

Zoning Board of Appeals Decisions Decisions for: 09-15-2016

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

SPECIAL PERMIT NO: 085-16

APPLICANT/OWNER(S): HERBERT F. FOSTER, JR. and DIANE C. FOSTER
of Somerville, MA

SUBJECT PROPERTY: 199 Surf Drive, Falmouth, Massachusetts
Assessor's Map: Map 47, Section 03, Parcel 079, Lot 001

DEED/CERTIFICATE: Book 5385 / Page 239

SUMMARY: Special Permit Granted with Conditions

PROCEDURAL HISTORY

1. Under a date of July 29, 2016, the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-69E and 240-3 C. of the Code of Falmouth to raze the pre-existing nonconforming single-family dwelling and reconstruct with a lower level garage increasing lot coverage in excess of 20% on subject property known as 199 Surf Drive, 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 15, 2016
4. The public hearing was terminated on September 15, 2016, wherein the Board consisting of Chairman Kimberly Bielan, Vice Chairman Kenneth Foreman, Clerk Terrence Hurrie, Member Ed Van Keuren and Member Paul Murphy 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 Attorney Kevin P. Klauer, II with Ament Law Firm, who reviewed and discussed proposed plans with the Board. Also on behalf of the applicant, Jack Landers-Cauley, PE
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

9/15/2016 At the hearing Attorney Leonard A. Eskenas, on behalf of Gloria M. Arcisz gave testimony and submitted a 'Memorandum of Gloria M. Arcisz' and attached copy of a 'Quit Claim Deed' from Arcisz to Foster (applicant).

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

8/4/2016 Amended 8/5/16 – Attorney Klauer submitted to the Board of Appeals an application, authorization of representation, fee, plans and photo of dwelling.

8/10/2016 Attorney Klauer forwarded an e-mail to Zoning Administrator Budrow with attachments: 1) copy of Deed for subject property; and 2) copy of MGL Ch 184, Sec 23. (documents stamped 8/11/2016 as received by staff). The e-mail states, based on the Ch 184 submitted that: "Conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument". ... Whereas the deed is dated November 3, 1986, those restrictions shall expire on November 3, 2016.

8/15/2016 Attorney Klauer submitted four letters of support from abutters (form letter): 1) Ed Krasenics of 10 Seagull Lane; 2) Helen Lampanelli of 386 Mill Road; 3) Paul and Mary Gately of 22 Seagull Lane; and 4) George Sethares of 16 Seagull Lane.

9/9/2016 Photos of existing dwelling (five pages) with Board date 'received' stamp of September 9, 2016.

9/9/2016 Attorney Klauer submitted a letter dated September 9, 2016 to the Zoning Administrator, with attachments (building calculations of general neighborhood), with information relative to the property history and zoning issues.

Letters/Referrals/E-mails from Town Departments

8/9/2016 Referral submitted to the file by Conservation Commission states: NOI scheduled for 8/24/16 hearing before ConCom.

8/9/2016 Referral submitted to the file by the Planning Department staff with no comment.

8/10/2016 Referral submitted to the file by the Town Assessor with no comment.

8/11/2016 Referral submitted to the file by Falmouth Fire Rescue Department with no comment.

8/16/2016 Referral submitted to the file by the Engineering Department (S. Schluter) with standard comments and with a recommendation that the applicant add drywells, rain garden or other stormwater measure for roof runoff.

Plans submitted by Applicant/Applicant's Representative

"Site Plan" prepared for Herbert Foster of 199 Surf Drive Falmouth, MA – Sheet 1 of 1 drawn by J.E. Landers-Cauley, P.E. with a final revision date of 8/25/2016 – plan is stamped and signed by John Landers-Cauley, P.E. and has a Board date 'received' stamp of September 15, 2016;

Hand drawn (2 pages) Existing First Floor Plan and 2nd Story Deck Plan with a Board date 'received' stamp of 8/5/2016;

"Proposed Residence at 199 Surf Drive Falmouth, MA" prepared for Herb Foster by Mark S. McCarthy of Longfellow Design Build consisting of: Drawing A-0 'Garage Floor Plan' dated August 24, 2016 with a Board date 'received' stamp of September 9, 2016; Drawing A-1 'First Floor Plan' dated July 15, 2016 with a Board date 'received' stamp of August 5, 2016; Drawing A-2 'Second Floor Plan' dated July 15, 2016 with a Board date 'received' stamp of August 5, 2016; and Drawing A-3 'Exterior Elevations' dated July 15, 2016 with a Board date 'received' stamp of September 9, 2016.

