

Zoning Board of Appeals Decisions Decisions for: 03-03-2016

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

SPECIAL PERMIT NO: 001-16

APPLICANT: THOMAS F. SMITH of Mashpee, MA
OWNER: Joan P. Gilmartin, Trustee of the Gilmartin Family Trust

SUBJECT PROPERTY: 30 Martin Road, Waquoit, MA
Assessor's Map: Map 30, Section 04, Parcel 002, Lot 001

DEED/CERTIFICATE: Certificate 116016, Lot 1 – Plan 32101-B

SUMMARY: Granted Special Permit With Conditions

PROCEDURAL HISTORY

1. Under a date of January 6, 2016, the applicant applied to the Zoning Board of Appeals for a modification of an existing Special Permit (7-98) pursuant to Section(s) 240-3 C. of the Code of Falmouth to convert the existing structure from a plumbing business to a general contractor's office and storage creating residential space on the 2nd floor on subject property known as 0 Arrowhead Circle and 30 Martin Road, Waquoit, 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 February 4, 2016.
4. The public hearing was terminated on March 3, 2016, wherein the Board consisting of Chairman Kimberly Bielan, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate Mark Cool 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 Geoffrey Nickerson of Oppenheim and Nickerson, LLP, who reviewed and discussed proposed plans with the Board.
6. On February 11, 2016 Attorney Nickerson submitted a letter requesting for the Board to amend the application to remove the residential use, originally requested, from the application.
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

- 2/9/2016 Lars Berggren of 33 Martin Road submitted information regarding complaint of subject property from 2012 and current photos of subject property and activity on said property.
- 2/17/2016 E-mail letter to the ZBA from John and Debra Lyons of 25 Martin Road giving history of subject property, issues, violations and photos of subject property and activities.
- 2/28/2016 Letter to the ZBA dated February 7, 2016 of concerns and issues regarding existing and proposed business on subject property. Letter was signed by four (4) abutters in neighborhood.
- 3/1/2016 E-mail letter to the ZBA from John and Debra Lyons amending first communication of 2/17/2016 to the Board regarding concerns and info of subject property.

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

1/28/2016 Letter from Attorney Nickerson dated January 28, 2016 requesting to amend this application to remove the requested residential use on 2nd floor; Exhibits A through E attached (Exhibit A SP #107-92, Exhibit B SP #7-98, Exhibit C Affidavit from Daniel P. Gilmartin, Exhibit D New First Floor Plan, Exhibit E Second Floor Plan, Exhibit F Title 5 Official Inspection Form dated 5/6/2015, Exhibit G is 8 Certificates of Registration for vehicles – Note: One is a personal passenger vehicle [Lexus] in the name of Bonnie Smith)

2/4/16 Attorney Nickerson submitted photos of structure and subject property (4) and a copy of the ANR plan for Lot 1 and Lot 7 that was never filed with the Registry of Deeds – Lots not merged.

Letters/Referrals/E-mails from Town Departments

2/5/2016 ZBA staff reviewed the file in the Building Department/Zoning Enforcement and retrieved documents regarding zoning enforcement complaints and actions to submit to file

3/3/2016 Referral submitted to the file by the Engineering Department (S. Schluter) that states: This application was reviewed only for impacts to public right of ways and public utilities. Martin Road is a public right of way and Arrowhead Circle is a Private right of way in this area. No alterations are proposed to the Town right of way; any changes within the right of way would require filling a permit with the Engineering Division. Any connections or alterations to public utilities would require permission from the appropriate Town Department. The project must not direct any stormwater runoff to public property, abutters or right of ways.

1/28/2016 Referral submitted to the file by Board of Health Agent David Carignan states: No information on the existing septic system is available in the ZBA file, nor is there a break- down of the proposed uses of the property in terms of estimated wastewater flows, office space area and bedroom count, for example, so no positive comments can be made on this proposed project at this time.

1/15/2016 A letter was submitted to the file by the Falmouth Fire Rescue Department's Lt. Mel Trott that states a more accurate building plan with floor plans and dimensions would be helpful for a determination of adequacy of safety and at the very least the building will require a monitored Fire Alarm System.

1/12/2016 Referral submitted to the file by Building Commissioner Gore has no comment.

