

**FALMOUTH ZONING BOARD OF APPEALS
FINDINGS AND DECISION**

APPEAL NO: 101-16

APPELLANT: ESTATE OF JOHN N. MYETTE of Bourne, MA

SUBJECT PROPERTY: Lots 18, 22, 24, 26, 28 and 30 on Broken Bow Lane, Teaticket, MA
Assessor's Map: Map 34, Section 04, Parcel 031, Lots 022, 024, 026, 028 and 030

DEED/CERTIFICATE: Book 3265 / Page 217

SUMMARY: Appeal of Building Commissioner's Determination that the lots are not protected under Section 240-66 C. of the Code of Falmouth –
Board Decision: Granted Appeal – Overturned Building Commissioner's Determination of Unbuildable Lots

PROCEDURAL HISTORY

1. Under a date of September 26, 2016, Attorney Edward W. Kirk filed an Appeal with the Falmouth Town Clerk on behalf of the appellant pursuant to M.G.L. Chapter 40A, Sections 8 and 15 and Section 240-202 of the Code of Falmouth appealing the Building Commissioner's determination that the subject lots were held in common ownership and are not protected under Section 240-66 C. of the Code of Falmouth. The subject lots are located on Broken Bow Lane in Teaticket, Massachusetts.
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 November 3, 2016. It is noted that there are waivers to extend the 100 day hearing process, signed by Attorney Kirk and filed with the Falmouth Town Clerk.
4. The public hearing was terminated on July 6, 2017, wherein the Board consisting of Acting Chairman Kenneth Foreman, Clerk Terrence Hurrie, Member Ed Van Keuren and Associates Gerald Potamis and Robert Dugan sitting as voting members, made a decision to Grant the Appeal Overturning the Building Commissioner's Determination. Minutes from the hearing are on file in the Board of Appeals.
5. The applicant was represented at the hearing by Attorney Edward W. Kirk. Note: Attorney Kirk requested and the Board agreed, that Appeal #100-16 Sherbource Hotel Management Group, Inc. and Appeal #101-16 Estate of John N. Myette be opened and heard together.
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

10/28/2016 Letter submitted to the file by Irene N. Nickolson of 119 Homestead Lane stating objection to *“losing the beautiful wooden area in the back of my property”*.

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

09/26/2016 Attorney Edward Kirk submitted on behalf of the appellant, a letter of appeal dated September 6, 2016 to the Town Clerk of Falmouth with attached copy of a letter dated August 29, 2016 to Theodore A. Schilling, Esq., from Building Commissioner Rod Palmer (determination was basis of appeal)

02/06/2017 Letter with attachments (Statement of Facts and 6 Exhibits) from Attorney Kirk dated February 6, 2017 submitted to the file

02/06/2017 Letter submitted to the file from Attorney Edward W. Kirk dated February 6, 2017 with attached ‘Joint Memorandum’ in support of the appeal.

06/15/2017 Letter from Attorney Edward Kirk dated June 14, 2017 to Building Commissioner Rod Palmer regarding new information regarding recordation (dates) of deeds for subject properties with Barnstable Registry of Deeds – with 6 Exhibits attached

07/05/2017 E-mail from Attorney Kirk to Sari Budrow (Zoning Administrator) with two attachments: 1) Notice of Decision *Domenic Esposito & another vs. Members of Falmouth Board of Appeals & others* (re: Montuori Special Permit for buildable lot); and 2) a letter to the Zoning Board of Appeals from Rivard & Associates dated June 4, 2017 regarding Mr. Myette’s position with Sherbourne entity

Letters/Referrals/E-mails from Town Departments

09/27/2016 Referral submitted to the file from the Director of Assessing that states: *131 Land use code potential buildable.*

09/30/2016 Referral submitted to the file from Conservation Commission with no comment

10/5/2016 Referral submitted to the file from Town Engineering Department with no comment

05/31/2017 ZBA staff submitted to the file a copy of a Memorandum dated 5/21/2014 from Frank Duffy, Town Counsel, to Eladio Gore, then Building Commissioner, regarding subject properties

05/31/2017 ZBA submitted to the file a letter from Frank Duffy, Town Counsel, dated January 8, 2016 to Stephen C. Myette regarding subject properties

05/05/2017 ZBA submitted to the file a copy of a Memorandum dated 6/5/2017 from Frank Duffy, Town Counsel to Zoning Administrator regarding subject properties (in response to a request for opinion from Board)

Plans submitted by Applicant/Applicant's Representative

“Robinwood Estates” subdivision plan filed with the Barnstable Registry of Deeds on December 23, 1969 – Book 233 / Page 141 - 2nd page same plan with lots highlighted and a Board date ‘received’ stamp of February 6, 2017