Hearing:

Attorney Klauer reviewed the existing site conditions that include the nonconforming setback from the existing dwelling of 17.7' to the front property line off Surf Drive. The existing dwelling that is located within the Velocity zone, consists of approximately 1,300 square feet of habitable space with a roof deck; and is in compliance (with less than 20% lot coverage by structures) with the requirements for lot coverage according to Town Code. The applicant is proposing to raze and reconstruct the structure in order to get additional living space and is required to bring the dwelling into compliance with flood zone regulations. Attorney Klauer reviewed the proposed plans noting that the first floor will be at the 17' elevation (12 feet above grade), the dwelling will be a two-story structure with a height of 34'11" and will be in compliance with all setback requirements. The existing dwelling has three bedrooms and the proposed will have four bedrooms. The property is on Town sewer. Attorney Klauer explained that the application has been before Conservation Commission and they are awaiting a decision. He then reviewed the general neighborhood area relative to the increase in lot coverage and bulk on subject property.

The Board discussed the plans with Attorney Klauer and Jack Landers-Cauley, P.E. and stated concerns about the height of the dwelling proposed with the architectural feature on the second level that is approximately 2.5' in height and 5' wide. The Board asked the applicant if he has considered scaling down

the second floor or removing the architectural feature on top of the second level.

Attorney Klauer answered that the second level is a master suite and living area for the applicant's sister who will be residing with them. Mark Bogosian, Contractor, explained to the Board the reason for the architectural feature (to introduce light into the second floor).

After discussion Mr. Foster, the applicant, stated he would be amenable to removing the architectural feature on top of the second level thereby reducing the height of the proposed dwelling structure.

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

Attorney Leonard Eskenas of Falmouth, Massachusetts stated opposition on behalf of Gloria Arcisz of 11 Seagull Lane (abutting property). Attorney Eskenas cited MGL Ch 184, Section 23 regarding an increase of height restriction she had put on the three lots she sold (which subject property is one of). He further stated that MGL Ch 184, Section 26 states "restrictions may be imposed on parcels as part of a 'common scheme', which he believes this restriction was and therefore he feels the restriction does not expire in November of 2016. He then asked the Board to deny this application.

It was noted that the Chair asked Attorney Eskenas for any case law to which he replied no.

Jim Salinger of 181 Surf Drive stated concern with the proposed structure exceeding the 20%.

Board discussed the application, plans and testimony.

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:

The subject property located at 199 Surf Drive in Falmouth contains 8,429 square feet of Residential C zoned land that is not located within any overlay district. The applicant applied under Section(s) 240-69 E. and 240-3 C. of the Code of Falmouth to raze the pre-existing nonconforming single-family dwelling and reconstruct with a lower level garage increasing lot coverage in excess of 20% on subject property. The property is located within a Velocity zone and will be required to meet flood zone compliance, which requires the proposed dwelling to have a first floor elevation of 17' (will be 12' above grade according to testimony by representative). The proposed dwelling will meet all setback requirements under Section 240-68 A. and B. of the Code of Falmouth, thereby eliminating the current nonconforming front yard setback. The existing dwelling has three bedrooms and the proposed will have four bedrooms. The subject property is hooked to the Town sewer.

The Board made note of the issue raised by Attorney Eskenas on behalf of the property owner at 11 Seagull Lane regarding an easement (with no time frame) from 1986. However, the concerns, details and possible expiration of said easement is a civil matter and not the jurisdiction of this Board.

The Board finds that the applicant's representative submitted four letters of support from surrounding neighbors for the proposed raze and reconstruction of the single-family dwelling as represented herein.

Section 240-3 C. of the Code of Falmouth allows 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 existing one-story dwelling has approximately 1,342 square feet of living space and the proposed two-story dwelling will have approximately 3,250 square feet of living space. The Board further finds that the increase in living space will be an enhancement to the utilization of the dwelling by the applicants and serve their need for additional family member. Furthermore, the Board finds that the proposed reconstructed dwelling will not be substantially more detrimental than what exists.

The Board finds that the proposed dwelling structure will have a height of 34'11" which includes a 2' x 5' (approximately) architectural feature with windows to give additional light to the second level space and is not considered a cupola. The maximum height allowed for a residential structure is 35' pursuant to Section 240-70 of the Code of Falmouth. The Board further finds that the applicant, through his testimony (Mr. Foster), will eliminate the 2' x 5' architectural feature from the plan, which will reduce the height of the structure proposed. Furthermore, the Board finds that according to the calculations noted in the "Size Comparison Chart" submitted by the applicant's representative and photos submitted to the file of dwellings in the general area, the proposed dwelling is in average height and size of approximately eleven out of thirty-six dwellings – five of which have been recently improved.