1/6/2016 Referral submitted to the file by the Planning Department staff has no comment.

Plans submitted by Applicant/Applicant's Representative

2/22/2016 "Site Plan of Land Prepared for Thomas F. Smith Showing the Existing Conditions" as drawn by John P. Doyle, PLS with a revised date of 2/20/16 – stamped and signed by John P. Doyle, III, PLS on 2/22/16 and with a Board date 'received' stamp of February 22, 2016; and

Hand drawn First and Second Floor Plans for Thomas Smith with a Board date 'received' stamp of January 28, 2016 (2 pages).

Hearing: February 4, 2016

Attorney Nickerson reviewed the existing site conditions, existing special permits on subject property and proposed modification to change use to General Contractor's office with a residence on the second floor. The special permit existing is for a plumbing business and has no residential use. Attorney Nickerson explained the first floor would be used for general contractor use and the second floor would be a residence with one bedroom and two offices. He noted that the existing septic is adequate for three bedrooms, but there will only be one in the residence. He stated that the application is for the two lots that show on an ANR plan from 2006 that was never filed with the Barnstable Registry of Deeds. The applicant would like to have parking in the rear for the residential use and the seven spaces at the front of the property will accommodate seven vehicles used in the business Attorney Nickerson stated that the hours of operation will be the same as existing which he said is 6 AM to 6 PM

The Board discussed plans with Attorney Nickerson and stated concerns with the proposed meeting the criteria of Section 240-162 of the Code of Falmouth, hours of operation, employee parking, number of employees, addition of a residential use and proposed use on Lot 7.

Attorney Nickerson and Dan Gilmartin (current owner) answered questions by the Board. When questioned on the past use of subject property and complaints Mr. Gilmartin stated that he had up to 20 employees, 10 trucks, deliveries to the properties, two secretaries in the building, had multiple storage units outside to the right of existing building, contractors and customers came to the site, his hours were 24/7 and he had a dumpster on site (front lot). Attorney Nickerson stated, when asked about the ANR plan submitted to the file but not filed with the Registry of Deeds that the ANR plan will be submitted to the Registry and would let the assessor know that the lots are merged.

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

Lars Berggren of 33 Martin Road spoke in opposition stating that the site (subject property) has a lot of scrap metal currently with very loud grinding and that auto repairs were also being done on site. Mr. Berggren stated that there have been many complaints on the activities and noise from the site with police visits; people have been living there. He questioned if the plumbing operation has existed for the past few years as other activities have taken place.

The Board discussed and determined that the need more information submitted including a plan showing the two lots or a filing of the ANR with the Registry, information about vehicles on site, use of Lot 7 (rear lot), revised floor plans, further review by the Fire Department for commercial and residential use of existing structure.

Member Murphy made a motion to continue the hearing to February 25, 2016 at 6:30 PM. Member Van Keuren second the motion. Motion carried 5 – 0.

The hearing date of February 25, 2016 did not have a quorum. This hearing was re-scheduled to March 3, 2016 with notification to applicant and his representative.

Hearing Continuation: March 3, 2016

Attorney Nickerson explained that he had submitted a request to the Board to remove the residential use from the application. The second floor will now be used for office space and storage. He stated that Mr. Smith will have an office on second floor along with a full-time secretary and a part-time bookkeeper. The hours of operation are proposed as Monday through Saturday 6 AM to 6 PM with no Sunday hours. Mr. Smith has at least ten (10) employees. Attorney Nickerson review the plot plan noting that the proposed application will be for Lot 1 only and Lot 7 will not be used by the applicant or for this special permit use. Parking is proposed with five spaces in the front of the building and five spaces at the south side of the building in the right of way (see plan). The concrete slab at the rear of the building will be used to stage a backhoe. Attorney Nickerson reviewed the seven (7) company vehicles that will be staged on site: 2 pickup trucks, 1 backhoe and 4 trailers – one trailer is a construction trailer (enclosed) and three are utility trailers (open or boxed sides).

The Board shared concerns about second floor use, parking in a right of way, number of employees coming to and from the site, parking for employees on site and equipment staged and used at site.

Mr. Smith informed the Board that there is no stove in the kitchenette on second floor.

Attorney Nickerson informed the Board that after speaking with the applicant, he is willing to move all parking out of right of way and relocate it to the front of the building.