Hearing May 25, 2017:

Attorney Edward W. Kirk who is representing both Sherbourne Hotel Management Group, Inc. and the Estate of John Myette, reviewed the subdivision plan and subject lots. Between the two applicants they own ten (10) lots, each being 10,000 square feet in size. The separate appeals of Sherbourne Hotel Management Group, Inc. and Estate of John N. Myette were both filed with the Town Clerk of Falmouth on September 26, 2016. The plan, originally laid out in 1969, is in the Agricultural B zoning district. Attorney Kirk reviewed the history of the ownership of subject lots that have also been submitted to the file. He then reviewed the Falmouth Zoning Bylaw, Section 240-66 C. regarding substandard size lots and status of ownership of said lots as of January 1, 1981. Attorney Kirk explained that in 2014, then Building Commissioner Gore signed off on letters submitted by Attorney Laura Moynihan that states the subject lots are buildable based on information provided (letters from Attorney Moynihan dated March 25, 2014 one for each lot, signed by Mr. Gore on 6/12/2014). In 2016, the current Building Commissioner feels that the properties are held in common ownership and therefore determined that the lots are not entitled to protection under Section 240-66 C. of the Code of Falmouth. Mr. Palmer believed that there is a controlling interest by the entities of the lots (see letter dated August 29, 2016 from Rod Palmer, Building Commissioner, to Theodore A. Schilling, Esq.)

The Board discussed the history of the lots, all information submitted and case law with Attorney Kirk. The Board asked Attorney Kirk for additional information regarding conveyance of subject properties and Board of Directors status of Sherbourne Group (appellant).

Public comment in support or opposition of the proposed project. There was no public comment.

Member Van Keuren made a motion to continue the hearing to June 5, 2017 at 6:30 PM in the Civil Defense Room in Town Hall. Member Dugan seconded the motion. Motion carried 5 – 0.

Hearing June 5, 2017:

Attorney Kirk asked the Board to continue the hearing to July 6, 2017 as he has new information that he would like to submit to Building Commissioner Palmer in the hope that the Commissioner’s decision would be reversed.

Member Van Keuren made a motion to continue the hearing to July 6, 2017 in the Board of Selectmen Meeting Room. Terrence Hurrie seconded the motion. Motion carried 5 – 0.

Hearing July 6, 2017:

Prior to the continued hearing held on July 6 2017, Attorney Kirk had submitted new information to Building Commissioner Palmer that the deeds for the conveyance of subject lots, both to Myette and Sherbourne from private parties were not filed with the Barnstable Registry of Deeds until April of

1981. Attorney Kirk, nor the Board of Appeals had any response from the Building Commissioner relative to the new information submitted.

Attorney Kirk reviewed the new information regarding recording dates of mortgages for subject properties represented herein. He noted that although the subject properties, Lots 18, 22, 24, 26, 28 and 30 were conveyed to John N. Myette by Rosemary DeVellis on November 10, 1980, said conveyance was not filed with the Barnstable Registry of Deeds until April 7, 1981, therefore on January 1, 1981 the subject lots were in separate ownership as was initially determined by former Building Commissioner Eladio Gore.

Board discussed new evidence with Attorney Kirk.

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

Chairman Foreman 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 properties known as Map 34, Section 04, Parcel 031, Lots 18, 22, 24, 26, 28 and 30 located on Broken Bow Lane in Teaticket each contain 10,000 square feet of Agricultural B zoned land that is located within the Green Pond Coastal Pond Overlay District. Attorney Edward W. Kirk filed an appeal on September 26, 2016 on behalf of the Estate of John N. Myette for said properties and also filed a second appeal, same day, on behalf of the Sherbourne Hotel Management Group, Inc. who own properties known as Map 34, Section 04, Parcel 031, Lots 20, 23, 25, 27 and 29 on Broken Bow Lane. The appeals were filed pursuant to M.G.L. Chapter 40A, Sections 8 and 15 and Section 240-202 of the Code of Falmouth to request the Board of Appeals to overturn a determination made by the Building Commissioner (Rod Palmer) that said lots are not protected under Section 240-66 C. of the Code of Falmouth.

The Board finds that all of the subject lots were created by a plan entitled "Robinwood Estates for Cosmo DeVellis" which plan was approved by the Falmouth Planning Board on November 4, 1969 and recorded at Barnstable County Registry of Deeds at Plan Book 233, Page 141 on December 23, 1969. Each of the subject lots contains in excess of 10,000 square feet and each lot conforms to the minimum area requirement necessary for lots in the district at the time of approval and recordation of the plan.

