

FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

SPECIAL PERMIT NO: 045-17 – Modification of Special Permit #83-13

APPLICANT/OWNER: GENERATION AJW, LLC of Woods Hole, MA

SUBJECT PROPERTY: 742 Nathan S. Ellis Highway, Hatchville, Massachusetts
Assessor's Map: Map 10, Section 04, Parcel 016A, Lot 017

DEED/CERTIFICATE: Certificate 200749 – Lot 17, Plan 12349-O / Lots 19 & 21, Plan 12349-P

SUMMARY: Special Permit Modifying Permit #83-13 – Grant with Conditions

PROCEDURAL HISTORY

1. Under a date of June 9, 2017, the applicant applied to the Zoning Board of Appeals for a Modification of Special Permit #83-13 pursuant to Section(s) 240-50 and 240-72.3C. (5) of the Code of Falmouth to allow two (2) 1,000 gallon fuel tanks on subject property known as 742 Nathan S. Ellis Highway, Hatchville, 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 August 3, 2017.
4. The public hearing was terminated on August 3, 2017, wherein the Board consisting of Chairman Kenneth Foreman, Vice Chairman Terrence Hurrie, Clerk Kimberly Bielan, Member Ed Van Keuren and Associate Robert Dugan (sitting as voting member) made a decision to Grant the Special Permit with conditions. Minutes of the hearing(s) are on file in the Board of Appeals.
5. The applicant was represented at the hearing by Attorney Jeffrey W. Oppenheim of Oppenheim & Nickerson LLP and Jeffrey Hamilton, Manager of Generation AJW, LLC, 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)

06/09/2017 Attorney Oppenheim filed, on behalf of the applicant, an application, letter of authorization, fee, plan and a copy of a 'Hazardous Spill Prevention and Response Plan'

08/01/2017 E-mail submitted to the file from Attorney Oppenheim in response to a question forwarded by Zoning Administrator regarding monitoring, alarming and spillage at proposed fuel tanks

Letters/Referrals/E-mails from Town Departments

06/12/2017 Referral submitted to the file from Director of Assessing noting that subject property entails Lots 17, 19 and 21

06/13/2017 Referral submitted to the file from the Planning Department with no comment

06/13/2017 ZBA staff submitted to the file a copy of the 'Site Plan Review' Decision dated November 13, 2013 – there is no condition that requires change in plans for applicant to return to Planning Board for any change or addition to site

06/20/2017 Referral submitted to the file from Conservation Commission that states: *As long as all state and local regulations are carried out for safety and precautions taken to avoid spills.*

06/22/2017 Referral submitted to the file from Falmouth Fire Rescue Department noting: *Permits as required per 527 CMR 1 Fire Prevention Code.*

07/11/2017 Referral submitted to the file from the Town Engineering Department with standard comments

08/01/2017 ZBA staff submitted to the file a copy of Special Permit #83-13 for subject property (and applicant)

Plans submitted by Applicant/Applicant's Representative

“Plan of Proposed Fuel Storage Tank” prepared for Hamilton Tree Service #742 Nathan S. Ellis Highway in Hatchville Falmouth, MA as drawn by Holmes and McGrath, Inc. – Sheet 1 of 1 dated May 16, 2017 – stamped and signed by Michael B. McGrath, P.L.S. and with a Board date ‘received’ stamp of June 9, 2017.

Hearing:

Attorney Oppenheim reviewed the 2.95 acre lot that has benefit of a special permit, with conditions, to operate Hamilton Tree and Landscape and two (2) apartments. The applicant is requesting herein to be allowed to construct a 10' x 16' concrete pad and concrete vault that will contain two (2) one-thousand gallon (1,000) tanks for fuel storage. There will be a roof over the structure for protection from the elements during fueling. The tanks will consist of double walled mild carbon steel. One of the tanks will be used for on-road vehicles, and the other tank for off-road vehicles (equipment). The concrete fuel pad will have grooves in it to keep minor spillage from fueling vehicles/equipment onto the pad, which will then be cleaned up by personnel. Attorney Oppenheim reviewed the sensors on the tanks that will indicate if the tanks fail, the vault is reinforced concrete and there are grooves in the concrete pad to

