

**FALMOUTH ZONING BOARD OF APPEALS**

**FINDINGS AND DECISION**

**SPECIAL PERMIT NO:** 128-16

**APPLICANT/OWNER:** DAVID B. SMITH, TRUSTEE of David B. Smith 2012 Trust  
and PATRICIA H. SMITH, TRUSTEE of Patricia H. Smith 2012 Trust

**SUBJECT PROPERTY:** 390 Edgewater Drive East, East Falmouth, Massachusetts  
**Assessor's Map:** Map 41, Section 06, Parcel 000, Lot 018

**DEED/CERTIFICATE:** Book 27401 / Page 78

**SUMMARY:** Special Permit Granted with Conditions

**PROCEDURAL HISTORY**

1. Under a date of December 14, 2016, the applicant applied to the Zoning Board of Appeals for a Special Permit pursuant to Section(s) 240-3 C. and 240-69 E. of the Code of Falmouth to raze and reconstruct the pre-existing nonconforming single-family dwelling, increasing lot coverage by structures above 20%, on subject property known as 390 Edgewater Drive East, 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 February 16, 2017. The hearing was continued by request of the application without testimony to March 23, 2017, wherein it was again requested by the applicant to continue without testimony to April 27, 2017.
4. The public hearing was terminated on April 27, 2017, wherein the Board consisting of Clerk Terrence J. Hurrie sitting as Acting Chairman, Member Paul Murphy sitting as Acting Clerk, Member Ed Van Keuren 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 Michael Borselli, P.E. with Falmouth Engineering, Inc., 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/Referrals/E-mails from Town Departments**

- 12/16/2016 Referral submitted to the file by the Planning Department staff with no comment
- 12/21/2016 Referral submitted to the file by the Director of Assessing with no comment
- 12/23/2016 Referral submitted to the file by the Falmouth Fire Rescue with no comment
- 01/04/2017 Referral submitted to the file by the Engineering Department that states: *This application was reviewed only for impacts to public right of ways and public utilities. Edgewater Dr East is a Public right of way in this area. 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. It appears that drywells will be installed to keep roof runoff within the property. The plans show alterations to the driveway that will require filing a Driveway Application with Engineering. Please note that the driveway cannot discharge stormwater into the roadway from the property line in. Application and requirements are available for download under our Department on the Town website.*
- 04/26/2017 ZBA staff submitted a copy of lot coverage calculations with photos of homes in the area
- 04/27/2017 ZBA staff requested a copy of the Order of Conditions approved by Conservation Commission for subject property and submitted them to this file

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

“Existing Conditions Plan for #390 Edgewater Drive East” prepared for David and Patricia Smith in Falmouth as drawn by Falmouth Engineering, Inc. – Sheet 1 of 3 dated November 17, 2016 with a final revision date of 2/1/2017, stamped and signed by Gary S. Labrie, P.L.S. and with a Board date ‘received’ stamp of February 2, 2017;

“Plot Plan – Proposed Improvements for #390 Edgewater Drive East” prepared for David and Patricia Smith in Falmouth as drawn by Falmouth Engineering, Inc. – Sheet 2 of 3 dated November 17, 2016 with a final revision date of 2/17/2017, stamped, signed and dated by Gary S. Labrie, P.L.S. on 2/1/2017 and stamped and signed by Michael J. Borselli, P.E. with a Board date ‘received’ stamp of February 2, 2017;

“Septic System Details for #390 Edgewater Drive East” prepared for David and Patricia Smith in Falmouth, MA as drawn by Falmouth Engineering, Inc. – Sheet 3 of 3 dated November 17, 2016, stamped and signed by Michael J. Borselli and with a Board date ‘received’ stamp of December 14, 2016; and

“Smith House Remodel 390 Edgewater Drive East, Falmouth, MA” architectural plans drawn by Denise D’Ambrosi Bonoli, A.I.A. consisting of 13 pages showing Existing Floor Plans including basement, Existing Elevation Plans, Proposed Floor Plans including basement and Proposed Elevation Plans – all with a Board date ‘received’

stamp of January 31, 2017. Note: Elevation plans show grade elevation at 9' with first floor elevation at 13'3" – ridge height of 44'.

Hearing:

Michael Borselli, P.E. with Falmouth Engineering, Inc. reviewed the proposed razing and reconstructing of the existing non-conforming four-bedroom single-family dwelling. The dwelling has a nonconforming setback of 5.3' from the northerly side yard property line. He explained that the existing foundation will be used in the proposed dwelling, leaving the nonconformity as is; and the plan is to raise the proposed dwelling to meet the flood requirements in this AE12 zone. The proposed dwelling will be two-stories and will not exceed 35' in height as required by Section 240-70 of the Code of Falmouth. The dwelling will remain four bedrooms and a new septic system will be installed (see plan for location). Mr. Borselli explained that the lot coverage was calculated based on the mean high water as shown on a plan from 1946. However, the land has gone through accretion and increased in size and if the actual to date lot size was used in a lot coverage calculation, the lot coverage by structures would be approximately 11.5%.

The Board discussed plans with Mr. Borselli, including the referral from the Engineering Department regarding runoff. Mr. Borselli explained that drywells will be installed and the driveway pitched so that all runoff is maintained on site. All concerns and questions were addressed.

Chairman Hurrie asked for any public comment in support or opposition of the proposed project. There was no public comment.

Member Van Keuren made a motion to close the hearing. Member Murphy seconded the motion. Motion carried 4 - 0.