Public Comment:

Lars Berggren of 33 Martin Road stated his concerns with the previous and proposed business use in the neighborhood and the overuse of any commercial entity.

Board discussed and reviewed testimony for application.

Member Cool made a motion to close the hearing. Member Van Keuren seconded the motion. Motion

carried 5 - 0.

Chairman Bielan closed the hearing.

Board discussed concerns and possible findings and suggest that the Zoning Administrator draft an affirmative decision based on their discussion and bring back to the Board for review and possible vote. Member Cool made a motion to direct the Zoning Administrator to draft an affirmative decision and bring back to the Board at a future open meeting for Board's review and possible vote. Member Murphy 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 subject property located at 30 Martin Road in Waquoit contains 11,963 square feet of Agricultural a zoned land that is in the Quashnet River Coastal Pond Overlay and Wildlife Corridor Overlay Districts. The applicant applied to modify the existing Special Permit(s) under Section(s) 240-3 C. of the Code of Falmouth to allow for a general contractor's office and storage. The initial request for a residence within existing structure on subject property was eliminated per the request of the applicant (see letter dated February 11, 2016 from Attorney Geoffrey Nickerson submitted to the file same date). The previous Special Permit 107-92, allowed a dormer addition to the existing structure used for a plumbing business and to allow alternate parking surface - this Special Permit noted that only one business can operate from the site. Special Permit 7-98 requested more than one business to operate from the site and to extend the nonconforming parking area on an alternate surface. This Special Permit denied the additional business use, allowed the alternate parking surface, allowed only seven (7) vehicles on site and no outside parking of any equipment.

The Board finds that the business operation proposed herein will be conducted on Lot 1 only and not Lot 7 as first proposed. The ANR plan drawn in the 1990's was never filed with the Registry of Deeds and therefore Lot 7 and Lot 1 have not been merged and are separate lots.

The Board finds through testimony and submission of letters by abutters that the previous business was not compatible as it existed in the neighborhood. Special Permit #7-98 for subject property states that violations did occur regarding over use of the property by more than one business and the Board found and conditioned that there should be only seven (7) vehicles on site - not the ten (10) or more which the previous owner stated he was allowed at the hearing and one business operation so that the neighborhood is not further impacted by additional traffic. Furthermore, through review of the complaints and violations found on subject property by the Building and Zoning Department, that previous owner [Gilmartin] was notified that the use of property was being used for a scrap metal business and further that there were persons staying overnight in an 'apartment' over the garage (see letter from Zoning Enforcement Officer dated December 5, 2012 submitted to the file). In the letter the owner of the property was reminded that he was notified in May of 2012 that the property could not be used for sleeping purposes and that application to the Board of Appeals is required to modify the special permit to allow for a residence use.

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 proposed change in use of the existing structure on subject property to a General Contractor's Office will not be substantially more detrimental than what currently exists. The Board further finds through testimony by the applicant's representative, based on concerns by the Board, that the parking will be eliminated from the right-of-way [Arrowhead Circle] and all parking will be maintained on Lot 1 - subject property. Furthermore, the Board further finds that the proposed use will be conditioned by the Board so as to be in keeping with the residential aspect of the area.

The Board finds through testimony by the applicant's representative that the ten (10) laborers employed by the applicant, will drive directly to work sites and not park on subject property or Lot 7 which is located behind [abutting] Lot 1 [subject property]. The Board further finds through testimony of the applicant's representative that one full-time secretary and one part-time bookkeeper will be on site within

the office on the second floor – as well as the applicant [Mr. Thomas]. Furthermore, the Board finds that the applicant is amenable to the parking of no more than seven vehicles, as submitted to the file and noted herein, will be allowed on Lot 1 and located at the front of the existing building.

The Board finds that the applicant's representative, in a letter dated February 11, 2016 and submitted to the file, requested that the request for use of a residence on the subject property be eliminated from the application. However, there was no revision of a second floor plan submitted to the file; only testimony that the upstairs would be used for office and storage space as the testimony given was that the applicant would have an office with one full-time secretary and a part-time bookkeeper. The Board further finds that parking space for the office employees was not designated separate from the proposed seven parking spaces that will be located, as conditioned herein, at the front of the existing building on site.