catch spills; absorbent pads and socks will be used for larger spills. The applicant filed a hazardous prevention plan. Employees will be trained on how to use the material for spills and process for cleaning up spills. The applicant anticipates two (2) deliveries of diesel fuel a month. He noted that the primary use on subject property is the Hamilton Tree and Landscape operation; the fuel storage is an accessory use to that primary use (Section 240-50 of Town Code). The subject property is located within the Water Resource Protection Overlay District and pursuant to Section 240-72.3 C. (5) of the Code of Falmouth, the storage of liquid and hazardous material must have secondary containment. The proposed vault will meet the requirements of 110% capacity of the fuel tanks. The proposed fuel storage will be a benefit to the tree and landscape business operating on site and will decrease traffic as the trucks/equipment will be refueled on site and without the need to travel to area service stations.

The Board discussed plans with Attorney Oppenheim regarding monitoring of tanks and sensors if tanks fail. Attorney Oppenheim and Jeffrey Hamilton addressed concerns/questions. The tanks will be monitored and have a sensor in the event of tanks failing – employees will monitor and there is a daily log that is required to be completed; all runoff from the roof over the tanks will flow into the nearby catch basins; and there are five (5) cameras mounted on existing building for security purposes.

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

Scott Zylinski, 18 Teixeira Lane spoke in favor of the applicant. He inquired about lighting at tanks, signage and if bollards will be in place to protect tanks from vehicle impact.

Attorney Oppenheim noted that bollards are shown on the plan. He said there are no proposed plans for lighting and signage will be according to Massachusetts Code. Jeffrey Hamilton noted that there are two (2) light poles on the southeast side of the lot which can be activated to illuminate the area. He said he can install lights at the fueling station for use at night.

Member Bielan 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 property located at 742 Nathan S. Ellis Highway in Hatchville contains 2.95 acres of Business 2 zoned land that is located within the Great Pond Coastal Pond Overlay District, the Wild Life Migration Corridor, the Water Resource Protection Overlay District, the Natural Heritage and Endangered Species Program – estimated and priority – and the northwest corner of the lot is in the Zone II Overlay. The subject property has benefit of Special Permit #83-13 that allowed the former use of movie theaters on site to a commercial garage to operate Hamilton Tree and Landscape Company and add a second level that contains two (2) apartment units. The applicant applied under Section(s) 240-50 and 240-72.3 C. (5) of the Code of Falmouth to allow two (2) 1,000 gallon fuel tanks on subject property. The fuel will be diesel and used to fuel Hamilton Tree and Landscape vehicles and equipment only.

Section 240-50 "Permitted accessory uses." of the Code of Falmouth allows accessory uses on a lot that are customarily incidental to a use within a Business zoned district and that storage of any goods must be incidental and secondary to a primary use conducted within the permanent structure on subject property.

The Board finds that the proposed two (2) tanks that will store fuel for the vehicles/equipment used in the primary operation on subject property is within the requirements of Section 240-50 of the Code of Falmouth as the fuel storage shall be used to fuel vehicles/equipment for the Hamilton Tree and Landscape business operated from subject property and is incidental and secondary to the primary use of the Landscape company.

Section 240-72.3 "Use regulation" of the Code of Falmouth – sub-section C. 'Uses and activities requiring a special permit'; and (5) requires that in a Water Resource Protection District storage of liquid hazardous materials on a subject property shall be within a building or aboveground freestanding container with secondary containment adequate to contain a spill the size of the container's total storage capacity plus 10% (total 110%).

The Board finds that the applicant to allow two (2) 1,000 gallon fuel tanks on subject property is appropriately before the Board as a modification of Special Permit #83-13. The Board further finds that the applicant has submitted sufficient plans that meet the requirement of Section 240-72.3 C. (5) of the Code of Falmouth regarding containment and capacity of containment for hazardous materials to be stored on site – specifically diesel fuel. Furthermore, the Board finds that the applicant has submitted a 'Hazardous Spill Prevention and Response Plan' that will be put in place for the care and dispensing of said fuel on subject property; and that all employees will be trained in monitoring the tanks and on the handling and cleanup of any spill that may occur.

