preponderance of credible evidence that the use commenced prior to May 19, 1959 and said use was not abandoned or not used for a period of more than two years; and that the number of dwellings on a property may not increase in number.

The Board finds through testimony by the applicant's representative, documentation and information submitted to the file that credible evidence showing the two dwellings existed on subject property prior to May 19, 1959. The Board further finds that an Affidavit was submitted by previous owner (D'Agostino) stating that during his ownership from 1969 to 2014, both dwellings were used by family or were rented out. Further testimony was given by an abutter (directly across the street since 1991 to present) that the dwellings have been occupied until this past year. The Town's Engineering Department confirmed through aerial photos in 1950 that two buildings existed on site as shown on plot plan submitted; and an aerial photo from 1960 shows exact same as 1950 photo with no change to buildings.

Section 240-3 of the Code of Falmouth – "Preexisting structures and uses." allow the Board of Appeals to approve a special permit to extend, alter or change a pre-existing non-conforming structure or use if the Board deems said change is not substantially more detrimental than what exists.

The Board finds that the proposed raze and reconstruction of the two dwellings on subject property will not be substantially more detrimental than what currently exists. The Board further finds that the reconstruction and new location on subject property of both dwellings will meet the required setbacks under Sections 240-68 A. and B. of the Code of Falmouth. Furthermore, the Board finds that the overall site will be greatly improved with elimination of cesspools, installation of a Title V septic system and landscaping.

The Board finds through testimony by the applicant's representative and submission of a document to the file that the driveway of one or both of the units cannot be off the adjacent Bacardi Lane as it is a private road and the applicant has no rights to said Lane. The Board further finds that the applicant will file with the Town Engineering Department to procure permitting for curb cut(s) off Old Barnstable Road to service each dwelling and will comply with Department of Public Works requirements.

The Board finds that the existing two dwellings on subject property both have two bedrooms and that the proposed two dwellings are modest houses will also have two bedrooms, thereby not increasing the number of bedrooms on subject property. The Board further finds through review of the plans submitted that there are basements proposed for the two dwellings and testimony was given by applicant's agent that there will be no bedrooms created within proposed basements

In addition to the above findings, the Board finds that the proposed razing and reconstruction of the two dwellings on subject property will be in harmony with the general purpose and intent of this chapter and does include consideration set forth in Section 240-216 of the Code of Falmouth as follows:

A. The site is adequate in terms of size for the proposed reconstruction of two dwellings as all nonconforming setbacks will be eliminated and comply with Section 240-68 A. and B. of the Code of Falmouth; and that the lot coverage will be in compliance pursuant to Section 240-69 A. of the Code of Falmouth.

B. The site is suitable for the proposed use as the property has been found by the Board of Appeals herein to have the use of two dwellings on said property prior to May 19, 1959 with continued use to present; and that the use will remain that of two, two-bedroom dwellings through this special permit.

C. There will be no impact on traffic flow and safety as there is no increase in the number of bedrooms on the property. There will be a new curb cut off Old Barnstable Road that may minimally impact traffic of said road.

D. The visual character of the subject property will be greatly improved and there does not appear to be any impact on the neighborhood's visual character; and there is no impact on any view or vista from the roadway or abutting properties.

E. The existing cesspools on subject property will be eliminated and the Board of Health will approve a 'shared' Title V septic system for the proposed dwellings prior to issuance of a Building Permit.

F. There are adequate utilities to subject property by virtue of an existing dwelling on site, that be brought up to code.

G. The proposed reconstruction of dwellings discussed and represented herein will have no effect on the supply of affordable housing in Falmouth.

H. There was no Site Plan Review required by the Planning Board and the referral submitted to the file

from the Planning Department had no comment.

I. The application is within compliance of all applicable sections of the zoning bylaws as represented, except for the nonconformities stated herein.

J. The approval of this special permit does not include any affordable housing.

The Board of Appeals has weighed the effects of the proposed razing and reconstruction of two pre-existing nonconforming single-family dwellings on subject property as discussed herein and finds that the beneficial effects of granting this permit outweigh any negative effects there may be. The Board further finds that the granting of this permit will be in harmony with the purpose and intent of the Zoning Bylaw.

Member Potamis 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 John W. and Laura W. Kelley (herein referred to as Applicant) under Section(s) 240-3 and 240-3 A. of the Code of Falmouth to acknowledge existence prior to May 19, 1959 of two dwellings and to allow the two pre-existing nonconforming dwellings to be razed and reconstructed on subject property known as 471 Old Barnstable Road, East Falmouth, Massachusetts. This special permit is subject to the following conditions:

1. The razing and reconstruction of the two dwellings, location on subject property of both dwellings, driveways, setbacks, lot coverage, height of dwellings, septic system for dwellings and use of dwellings shall be as represented to the Board and as shown on plans submitted and reviewed by the Board entitled as follows:

- "Plot Plan – Existing Conditions" prepared for John Kelley 471 Old Barnstable Road East Falmouth, MA – drawing 1 of 3 by BSS Design, Inc. dated January 5, 2016 stamped and signed by Thomas J. Bunker, PLS with a Board date 'received' stamp of April 6, 2016;

- "Plot Plan – Proposed Houses and Subsurface Sewage Disposal System" prepared for John Kelley 471 Old Barnstable Road East Falmouth, Massachusetts – Drawing 2 of 3 'Proposed Site Plan' by BSS Design, Inc. dated February 17, 2016 revised on April 4, 2016 stamped and signed by Thomas J. Bunker, PLS with a board date 'received' stamp of April 6, 2016;

- "Plot Plan – Proposed Houses and Subsurface Sewage Disposal System" prepared for John Kelley 471 Old Barnstable Road, East Falmouth, Massachusetts – Drawing 3 of 3 'SSDS Profile and Details' dated March 29, 2016 not stamped, with a Board date 'received' stamp of April 6, 2016;

- Proposed Custom Home Kelley Residence 471 Old Barnstable Rd. E. Falmouth MA" drawn by SPB Designs consisting of the following drawings all with a Board date 'received' stamp of February 24, 2016: Drawing Number A1 dated 12/14/2015 showing proposed front, left and rear elevation; Drawing Number A2 dated 12/14/2015 showing first and second floor plan; Drawing Number A3 dated 12/14/2015 showing foundation and right elevation; Drawing Number A4 and A5 are framing plans dated 12/14/2015; Drawing EX – four pages showing existing buildings (2) elevation and floor plan dated 2/23/016

2. There shall be no more than two (2) bedrooms allowed in the two dwellings approved herein on subject property. There shall be no more than four (4) bedrooms total allowed on subject property.

3. There shall be no bedrooms or sleeping accommodations created within the basement area of either dwelling on subject property.

4. In the event there is change in the location of dwellings due to review of Septic Plans by the Board of Health, the applicant shall submit revised plans to the Board of Appeals for administrative review by the Zoning Administrator or the Board of Appeals.

5. Any deviation, no matter how minor, from plans submitted and approved, orally or in writing, by this Board, shall be submitted to the Board for approval prior to implementation of said change. Minor changes may be administratively approved by the Zoning Administrator.

6. The Applicant shall meet the requirements of the DPW Water Division.

7. 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.)

8. 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: 025-16

Applicant: JOHN W. KELLEY & LAURA W. KELLEY of North Easton, MA

Subject Property: 471 Old Barnstable Road, East Falmouth, Massachusetts
Map 20, Section 01, Parcel 011, Lot 000A

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, Clerk, 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 025-16 Kelley / filed w/Town Clerk 5/5/16