The Board finds that the character of the neighborhood has been established by the construction of more than fifty (50) single-family dwelling on lots of approximately 10,000 square feet in size (comparable to subject lots).

The Board finds that under the provisions of M.G.L. Chapter 40A, Section 6, as existing at the time, the lots shown on the plan were protected from any subsequent zoning change for a period of seven (7) years following the approval of the plan.

The Board finds that on January 13, 1976, during the period of protection, lots number 18, 22, 24, 26, 28 and 30 (subject lots of separate appeal by Estate of John N. Myette) were conveyed to Rosemary DeVellis; and also on January 13, 1976, during the period of protection, lots number 20, 23, 25, 27 and 29 (subject lots of this appeal owned by Sherbource Hotel Management Group) were conveyed to Victor DeAgazio.

The Board finds as additional note to both appeals, that John N. Myette was President of Sherbource Hotel Management Group; Mr. Myette passed away on October 30, 2009. The Board further finds that according to a letter submitted by Attorney Kirk and from Attorney Stephane Rivard dated June 4, 2017 (received on July 5, 2017), Mr. Myette was not a majority holder of the Sherbource Hotel Management Group; and that on January 1, 1981, Jacques Matte held title to all the shares of Sherbource as Escrow Agent for a larger group of investors; and that Sherbource Group was the owner of, or the investor of many properties in Canada. Furthermore, The Board finds based on the information submitted, John Myette did not have control over the Sherbource lots simply because he was President of said group; and that Mr. Myette could not act on behalf of the group without the unanimous approval of two (2) directors.

The Board finds that on April 7, 1981 record title at the Barnstable Registry of Deeds to lots numbered 20, 23, 25, 27 and 29 stood in the name of Victor De Agazio; and that on January 1, 1981 record title at the Barnstable Registry of Deeds to lots 18, 22, 24, 26, 28 and 30 stood in the name of Rosemary DeVellis. The Board further finds that on April 7, 1981 there was recorded, at Barnstable Registry of Deeds, a deed dated July 16, 1980 whereby Victor De Agazio conveyed lots 20, 23, 25, 27 and 29 to a Canadian Corporation named Sherbource Hotel Management Group, Inc.; and on April 7, 1981 there was recorded at Barnstable Registry of Deeds a deed dated November 10, 1980 whereby Rosemary DeVellis conveyed lots 18, 22, 24, 26, 28 and 30 to John N. Myette.

The Board finds that former Building Commissioner Eladio Gore, following an examination of the record title to the subject lots and with the benefit of advice from the Falmouth Town Counsel, made written determinations on letters dated June 6, 2014, that on January 1, 1981, lots numbered 18, 22, 24, 26, 28 and 30 were in separate ownership from lots numbered 20, 23, 25, 27 and 29; and determined that each such individual lots numbering 18 – 30 were protected as individual building lots pursuant to the provisions of Section 240-66 C. 2.(c) of the Code of Falmouth.

The Board finds that the lots conveyed to Sherbource Hotel Management Group, Inc. (separate appellant) and John N. Myette (appellant) were filed with Barnstable County Registry of Deeds on April 7, 1981 and therefore subject lots were in separate ownership as of January 1, 1981 as determined by Building Commissioner Eladio Gore in June of 2014 and that they had not merged as a result of the conveyances to Sherbource Hotel Management Group, Inc. and John N. Myette.

The Board finds that Attorney Kirk has submitted a preponderance of evidence and information to the file as well as testimony and case law regarding the facts of subject properties discussed herein.

The Board finds, based on the above findings and testimony that the Building Commissioner (Rod Palmer) erred in his determination of August 29, 2016 of subject lots not being entitled to the protection of Section 240-66 C. 2. (c) of the Code Falmouth and herein, by the motion and vote below, overturns the Building Commissioner's determination and grants the appeal.

Member Potamis made a motion to Grant the Appeal Overturning the Building Commissioner's determination that subject properties are not entitled to protection under Section 240-66 C. 2.(c) of the Code of Falmouth. Member Dugan seconded the motion. Motion carried 5 – 0.

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 subject properties discussed herein are not entitled to protection under Section 240-66 C. 2.(c) of the Code of Falmouth.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: **101-16**

Applicant: **Estate of John N. Myette of Bourne, MA**

Subject Property: **Lots 18, 22, 24, 26, 28 and 30 on Broken Bow Lane, Teaticket, MA
Map 34, Section 04, Parcel 031, Lots 18, 22, 24, 26, 28 and 30**

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 subject properties are not entitled to protection under Section 240-66 C. 2.(c) of the Code of Falmouth.



Terrence J. Hurrie, Clerk, Board of Appeals

RECEIVED

JUL 20 2017

FALMOUTH TOWN CLERK 

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.