The Board finds that the tank is considered a vault that will hold the two (2) 1,000 gallon tanks and the plan shows a concrete pad for vehicles when fueling, as well as the location of bollards at the vault as a protection to the tanks from vehicles. The Board further finds that the concrete pad has grooves that will contain minor spills when fueling and the nearby location of absorbent pads and/or socks (containment pads) for larger spills; and the applicant has hazmat kits and clean up material stored on site. Furthermore, the Board finds that the tank area will have a roof constructed over it to protect it from the elements.

The Board finds that there is a locked gate around the perimeter of the Landscape operation, including the proposed tank storage vault; the only area not gated is the front of the lot off Nathan S. Ellis Highway where there is public parking. The Board further finds through testimony by the applicant, that there are five (5) security cameras mounted on the existing building; there is lighting attached to the building and additional lighting on poles along the southeast property line. Furthermore, the Board finds through testimony by the applicant that he is amenable to additional lighting (motion sensor) at the proposed tank storage vault; and that appropriate signage according to Massachusetts Regulations will be posted on said vault.

The Board finds that the proposed fuel storage vault will not be seen from the main roadway (Nathan S. Ellis Highway) due to the proposed location and that there is natural vegetation as a visual buffer (site Plot Plan). The Board further finds through testimony by the applicant's representative that there will be no more than two (2) deliveries of fuel to subject property per month. Furthermore, the Board finds that

the proposed fuel storage is an increase of use to the property, but is a secondary and incidental use to the ongoing existing Landscape Company on said property.

In addition to the above findings, the Board finds that the proposed fuel storage vault 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 fuel storage vault as it will not create any new nonconformities on subject property pursuant to Sections 240-68 A. and B. and Section 240-69 A. of the Code of Falmouth.

B. The site is suitable for the proposed use as the property is zoned Business 2 and the proposed addition of the fuel storage vault was found to be an incidental and secondary accessory use to the existing ongoing landscape business on subject property.

C. There will be no impact on traffic flow and safety to the site through this approval and there will be no change in the existing driveways on subject property. The Board also finds that the proposed fuel storage vault that will be used to fuel the vehicles and equipment for the on-site landscape company may decrease exits to and from the site by company vehicles as the proposed use will decrease the need for fueling at off-site service stations.

D. The visual character of the subject property will be unchanged as the proposed fuel storage vault with roof above will not be seen from the main roadway off the front of subject property; and there is no impact on any view or vista from the roadway or abutting properties.

E. The sewage disposal system in place will be unaffected by this approval of the special permit.

F. There are adequate utilities to subject property by virtue of an existing building and business on site.

G. The proposed modification of existing use on subject property 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.

The Board of Appeals has weighed the effects of the proposed fuel storage vault 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 Bielan 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 Special Permit as Modification of Special Permit #83-13** to Generation AJW, LLC (herein referred to as Applicant) under Section(s) 240-50 and 240-72.3C. (5) of the Code of Falmouth to allow two (2) 1,000 gallon fuel tanks on subject property known as 742 Nathan S. Ellis Highway, Hatchville, MA. This special permit shall be subject to the following conditions:

1. The location of the fuel storage vault with pumps, all hazmat materials required, training of employees on monitoring of tanks, fuel spill cleanup and delivery of fuel to site shall be as stated and represented to the Board and as shown on plans submitted and reviewed by the Board entitled as follows:
 - “Plan of Proposed Fuel Storage Tank” prepared for Hamilton Tree Service #742 Nathan S. Ellis Highway in Hatchville Falmouth, MA as drawn by Holmes and McGrath, Inc. – Sheet 1 of 1 dated May 16, 2017 – stamped and signed by Michael B. McGrath, P.L.S. and with a Board date ‘received’ stamp of June 9, 2017.
2. The applicant shall install motion sensor lighting on the fuel storage tanks approved herein.
3. The applicant shall meet all State and Environmental requirements of signage for the fuel storage tanks approved herein.
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. 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.)
6. 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: **045-17 – Modification of Special Permit #83-13**

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SUBJECT PROPERTY: **742 Nathan S. Ellis Highway, Hatchville, Massachusetts**
Assessor's Map: **Map 10, Section 04, Parcel 016A, Lot 017**

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, Vice Chairman, Board of Appeals

RECEIVED

AUG 14 2017

FALMOUTH TOWN CLERK

MD @ 11:50 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.