

**FALMOUTH ZONING BOARD OF APPEALS**

**FINDINGS AND DECISION**

**SPECIAL PERMIT NO:** 131-16

**APPLICANT/OWNER:** JAY RAO of Needham, MA

**SUBJECT PROPERTY:** 124 North Falmouth Highway, North Falmouth, Massachusetts  
**Assessor's Map:** Map 12, Section 04, Parcel 008, Lot 000

**DEED/CERTIFICATE:** Book 24958 / Page 333

**SUMMARY:** Special Permit Granted with Conditions

**PROCEDURAL HISTORY**

1. Under a date of December 20, 2016, the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-3 A. and 240-23 G. (1) of the Code of Falmouth to have the Town acknowledge that two (2) separate dwelling units existed prior to May 19, 1959 and to allow the raze and reconstruction of the two pre-existing nonconforming dwellings with one having a three (3) car garage on subject property known as 124 North Falmouth Highway, 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 scheduled to be opened on February 9, 2017, however, due to inclement weather the hearings for February 9<sup>th</sup> were re-scheduled to February 16, 2017 wherein said hearing was opened.
4. The public hearing was terminated on February 16, 2017, wherein the Board consisting of Chairman Kimberly Bielan, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate Robert Dugan (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 Attorney Kevin P. Klauer, II of Ament Klauer LLP, who reviewed and discussed proposed plans with the Board.
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)**

12/20/2016 Attorney Klauer submitted on behalf of the applicant, an application with authorization for representation, fee, 4 copies of "Plot Plan", 4 copies of existing/proposed architectural plans, photographs aerial views from various years – starting with 1950, photos of existing dwelling on site, copies of old Assessors' cards of subject dwellings noting two dwellings on subject property and an affidavit of Wilma Bourne dated December 2, 2011 stating knowledge of 2 dwellings on subject property prior to May 19, 1959

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

12/22/2016 Referral submitted to the file from the Director of Assessing with no comment

12/22/2016 Referral submitted to the file from the Conservation Commission that states: *Notice of Intent is scheduled with ConCom for 1/4/2017.*

12/23/2016 Referral submitted to the file from the Falmouth Fire Rescue Department with no comment

01/12/2017 Referral submitted to the file from the Planning Department staff with no comment

01/19/2017 Referral submitted to the file from the Town Engineering Department that states: *We reviewed the aerial photos available in our office. It appears that in the 1950, two structures can be seen on the lot in questions. We found evidence that there are two addresses used for this lot 124 and 122. E911 has this in their records, but in the interest of safety, we recommend that there be clearer indication of 116, 122 and 124 addresses off the shared driveway than what is there now.* (See photos attached to e-mail of same date).

01/19/2017 E-mail from Town Engineering Department (Scott Schluter) to Zoning Board regarding subject property and addresses. Photos attached noting two structures on subject property in the 1950's. Engineering further noted concern with appropriate display of addresses (specifically 116, 122 and 124 North Falmouth Highway).

### **Plans submitted by Applicant/Applicant's Representative**

"Plot Plan – Existing Conditions for 124 North Falmouth Highway" prepared for Jay Rao in Falmouth, MA by Falmouth Engineering, Inc. – Sheet 1 of 3 dated December 8, 2016, stamped, signed and dated by Gary S. Labrie, PLS on 12/16/16 with a Board date 'received' stamp of December 20, 2016;

"Plot Plan for #124 North Falmouth Highway" prepared for Jay Rao in Falmouth, MA by Falmouth Engineering, Inc. – Sheet 2 of 3 dated December 8, 2016, stamped, signed and dated by Gary S. Labrie, PLS on 12/16/16 and stamped and signed by Michael J. Borselli, PE – with a Board date 'received' stamp of December 20, 2016; and

“Rao Residence 124 North Falmouth Highway Falmouth, MA” as drawn by Steven Baczek Architect consisting of Drawing A-0 ‘Title Sheet, Drawing A-1 ‘Proposed Floor Plan’, Drawing A-2 ‘Proposed Front and Rear Building Elevations’, Drawing A-3 ‘Proposed Left and Right Side Building Elevations’, Drawing A-4 ‘Proposed Upper and Lower Level Carriage House – 1260 sq ft’, Drawing A-5 ‘Proposed Front and Rear Bldg Elevations Carriage House – 1260 sq ft’, Drawing A-6 ‘Proposed Left and Right Bldg Elevations Carriage House – 1260 sq ft’, Drawing A-7 ‘Existing Residence 1 Pondsides Residence’ and Drawing A-8 ‘Existing Residence 2 Streetside Residence’ – all plans dated 12/12/2016 and all with a Board date ‘received’ stamp of December 20, 2016.

