

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

SPECIAL PERMIT NO: 021-18

APPLICANT: BAD MARTHA FARMER'S BREWERY, LLC of Edgartown, MA

OWNER: Cherrystones, Inc. of East Falmouth, MA

SUBJECT PROPERTY: 876 East Falmouth Highway, East Falmouth, Massachusetts
Assessor's Map: Map 32 Section 05 Parcel 001A Lot 002

DEED/CERTIFICATE: Book 10630 / Page 156

SUMMARY: Special Permit Granted with Conditions

PROCEDURAL HISTORY

1. Under a date of March 9, 2018, the applicant applied to the Zoning Board of Appeals for a Modification of existing Special Permit pursuant to Section(s) 240-3 C. of the Code of Falmouth to raze the existing detached commercial kitchen structure (existing restaurant to remain) and construct a retail brewery on the subject property known as 876 East Falmouth Highway, East Falmouth, 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 May 3, 2018.
4. The public hearing was closed on May 24, 2018, wherein the Board consisting of Chairman Kenneth Foreman, Vice Chairman Terrence Hurrie, Acting Clerk Ed Van Keuren, Member Paul Murphy and Alternate Robert Dugan (sitting as voting member) made a decision to direct the Zoning Administrator to draft an affirmative decision for the Board's review at an open meeting to be held on June, 7, 2018. Minutes of the hearing(s) 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, as well as Thomas J. Bunker, PLS with BSS Design, project engineering firm.
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

05/01/2018 Email letter submitted to the file from Charles Walsh of 873 East Falmouth Highway stating concerns and questions relative to traffic, noise and hours of operation

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

03/10/2018 The applicant's representative (Attorney Klauer) submitted along with application and plans copies of a Variance Decision #2897 for addition to existing restaurant on-site and Modification

of Variance and Special Permit #9 and 10-84 which allowed bathroom addition to existing restaurant on-site.

- 03/23/2018 Attorney Klauer submitted a letter to the file with plans entitled “Proposed Basement Floor Plans” for proposed building
- 04/09/2018 A letter from BSS Design, Inc. (project site engineers) dated April 9, 2018 to Lt. Mel Trott of the Falmouth Fire Rescue Department was submitted to file with attached revised “Site Plan” that addressed east entrance from Route 28 concerns raised in referral from Falmouth Fire Rescue Department

Letters/Referrals/E-mails from Town Departments

- 03/15/2018 Referral submitted to the file from Planning Department staff that states: *The applicant filed a site plan review application with the Planning Board and will be on the 4/10/18 PB Agenda.*
- 03/19/2018 Referral submitted to the file from Director of Assessing with no comment
- 03/21/2018 Referral submitted to the file from Conservation Commission Agent that states: **Will drainage proposed address containing stormwater infiltration on the property? Stormwater Calculations appropriate? - *What precaution shall be taken to prevent siltation/stormwater downslope on west side of property? – Retaining wall proposed but if paved areas dug up, run-off can be significant.*
- 03/22/2018 Referral in the form of a letter dated March 22, 2018 was submitted to the file from Falmouth Fire Rescue Department – letter states concern with turning radius for fire apparatus making a left once on the property to access existing restaurant at East curb cut. NOTE: A second letter from Falmouth Fire Rescue Department dated April 12, 2018 was submitted on April 12, 2018 that notes the applicant revised plans that addressed the Fire Rescue Department’s concerns.
- 03/23/2018 Referral submitted to the file from Water Department with no comment
- 03/28/2018 Referral submitted to the file from Engineering Department that attached a copy of the referral they prepared for the Planning Department dated 3/26/2018 – NOTE: On April 12, 2018 the Engineering Department submitted a copy of an updated referral sent to the Planning Board regarding the revised plans by applicant

- There are emails submitted to the file from ZBA staff to applicant’s representative(s) asking for additional information relative to the application and plans.

Note: ZBA sent Referral requests to: Assessors, Building Department, Conservation Commission, Engineering Department, Board of Health, Fire Department, Planning Department, Board of Selectmen and Water Department

Plans submitted by Applicant/Applicant’s Representative

“Front #876 East Fal. Hwy Bad Martha” floor plan – hand drawn – of existing detached kitchen on same property as Oyster’s Too Restaurant – plan has a Board date ‘received’ stamp of 04/19/2018;

“Site Plan” prepared for Bad Martha Brewery 876 East Falmouth Highway, East Falmouth, Massachusetts as drawn by BSS Design, Inc. consisting of:

- ‘Existing Conditions and Demo’ with a final revision date of 4/19/18, is stamped and signed by Thomas J. Bunker, PLS and a Board date ‘received’ stamp of May 17, 2018;
- ‘Layout Plan’ with a final revision date of May 16, 2018 – stamped and signed by Thomas J. Bunker, PLS and with a Board date ‘received’ stamp of May 17, 2018;
- ‘Grading & Drainage Plan’ with a final revision date of May 16, 2018 – plan is stamped and signed by Thomas J. Bunker, PLS and has a Board date ‘received’ stamp of May 17, 2018;
- ‘Septic System Plan’ with a final revision date of May 16, 2018 – plan is stamped and signed by Jeffrey Edwin Ryther, PE and Thomas J. Bunker, PLS and has a Board date ‘received’ stamp of May 17, 2018;
- ‘Landscape Plan’ with a final revision date of May 16, 2018 – plan is stamped and signed by Thomas J. Bunker and has a Board date ‘received’ stamp of May 17, 2018;
- ‘Lighting Plan’ with a final revision date of May 16, 2018 – plan is stamped and signed by Thomas J. Bunker, PLS and with a Board date ‘received’ stamp of May 17, 2018; and

“Bad Martha Brewery 876 East Falmouth Highway, East Falmouth, MA” architectural plans drawn by Architectural Innovations consisting of Drawing A4-4 ‘Proposed Basement Floor Plan’ dated 03/16/2018 and with a Board date ‘received’ stamp of March 23, 2018; A1-3 ‘Proposed Floor Plans’ dated 2/06/2018 with a Board date ‘received’ stamp of March 9, 2018; A2-3 ‘Proposed Elevations’ dated 2/6/2018 with a Board date ‘received’ stamp of March 9, 2018; and A3-3 ‘Proposed Elevations’ dated 2/6/2018 with a Board date ‘received’ stamp of March 9, 2018.

Hearing - May 3, 2018:

Attorney Klauer reviewed the proposed razing of existing small detached structure on the subject property zoned Business 2 with a small portion at the rear zoned Agricultural A. He reviewed the previous Variance and Special Permit for existing restaurant relative to the front yard setback and two other structures (one being the subject kitchen and the other a single-family dwelling) also located on subject property. He asked the Board to include a modification of the previous variance as the proposed building, although compliant in setbacks and detached from the existing structure that variance was granted for, is on subject property which a variance was granted for. The variance granted in 1978 allowed the existing restaurant structure that is within the 35’ setback required along East Falmouth Highway to be added onto. The variance further noted the addition of two separate structures on site as cottages and required them *“to be upgraded and painted. They are to be used for dead storage only, not for habitation”*. The two (2) separate existing structures on site are currently a two-bedroom dwelling in the northwest corner of the lot (which is in the Agricultural A zoned portion of the lot) and a summer kitchen structure located in the northerly midsection of the lot. Attorney Klauer noted that the two separate structures have existed on subject property as is prior to the current owner purchasing the property in 1997. He asked the Board that the owner of the property be allowed to continue to utilize the structure in the northwest corner of the property as a two-bedroom dwelling; the other structure will be razed and the proposed brewery constructed approximately where it is located.

Attorney Klauer then reviewed the proposed brewery, seating in the brewery, on-site parking for all uses (restaurant, dwelling and proposed brewery), curb cuts proposed and eliminated and lot coverage. He explained this will be a brewery with retail sales and food service, which is allowed in Business 2 zoning. The proposed brewery will be constructed separately from the existing restaurant on site and will be a completely separate entity with seating. He explained that the Town Engineering Department and the Fire Department have reviewed the site plan and the applicant has revised the plan based on comments received. He said the Planning Board is currently reviewed the project under Site Plan Review.

The Board discussed plans with Attorney Klauer and project engineer, Tom Bunker with BSS Design, Inc., who was also present. The Board discussed access to existing restaurant, parking, landscaping, and traffic impact on Route 28 (East Falmouth Highway). The Board asked for more information to be submitted on landscaping, lighting and possible easement with Mahoney's for parking that Attorney Klauer briefly discussed.

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

Bob Kogut, owner of subject property stated support of the proposed project and stated it will be a positive for both businesses, it will be an improvement to the property and hopefully will bring customers to East Falmouth.

Member Hurrie made a motion to continue the hearing to May 17, 2018 at 6:00 PM. Member Van Keuren seconded the motion. Motion carried 5 – 0.

Hearing – May 17, 2018:

Attorney Klauer reviewed the previous hearing and request by the applicant to construct a new building to operate a brewery with retail sales. He reviewed the changes in the plan based on a response from the Town Engineering Department – relocating a utility pole, the addition of a van accessible space and the addition of a small shed that will house the controls for the septic. He noted that the applicant is still awaiting Site Plan Review Decision from the Planning Board.