Section 240-69 of the Code of Falmouth – "Maximum lot coverage." – sub-section E. states: In residence B, C and Agricultural B Zoning Districts maximum percent lot coverage by structures of to 25% may be allowed by special permit by the Board of Appeals. In issuing the special permit the Board of Appeals shall take into consideration the size and height of the structure in relation to the average size and height of structures in the neighborhood, the effects of shadow on adjacent properties, the impact on views and vistas from public ways, and the effect of nitrogen on coastal embayments.

The Board finds that the proposed reconstruction of the single-family dwelling discussed herein is in average size and height of the general area of the neighborhood of subject property (see file for sizes and height of dwellings in 36 properties within the general area); that the proposed dwelling structure will not have a shadow effect on the abutting properties due to the location of the dwelling and those of dwellings on properties known as 386 Mill Road, 185 Surf Drive and 189 Surf Drive; the proposed dwelling will not have any impact on a view or vista from a public roadway as the subject property is on the corner of two public roadways and across the public roadway is the ocean; and there is no impact on an coastal embayments. The Board further finds after consideration of the criteria set forth in Section 240-69 E., as noted above, that the increase in lot coverage is approvable by this Board.

In addition to the above findings, the Board finds that the proposed raze and reconstruction of the single-family dwelling represented herein 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 dwelling as the plans show the elimination of a nonconforming front yard setback and that all other setbacks meet the requirement of Section 240-68 A. and B. of the Code of Falmouth. The lot coverage by structures on subject property will exceed the 20% maximum allowed under Section 240-69 A. of the Code of Falmouth and is herein approved to increase to 23.6% under Section 240-69 E. of the Code of Falmouth.
- B. The site is suitable for the proposed use as the property is zoned residential and has been and will continue to be used as a single-family dwelling.
- C. There will be no impact on traffic flow as there is no change in the location of the driveway; the bedroom count will increase from three to four bedrooms which the Board finds as a minimal impact in traffic and with no effect on public safety.
- D. The visual character of the subject property will be improved and there does not appear to be any impact on the neighborhood's visual character as there are several houses in the surrounding area that have been improved such as this; and there is no impact on any view or vista from the roadway.
- E. The subject property is attached to the Town sewer.
- F. There are adequate utilities to subject property by virtue of an existing dwelling on site. However, the Applicant will have to contact the Town Water Department regarding possible updating of water system.
- G. The proposed dwelling reconstruction 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 raze and reconstruction of the single-family dwelling 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 Foreman made a motion to Grant the Special Permit with conditions. Member Murphy 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 Herbert F. Foster, Jr. and Diane C. Foster (herein referred to as Applicant) under Section(s) 240-3 C. and 240-69 E. of the Code of Falmouth to raze the pre-existing nonconforming single-family dwelling and reconstruct dwelling with a lower level garage increasing lot coverage in excess of 20% on subject property known as 199 Surf Drive, Falmouth, MA. This special permit is subject to the following conditions:

1. The raze and reconstruction of the single-family dwelling, bedroom count, lot coverage, setbacks and use of dwelling shall be as represented to the Board and as shown on plans submitted and reviewed by the Board entitled as follows:

- "Site Plan" prepared for Herbert Foster of 199 Surf Drive Falmouth, MA – Sheet 1 of 1 drawn by J.E. Landers-Cauley, P.E. with a final revision date of 8/25/2016 – plan is stamped and signed by John Landers-Cauley, P.E. and has a Board date 'received' stamp of September 15, 2016;

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2. The applicant shall revise Drawing A-3 of the architectural plans showing the elimination of the architectural feature on top of the second floor said to be approximately 2' x 5' with windows. The Drawing shall also note the revised height of the dwelling with the elimination of said feature. The revised Drawing shall be submitted to the Board of Appeals for approval prior to the issuance of a building permit.

3. There shall be no more than four bedrooms allowed on subject property.

4. Any additional accessory structure(s) on subject property will require approval by 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: 085-16

Applicant: Herbert F. Foster, Jr. and Diane C. Foster of Somerville, MA

Subject Property: 199 Surf Drive, Falmouth, Massachusetts
Map 47, Section 03, Parcel 079, Lot 001

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 085-16 Foster, Jr. Filed w/ Town Clerk 9/27/16