#### Hearing:

Attorney Klauer reviewed the existing 2.7 acre site that has two dwellings. He noted the nonconforming setback of the dwelling closest to the pond that was constructed approximately in 1949 is 40’ to the waters of Wing Pond that requires a 50’ setback; and the nonconforming setback of the garage structure with dwelling living space above that was constructed approximately in 1930 has an .08’ to the side property line that requires a 10’ setback. Lot coverage by structures on subject property is in compliance with the bylaw at 5.2%. The applicant is required under Section 240-3 A. of the Code of Falmouth to submit credible evidence that both structures on subject property existed prior to May 19, 1959 and have been used consistently since then. Attorney Klauer reviewed the aerial photos from the 1950 to the year 2001 that shows both structures unchanged since 1950. He noted the old assessors’ cards that were submitted to the file confirm the age of the structures and also notes that the structure by the pond was remodeled in 1968. Also submitted to the file is an Affidavit from Mrs. Bourne who was an abutter and friend of the previous owner [Podgoursky] who owned the property since 1947. The Affidavit notes that Mrs. Bourne knew the previous owners were not year round residents and used one house during the summer and rented the other to a year-round resident until 2010 when they sold the property to the applicant. Attorney Klauer reviewed the removal of the existing garage with living space above with the nonconforming setback to the side property line and constructing a three-car garage with living space above that will be in compliance with setbacks. The dwelling closest to Wing Pond will be razed as well and constructed in compliance with all setbacks according to zoning. He explained that the plan has been approved by the Conservation Commission and an Order of Conditions have been issued and submitted to the file.

The Board discussed plans with Kevin Klauer and asked about existing concrete wall for the existing below grade garage with structure above, proposed landscaping and issues with appropriate signage of addresses for 116, 122 and 124 No. Falmouth Highway that was noted in referral from Engineering Department. It was noted that there is not a basement proposed for either of the dwellings on the subject property and that access to subject property is by benefit of an easement through 0 North Falmouth Highway. All concerns and questions were addressed.

Chairman Bielan asked for any public comment in support or opposition of the proposed project. There were no comments.

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 124 North Falmouth Highway in North Falmouth contains 2.7 acres of Residential B zoned land that is located partially within the Search and Rescue Overlay District and a portion is within the Natural Heritage and Endangered Species Program (NHESP) Overlay District. The applicant is seeking relief by the Board of Appeals as the subject property is nonconforming or non-complying due to two dwellings on the property whereas only one dwelling is allowed – unless the Board finds herein that both dwellings existed on the lot prior to May 19, 1959. The applicant applied under Section(s) 240-3 A. of the Code of Falmouth for acknowledgement that both dwellings did in fact exist on subject property prior to May 19, 1956 without discontinuance of use – see affidavit submitted to file as well as photos from 1950 and other years. The applicant also applied for relief under Section 240-23 G. (1) to be allowed a three-car garage over 900 square feet in size for a dwelling that is of equal size to proposed garage [240-23 G. (1)(b)].

Section 240-3 A. of the Code of Falmouth requires an applicant to submit credible evidence that more than one structure on a subject property existed prior to May 19, 1959 and that said dwellings were used continually without a discontinuation or abandonment of two (2) years.

The Board finds that the applicant has submitted credible evidence that two dwellings existed on subject property through submission of photographs, old Assessors' cards and an affidavit by an individual as follows: Photographs submitted to the file by the applicant and the Town Engineering Department show two structures on subject property that are in exact location and footprint as existing today; that the old Assessors' cards from the 1950's show that two dwellings existed – one circa 1930 and one circa 1949; and that the affidavit from an individual who was a good friend of the previous owner of the subject property from 1947 to 2010 states that both dwelling units existed on subject property and that the then owners used one during the summer months and rented the other dwelling out to year round tenants.

The Board finds through testimony by the applicant that there is currently no intent to rent the dwellings out, that they will be utilized by family members and that they have not rented either unit out since purchasing the property in 2010.

Section 240-23 G. (1) (b) of the Code of Falmouth requires application to the Board of Appeals for a special permit to be allowed garage space for more than two (2) cars if the footprint of the garage is more than 900 square feet in size or if the garage is 50% of the footprint of the principal structure – whichever is less.

The Board finds that the proposed three-car garage is more than 50% of the footprint of the principal structure which is the habitable space above said garage. The Board further finds that the proposed garage with dwelling above does not adversely impact the subject property that consists of 2.7 acres and is appropriate for proposed use.

The Board finds through testimony by the applicant's representative and by the applicant that there will be a stairway from the second floor of the garage structure from dwelling [above] to grade and that the plan will be revised to show said stairs.

The Board finds that the Conservation Commission has approved this project – a signed Order of Conditions was submitted to the file.

The Board finds through submission of a referral from the Engineering Department that the posted addresses for the shared driveway of 124, 122 and 116 North Falmouth Highway should be more clearly posted in the interest of public safety, with possible directional signage to each dwelling.

