

## Zoning Board of Appeals Decisions Decisions for: 02-04-2016

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

SPECIAL PERMIT NO: 72-15

APPELLANT(S): HAROLD J. KEOHANE, TRUSTEE SANTUIT REALTY TRUST

SUBJECT PROPERTY: 80 Santuit Road, North Falmouth, Massachusetts  
Assessor's Map: Map 13, Section 10, Parcel 000, Lot 250

DEED/CERTIFICATE: Book 26061 / Page 211

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

### PROCEDURAL HISTORY

1. Under a date of July 29, 2015, the appellant filed with the Falmouth Town Clerk, an Appeal pursuant to Sections(s) 240-202 of the Code of Falmouth appealing the Building Commissioner's Determination that subject property, Lot 250, has been merged with an adjacent lot and is not a buildable lot – subject property is known as 80 Santuit Road, North 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 September 24, 2015
4. The public hearing was terminated on February 4, 2016, wherein the Board consisting of Chairman Kimberly Bielan, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate Mark Cool (sitting as voting member) made a decision to Grant the Appeal, overturning the Building Commissioner's Determination. Minutes from the hearing(s) are on file in the Board of Appeals.
5. The appellant's representative, Attorney Edward Kirk, signed waivers to extend the 100 day hearing process for this appeal. The signed waivers were filed with the Town Clerk and submitted to this record.
6. The appellant was represented at the hearing by Attorney Edward W. Kirk who reviewed the appellants' appeal on the determination of the Building Commissioner regarding 80 Santuit Road not being a buildable lot.
7. 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

9/11/2015 E-mail from Mark Kolligian of 77 Santuit Rd stating concern with drainage on Santuit Road relative to possible new dwelling being constructed.

9/17/2015 Cover Letter dated September 14, 2015 from Attorney Terrence P. Morris with letter attached of same date with comments on subject appeal.

11/2/2015 Letter dated November 2, 2015 submitted by Attorney Terrence P. Morris with three affidavits, accompanied by aerial photos – in opposition to appeal. Attorney Morris represents Sheila Hurley Canty (Lot 21), Cornelius Hurley, Jr. (Lot 20) and Maureen Hurley Kerr.

11/4/2015 E-mail from Attorney Morris with attachments: 1) letter to Building Commissioner Gore from Attorney Morris on January 8, 2013, 2) 'Confidential treatment requested under GL c4, sec 7(26) (c)'; 3) letter of August 22, 2014 from Attorney Morris to Building Commissioner Gore and 4) letter of September 14, 2015 from Attorney Morris to Falmouth Zoning Board of Appeals.

12/30/2015 Letter from Attorney Morris to ZBA re: Attorney Kirk's letter to Frank Duffy of December 8, 2015 and rebuttal of said letter with Exhibit.

1/5/2016 Letter from Attorney Morris to ZBA dated January 5, 2016 in response to Affidavit of Patricia Keohane submitted by Attorney Kirk.

1/25/2016 Letter from Attorney Morris to ZBA dated January 25, 2016 with attached chronology in response to Attorney Kirk's chronology submitted.

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

7/29/2015 Letter of Appeal dated July 29, 2015 with 8 Exhibits attached submitted to Town Clerk and ZBA as filing for appeal.

11/3/2015 Attorney Kirk submitted to the file copies of letter of July 23, 2014 with documentation (14 Exhibits) addressed to Eladio Gore, Building Commissioner.

11/3/2015 Letter of November 3, 2015 from Attorney Kirk regarding timeline of deeds for properties and six (6) Exhibits attached.

12/16/2015 Letter of December 8, 2015 from Attorney Kirk to Town Counsel Duffy re: 'use of common ownership vs. 'control of land' - with attachments

1/4/2016 Letter of December 31, 2015 from Attorney Kirk to ZBA responding to Attorney Morris' letter of December 29, 2015, with Affidavit of Patricia Keohane attached.