The Board finds that the hours of operation requested to start at 6:00 AM would have an adverse impact on the neighborhood and therefore the Board will require that the hours of operation for the General Contractor's Office will be from 7:00 AM to 7:00 PM Monday through Saturday. The Board further finds that there shall be no loading or off-loading of any equipment prior to 7:00 AM.

The Board finds that there shall be no building materials stored on the exterior perimeter of the existing building on subject property. The Board further finds that the shed at the northeast corner of the lot shall be relocated so that it is in compliance with setback regulations for a shed.

The Board finds that approval of this special permit will require a one-year administrative review by the Board.

In addition to the above findings, the Board finds that the proposed modification of special permit from a plumbing operation to a General Contractor's Office 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 use as there is no increase in any existing nonconformity and no new nonconformity.
- B. The site is suitable for the proposed use as conditioned herein.
- C. There will be no impact on traffic flow and safety as the proposed use will have less of an impact than what previously existed on site; and there is no change in the location of the existing driveway on site.
- 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; and there is no impact on any view or vista from the roadway or abutting properties.
- E. The sewage disposal system is in place and the residential aspect of the application has been eliminated at the applicant's request.
- F. There are adequate utilities to subject property by virtue of an existing structure and use on site.
- G. The proposed change in use as 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.

Member Cool 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 Modification of Special Permit 7-98 to Thomas F. Smith (herein referred to as Applicant) under Section(s) 240-3 C. of the Code of Falmouth to convert the existing structure from a plumbing business to a General Contractor's Office and storage on subject property known as 30 Martin Road, Waquoit, Massachusetts. This special permit is subject to the following conditions:

1. The applicant shall revise the "Site Plan of Land" to show accurate parking spaces on site according to the approval herein [seven parking spaces at the front of the building]; and the relocation of the shed at

the rear of the property so as to be in compliance with setback requirements. The revised "Site Plan of Land" shall be submitted to the Board of Appeals for approval within thirty (30) days of the filing of this Special Permit with the Town Clerk.

2. The applicant shall revise the second floor plans showing the elimination of a bedroom and the proposed office spaces. The revised floor plan shall be submitted to the Board of Appeals for approval within thirty (30) days of the filing of this Special Permit with the Town Clerk.

3. Hours of operation of the General Contractor's Office use approved herein shall be 7:00 AM to 7:00 PM Monday through Saturday. There shall be no hours of operation conducted on Sundays.

4. There shall be no off-loading or loading of equipment on site prior to 7:00 AM.

5. There shall be no construction work conducted on subject property.

6. All construction materials on site shall be stored on the interior of the structure.

7. There shall be no more than two full-time employees (including the owner of business) and one part-time employee employed on site.

8. There shall be no sleeping accommodations created within the existing structure on subject property. There shall be no overnight stays by any individual on subject property.

9. There shall be no cooking facilities of any kind allowed on subject property. This shall include no stove, oven or hot plate.

10. There shall be no more than two pickup trucks, one back hoe, three utility trailers and one construction trailer on site at any time. The registration for these vehicles shall be submitted to the file on a yearly basis upon registration. The applicant shall notify, and submit copy of registration, to the Board of Appeals any vehicle replacing another vehicle approved herein.

11. The applicant shall have hazmat materials in place in the event of fuel/oil leakage from equipment on site.

12. There shall be no more than seven (7) vehicles on site at any one time. All vehicles shall be parking at the front of the building

13. There shall be no maintenance of any vehicle conducted on site. All repairs and/or maintenance of any vehicle used in the operation approved herein shall be conducted off site.

14. This Special Permit [modification] shall have a one-year administrative review at a regularly scheduled meeting of the Board of Appeals. The one-year shall commence upon the expiration of the 20 day appeal process if there are no appeals. In the event of an appeal of this Special Permit, a one-year review will commence the date of a Massachusetts Court upholding the grant of the Special Permit.

15. 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.

16. 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.)

17. 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: 001-16

Applicant: THOMAS F. SMITH of Mashpee, MA

Subject Property: 30 Martin Road, Waquoit, Massachusetts
Map 30, Section 04, Parcel 002, 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 [Modification of Special Permit 7-98] 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 001-16 / Smith / filed w/Town Clerk 3/14/16