Chairman Hurrie 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 390 Edgewater Drive East is on Residential C zoned land that is located within the Eel Pond Coastal Pond Overlay District. The applicant applied under Section(s) 240-3 C. and 240-69 E. of the Code of Falmouth to allow the pre-existing nonconforming four-bedroom dwelling to be razed and reconstructed on same foundation as existing. The dwelling has a pre-existing nonconforming setback to the northerly side yard property line of 5.3' that requires a 10' setback pursuant to Section 240-68 B. of the Code of Falmouth. The engineer showed on the plan that the subject property was recorded on a plan in 1946 with the then 'mean high water' line which shows the lot to be 11,300 square feet in size. Mr. Borselli, P.E. stated that through accretion the land has increased in size and is now 20,300 square feet to the current 'mean high water' line on subject property; which would mean that the lot coverage for the proposed work would in actuality be 11.4% - not 20.5%. However, the applicant did apply under Section 240-69 E. in exceed the 20% lot coverage by structures requirement in said section. The proposed reconstruction includes a new septic system for a four-

bedroom capacity and the proposed height will be under the 35' maximum allowed pursuant to Section 240-70 of the Code of Falmouth.

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 raze and reconstruction of the four-bedroom pre-existing nonconforming dwelling will not be substantially more detrimental than what currently exists. The Board further finds that the existing foundation will be used in the reconstruction; testimony was that it will be filled and the new structure raised to an elevation as required by the AE12 flood zone requirements. Furthermore, the Board finds that the proposed reconstruction is in keeping with the integrity of the neighborhood as several of the homes in the area have been reconstructed and updated to meet the flood zone requirements.

The Board finds that there was no correspondence from any abutter within 300' in opposition to the proposed plans.

The Board finds that the nonconforming setback to the northerly side yard property line on subject property of 5.3' will remain as existing, with coming no closer to the property as the Conservation Commission required in their Order of Conditions issued for subject property for the existing foundation to be used in the new construction. The Board further finds that all other setbacks are in compliance with Section 240-68 A., B. and D. of the Code of Falmouth.

Section 240-69 E. of the Code of Falmouth allows the Board of Appeals to grant a special permit for an increase of lot coverage by structures to exceed the maximum 20% in a residential zoned district, up to 25%, after the Board considers the size and height of the proposed in relation to the average size and height of structures in the general area; if the proposed has any shadow effects on adjacent properties; if there is an impact on a view or vista from a public way; and if there is any effect of nitrogen on a coastal embayment.

The Board finds that the proposed lot coverage for the reconstruction of the dwelling on subject property of 20.5% is minimal; and that there are no impacts to the neighborhood, adjacent properties or subject property from the proposed reconstruction.

The Board finds through testimony by the applicant's representative that the proposed dwelling as constructed will have a height of less than 35' from the mean street grade level. The Board further finds that the plans show, and applicant's representative concurs, that the shed will be removed from subject property and shall not be replaced.

In addition to the above findings, the Board finds that the proposed 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 pre-existing nonconforming dwelling structure as there will be no new nonconforming setbacks created.
- B. The site is suitable for the proposed use as the property is zoned residential and will continue to be used as a single-family dwelling through this special permit approval.

C. There will be no impact on traffic flow and safety as there is no increase in the number of bedrooms on the property and the applicant will apply to the Engineering Department for the proposed change in the driveway location and said applicant will adhere to all requirements by the Engineering Department. Testimony by the applicant's representative was that the driveway will be pitched in two locations (one at garage and one mid-way) so as to maintain runoff into drywells that are being installed on subject property (see plan noted and approved herein – drywells at corner of front façade of garage and along the rear of the dwelling).

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 or abutting properties.

E. The proposed four-bedroom septic system (plan Sheet 3 of 3 by Falmouth Engineering, Inc.) shall be approved by the Board of Health prior to issuance of a building permit for the reconstruction of the dwelling.

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 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 pre-existing nonconforming 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 Murphy 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 **4 -0 to Grant the Special Permit** to David B. and Patricia H. Smith, Trustees (herein referred to as Applicant) under Section(s) 240-3 C. and 240-69 E. of the Code of Falmouth to raze and reconstruct the pre-existing nonconforming single-family dwelling on subject property known as 390 Edgewater Drive East, East Falmouth, Massachusetts. This special permit is subject to the following conditions:

1. The raze and reconstruction of the four-bedroom dwelling, all setbacks, lot coverage, septic system, height of proposed dwelling 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:

“Existing Conditions Plan for #390 Edgewater Drive East” prepared for David and Patricia Smith in Falmouth as drawn by Falmouth Engineering, Inc. – Sheet 1 of 3 dated November 17, 2016 with a final revision date of 2/1/2017, stamped and signed by Gary S. Labrie, P.L.S. and with a Board date ‘received’ stamp of February 2, 2017;

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2. The shed shall be removed from the property and not replaced.
3. There shall be no more than four (4) bedrooms allowed on subject property.
4. The height of the proposed dwelling shall not exceed 35’ from the mean grade at street level.
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 three 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: 128-16

Applicant: **DAVID B. SMITH, TRUSTEE of David B. Smith 2012 Trust  
and PATRICIA H. SMITH, TRUSTEE of Patricia H. Smith 2012 Trust**

Subject Property: **390 Edgewater Drive East, East Falmouth, MA  
Map 41, Section 06, Parcel 000, Lot 018**

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: 4 – 0 to Grant the Special Permit as represented to the Board, based on the Findings stated herein and with the above stated Conditions.



**Paul Murphy, Acting Clerk, Board of Appeals**

**RECEIVED**

**MAY - 5 2017**

FALMOUTH TOWN CLERK

8:10 AM

**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.