2/7/2016 Letter from Attorney Kirk of January 7, 2016 with attached waiver and chronology and proposed findings for subject appeal.

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

7/31/2015 Referral submitted to the file from Assistant Town Planner McCollum with no comment.

8/4/2015 Referral submitted to the file from Building Commissioner Gore with no comment.

9/2/2015 Referral submitted to the file from Board of Health Agent Carignan that states: No comment on this referral. The Health department will review a septic system plan, if a building permit is applied for, when such a plan is submitted with an application for a disposal works construction permit.

10/28/2015 Zoning Administrator reviewed the Building Department file and submitted the following docs: Letter of 7/2/2015 to Attorney Kirk from Eladio Gore, Bldg. Comm., letter of 1/6/2014 letter to Attorney Kirk from Eladio Gore, Bldg. Comm., letter dated 11/27/2001 from Attorney Kirk to Eladio Gore, Bldg. Comm., letter dated 10/29/20015 from Attorney Kirk to Eladio Gore, Bldg. Comm. Note to file from Ollie Fitzpatrick (Assistant ZEO) dated 3/27/2015.

11/6/2015 E-mail from Zoning Administrator Budrow to Town Counsel Frank Duffy requesting on behalf of the Board of Appeals, an opinion on 'control of land vs common ownership' and how does the use of 'common ownership' interact with the principles of 'merge' . Re-sent request 12/2/2015. On 12/16/2015 Budrow sent Town Counsel a copy of an opinion from 2014 to Commissioner Gore from Town Counsel Duffy as reference.

11/17/2015 Board of Appeals staff submitted: Gallagher vs. Falmouth ZBA, Mauri vs. BOA Newton, Marinelli vs. BOA Stoughton, Distefano vs. Town of Stoughton and McKenna vs. Falmouth BOA - cases for Board's review.

2/4/2016 Memo from Town Counsel Duffy to ZBA dated 2/1/2016 in response to the Board's request for opinion on subject lot.

#### Hearing:

Attorney Edward Kirk reviewed the appeal of the Building Commissioner's determination on the buildability of 80 Santuit Road [Lot 250] as 'not buildable'. The Building Commissioner had determined that Lot 250 had merged with Lot 21 because a tennis court had once existed across the common boundary line of Lot 21 and Lot 250. The Building Commissioner also determined that if Lot 25 had not merged with Lot 21, it merged with Lot 32 because a 10' x 10' shed had once been located on Lot 32. Attorney Kirk reviewed the history of the existing lots surrounding (immediately abutting) the subject property as shown on a plan recorded in 1926. He explained that in 1961, Lot 250 and Lot 21 were in the common ownership of Mildred Hurley and C. Keefe Hurley, that a residence was constructed on Lot 21 and a tennis court was constructed partially on Lot 21 and Partially on Lot 250.

In 1989 Lot 21, together with the residence thereon, was conveyed to Sheila Canty.

In 1991 Lot 250 was conveyed to C. Keefe Hurley, Jr. as Trustee of the Keohane Santuit Realty Trust.

In 1994 Lot 32 was conveyed to Patricia Keohane and Lot 250 was conveyed to Harold Keohane.

In 1996, Sheila Canty obtained a special permit to expand the existing dwelling on Lot 21, representing that the tennis court would be removed. Special Permit No. 60-96 was granted with a condition that the tennis court be removed. The tennis court was removed and the existing dwelling was expanded.

There is an existing driveway over Lot 250 that gives access to Lot 32 owned by Patricia Keohane, Trustee of the Kohane Santuit Realty Trust.

Attorney Kirk also provided some family history relating to the conveyance of Lot 32 and Lot 250.

Attorney Morris, representing Sheila Hurley Canty, Maureen Hurley Kerr and Cornelius Hurley, Jr., gave testimony in response to Attorney Kirk's testimony.