The Board finds that the proposed change to the pre-existing nonconforming dwellings on subject property will not be substantially more detrimental than what currently exists.

In addition to the above findings, the Board finds that the proposed raze and reconstruction of the two existing 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 raze and reconstruction of the two existing dwellings as the property consists of 2.7 acres and that sufficient and credible evidence was submitted to the file that both dwellings on subject property did exist prior to May 19, 1959 and have been used consistently to present day.

B. The site is suitable for the proposed use as the property is zoned Residential B and findings above note that the two dwellings existing on said property were created prior to May 19, 1959 and utilized as two single-family dwellings.

C. There will be no impact on traffic flow and safety as there is no change in the location of the existing driveway on site that is accessed through an easement.

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 the property is set back from North Falmouth Highway and not seen from the roadway; and there will be no impact on any view or vista from the roadway or abutting properties.

E. The subject property has sewage disposal systems that will be reviewed by the Board of Health for adequacy prior to the building permit being issued for this project.

F. There are adequate utilities to subject property by virtue of existing dwellings on site. However, the Applicant will have to contact the Town Water Department regarding updating of water service as there was no referral from the Water Department submitted to the file.

G. The proposed reconstruction of the 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 the two dwellings on subject property as reviewed 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 Van Keuren 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 Jay Rao (herein referred to as Applicant) under Section(s) 240-3 A. and 240-23 G. (1) of the Code of Falmouth acknowledging that two dwellings existing on site prior to May 19, 1959, to raze and reconstruct both dwellings and to allow a three-car garage on subject property known as 124 North Falmouth Highway, North Falmouth, Massachusetts. This special permit is subject to the following conditions:

1. The raze and reconstruction of the two existing dwellings, location of dwellings, setbacks, height of structures, lot coverage and use of dwelling units 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 for 124 North Falmouth Highway” prepared for Jay Rao in Falmouth, MA by Falmouth Engineering, Inc. – Sheet 1 of 3 dated December 8, 2016, stamped, signed and dated by Gary S. Labrie, PLS on 12/16/16 with a Board date ‘received’ stamp of December 20, 2016;
  - “Plot Plan for #124 North Falmouth Highway” prepared for Jay Rao in Falmouth, MA by Falmouth Engineering, Inc. – Sheet 2 of 3 dated December 8, 2016, stamped, signed and dated by Gary S. Labrie, PLS on 12/16/16 and stamped and signed by Michael J. Borselli, PE – with a Board date ‘received’ stamp of December 20, 2016; and
  - “Rao Residence 124 North Falmouth Highway Falmouth, MA” as drawn by Steven Baczek Architect consisting of Drawing A-0 ‘Title Sheet, Drawing A-1 ‘Proposed Floor Plan’, Drawing A-2 ‘Proposed Front and Rear Building Elevations’, Drawing A-3 ‘Proposed Left and Right Side Building Elevations’, Drawing A-4 ‘Proposed Upper and Lower Level Carriage House – 1260 sq ft’, Drawing A-5 ‘Proposed Front and Rear Bldg Elevations Carriage House – 1260 sq ft’, Drawing A-6 ‘Proposed Left and Right Bldg Elevations Carriage House – 1260 sq ft’, Drawing A-7 ‘Existing Residence 1 Pondsides Residence’ and Drawing A-8 ‘Existing Residence 2 Streetside Residence’ – all plans dated 12/12/2016 and all with a Board date ‘received’ stamp of December 20, 2016.
2. The applicant shall have the “Plot Plan for #124 North Falmouth Highway” drawn by Falmouth Engineering, Inc. – Sheet 2 of 3, revised showing a proposed landing and stairway to grade for the dwelling that will be above the three-car garage approved herein. The revised plan shall be submitted to the Board of Appeals for approval prior to the issuance of a building permit.
3. The applicant shall draw a plan of signage and location of signage for properties known as 116, 122 and 124 North Falmouth Highway and submit to the Board of Appeals for approval prior to final sign off by the Building Department and/or Zoning Administrator. The

applicant shall work with the property owner of 116 North Falmouth Highway for said signage. The signage may include a directional sign to said properties. The signage shall be posted to ensure that emergency vehicles have clear indication of direction for each dwelling in the event of an emergency.

4. 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.
5. The Applicant shall meet the requirements of the DPW Water Division.
6. 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.)
7. This permit shall lapse three (3) 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:       **131-16**

Applicant:                       **JAY RAO of Needham, Massachusetts**

Subject Property:               **124 North Falmouth Highway, North Falmouth, Massachusetts  
Map 12, Section 04, Parcel 008, Lot 000**

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.

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**Terrence J. Hurrie, Clerk, Board of Appeals**

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**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.