#### Public Comment:

##### 11/5/2015 Hearing:

Cornelius Hurley, Jr. (opposing appeal) stated he was disappointed that Attorney Kirk discussed private family matters and does not agree with his facts. He stated his father did not realize he was conveying Lot 250, but that it was needed in order for a septic to be installed for Lot 32.

The Board discussed the issues before them and requested the Zoning Administrator to contact Town Counsel for an opinion on the issues before the Board and buildability of subject property. The Board cautioned Attorney Kirk and Morris to submit information to or contact Town Counsel Duffy. All information is to go before the Board and the request for opinion is strictly on behalf of the Board of Appeals.

#### Continued Public Hearing - February 4, 2016:

The Board discussed the Appeal and opinion from Town Counsel Duffy. The Board shared the opinion at that time with Attorney Kirk and Attorney Morris. The Board then gave Attorney Morris and Attorney Kirk an opportunity to give their summations and offer comment on Attorney Duffy's opinion. After the attorneys' summations, the public comment portion of the hearing was closed and the Board began discussion of the Appeal.

The Board discussed Town Counsel's opinion and reviewed the criteria which Town Counsel stated to be relevant to the issue and evaluated the facts as presented in the many documents which had been submitted and as presented by the verbal testimony to the Board, including Section 240-66 C. (2) and (4) of the Code of Falmouth. Following the discussion and a preliminary consensus by the Board to grant the Appeal - overturning the Building Commissioner's determination, the Board directed the Zoning Administrator to draft an affirmative decision granting the appeal and to include findings which reflected the Board's views as discussed.

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

Chairman Bielan 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:

1. The Board finds the appellant appeals from a determination that Lot 250 is not a buildable lot either because it merged with adjoining Lot 21 when a tennis court once existed on Lot 21 and Lot 250 when those lots were in common ownership, or because a 10' x 10' shed had once existed on Lot 32 which abuts Lot 250.
2. The Board finds that the subject property, Lot 250, known as 80 Santuit Road in North Falmouth contains 12,000 square feet of Residential B zoned land that is not located within any overlay district. Lot 250 is shown on a plan of "Old Silver Beach Village" dated 1926 (filed with the Registry of Deeds) is currently a vacant lot and abuts two lots (Lot 20 and Lot 21) that both have a residential structure.
3. The Board finds that Lot 21 and Lot 250 were conveyed to C. Keefe Hurley and Mildred G. Hurley (husband and wife) by deed in 1961 which deed separately described each lot by metes and bounds.
4. The Board finds that a house was built on Lot 21 and a tennis court was constructed which extended over the boundary line onto Lot 250.
5. The Board finds in 1989 common ownership of Lots 250 and 21 was severed when Lot 21 was conveyed to Sheila Hurley Canty.
6. The Board finds that Lot 250 has not been in common ownership with any lot since 1989.
7. The Board finds that in 1991 Lot 250 was conveyed to Cornelius Hurley, Jr.
8. The Board finds that in 1993 Lot 250 was conveyed to Harold J. Keohane and Lot 32 was conveyed to Patricia Keohane.
9. The Board finds that in 1996, Lot 21 and Lot 250 were in separate ownership. In 1996, Lot 21 received a special permit to construct an addition to the existing dwelling with a condition that the tennis court extending over the boundary on to Lot 250 be removed. In accordance with the condition, the tennis court was removed from Lot 21 and Lot 250.
10. The Board finds that in 2015, the Building Commissioner made a determination – even though the tennis court was eliminated in 1996 – that Lot 250 had been merged with Lot 21 due to the accessory use of a tennis court and that Lot 250 was denied protection under Section 240-66 C. (2) and (4) of the Code of Falmouth
11. The Board finds that the Building Commissioner further determined that Lot 250 would have merged with Lot 32 with the installation of a shed on Lot 250. The Board further finds that Lot 250 did not merge with Lot 32 due to a shed being located on Lot 250 and is protected under Section 24066 C. (2) and (4) of the Code of Falmouth. (An affidavit submitted to the file by the owners of Lot 32 and Lot 250 states that they did not install the shed on Lot 250, nor did they make use of said shed. The shed was removed from Lot 250 in 2002 when the dwelling was constructed on Lot 32.)
12. The Board finds that a single-family residence was constructed on Lot 32 in 2002.
13. Section 240-66 C. of the Code of Falmouth – "Nonconforming Lots" sets forth 8 subsections of criteria that may allow a lot to be buildable – in this instance (2) and (4) are discussed:
  - (2) Any lot not held in common ownership with any adjoining land as of 1 January 1981, not protected by Subsection C(1), shall be eligible to apply for a building permit if the lot has at least

- (a) Forty thousand square feet or area in an AGAA/RAA District;
- (b) Twenty thousand square feet of area in an AGA/RA/PU District;
- (c) Ten thousand square feet of area in an AGB/RB District; or
- (d) Seven thousand five hundred square feet of an area in an RC/GR District for single-family construction only.

(4) 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, or if subsequent to 1 January 1981 the lot was no longer held in common ownership and a dwelling was permitted by special permit on each of such adjoining lots.

14. The Board further finds that Section 240-66 C. (4) offers protection to Lot 250 so as to be deemed not held in common ownership with adjacent Lot 21.

15. The Board finds that Lot 250 and Lot 21 have been assessed separately as buildable lots with no change to lot lines.

16. The Board finds that there has not been a fence or wall indicating use of Lot 21 and Lot 250 in common use.

17. The Board finds there is no recordation or intent by the parties to merge Lot 21 and Lot 250 and that Lot 21 and Lot 250 remain the same as shown on the original plan filed in 1926 with no change in metes and bounds.

18. The Board finds that an accessory structure, in this case a tennis court that crossed the property lines of Lot 21 and Lot 250, was eliminated in 1996 upon condition of a special permit granted to Lot 21 to allow an addition to the dwelling on that lot; and therefore the lot has been vacant (see *Seltzer v. Town of Orleans, Filipowski/Sutherland vs Falmouth Board of Appeals* and *McKenna vs Board of Appeals of Falmouth*).

19. The Board finds that the various ownerships of the lots at various times did not constitute "checkerboarding" and that there was no exercise of control of the lots by any one person which would warrant a finding that the lots were not in separate ownership as reflected by the Deeds.

20. The Board finds that because the parents (C. Keefe Hurley and Mildred Hurley) purchased lots and later conveyed them to their children does not indicate an intent to 'control' the lands; that the various ownerships of the lots at various times did not constitute "checkerboarding" (*Distefano vs. Town of Newton Board of Appeals*) by any one person; and that the 'doctrine of merger' did not occur for Lot 21 and Lot 250 as said lots have always been treated and assessed as separate lots and conveyed separately.

21. The Board finds that it has had the benefit of reviewing the Falmouth bylaws, an opinion of Town Counsel and various Massachusetts cases.

22. The Board finds that Lot 250 qualifies for the protection provided by Section 240-66 C. (2) and (4) based on the findings set forth herein.

Member Murphy made a motion to Grant the Appeal – Overturning the Building Commissioner's Determination. 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 Appeal – Overturning the Building Commissioner's Determination that Lot 250 (80 Santuit Road – subject lot) merged with adjacent lot and is not a buildable lot.

This action deems the subject property – Lot 250, known as 80 Santuit Road in North Falmouth, Massachusetts a buildable lot.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: 72-15

Applicant: HAROLD KEOHANE, TRUSTEE of Belmont, MA

Subject Property: Lot 250 – 80 Santuit Road, North Falmouth, MA  
Map 13, Section 10, Parcel 000, Lot 250

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 Appeal – Overturning the Building Commissioner’s Determination that Lot 250 (80 Santuit Road) is not a buildable lot.

\_\_\_\_\_  
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 72-15 Keohane, Tr - filed w/Town Clerk 2/22/16