The Board discussed additional landscape issues and parking – specifically the easement with Mahoney's that Attorney Klauer stated the applicant will be discussing with Mahoney's. Attorney Klauer reviewed landscaping on lot and along East Falmouth Highway as well as proposed easement with Mahoney's for additional parking.

The Board did ask Attorney Klauer to request the applicant to preserve the Cedars on the west side of Oysters Too Restaurant while paving and landscaping and to relocate the 'endcap' for where proposed parking easement with Mahoney's will be located.

Member Van Keuren made a motion to continue the hearing to May 24, 2018 at 6:00 PM. Members Hurrie seconded the motion. Motion carried 5 – 0.

Hearing – May 24, 2018: Note – Member Paul Murphy absent – quorum of Board is four (4) members.

Attorney Klauer informed the Board that the Planning Board did vote to approve the project under Site Plan Review and a copy of their decision was submitted to the file.

Board reviewed the site plan for any changes from previous hearing and asked Attorney Klauer about the easement with Mahoney's for additional parking. Attorney Klauer stated that they will be meeting with Mahoney's and hopefully have an easement prior to issuance of a building permit.

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

Chairman Foreman closed the hearing.

Board members discussed and consensus was to have draft decision prepared for review and vote.

Member Hurrie made a motion to direct the Zoning Administrator to draft a favorable decision for Board's review at the June 7, 2018 meeting of the Board. Member Van Keuren seconded the motion. Motion carried 4 – 0.

Open Meeting – June 7, 2018: The Board reviewed and discussed the draft decision.

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 876 East Falmouth Highway in East Falmouth contains 2.37 acres of primarily Business 2 zoned land with a small triangular portion at the northwest corner that is zoned Agricultural A. The property is located within the Eel Pond Coastal Pond Overlay District. The existing nonconformity is the setback from the front of the existing restaurant structure to the front property line off East Falmouth Highway (Route 28) of 25.8' that requires a 35' setback under Section 240-68 A. The subject property had been granted a Variance in 1978 for addition to the structure to be within the front setback requirement of 35 feet to East Falmouth Highway; and a modification of the Variance and a Special Permit under #9 and 10-84 (one document) to allow addition of new bathrooms and handicap ramp. At the time the variances and special permit were granted, the subject property was 11.27 acres, the site is now 2.37 acres. The applicant applied under Section(s) 240-3 C. of the Code of Falmouth to raze the one detached structure in the northerly midsection of the property and construct a structure to be used for a retail brewery and associated parking. The existing restaurant will have 171 seats and the proposed retail brewery will have a potential occupancy of up to 94 seats (total of indoor seating and outdoor seating combined); proposed parking on site will be 90 spaces and the proposed easement with Mahoney's will add 14 additional parking spaces. There are five (5) handicap parking spaces proposed – two (2) at the brewery and three (3) at the existing restaurant (Oyster's Too).

The Board finds that the structure in the northwest corner of the property most likely did not get converted from a cottage to 'dead storage' as required in Variance #2897 and is currently a two-bedroom dwelling; and that testimony from the applicant's representative was that it was a dwelling structure when the current owner purchased the property in 1997. The Board further finds that the two-bedroom dwelling structure is obscured and not noticeable being tucked back into the corner of the property. Furthermore, the Board finds that the septic system on subject property has taken into consideration the two-bedroom dwelling and that the dwelling itself does not create any negative impact to the use of the existing restaurant and the proposed retail brewery.

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 razing of existing detached structure known as a kitchen and construction of a new building for retail brewery use will not be substantially more detrimental than what currently exists on subject property as the one nonconforming front yard setback will remain as existing and not be increased. It is noted herein that there are no setbacks shown on the plan from the existing two-bedroom dwelling at the northwest corner of the property to the rear and side yard property lines, which should be 10' setbacks pursuant to Section 240-68 B. of the Code of Falmouth. The Board further finds that there will be no new nonconformities created through this approval and that the lot coverage will be in compliance with Section 240-69 A. of the Code of Falmouth and also noted that there is a reduction of total lot coverage through the proposed plan. Furthermore, the Board finds that the existing two-bedroom dwelling will remain a two-bedroom dwelling with no expansion and that said dwelling has existed for many years and appears to be compatible with the existing restaurant operation on subject property.

The Board finds that the proposed landscaping and lighting plan are appropriate for the change proposed herein in subject property and that the Board requests that the applicant take all precaution to preserve the cedar trees at the westerly portion of subject property where paving and landscaping are proposed. The Board further finds that the applicant has represented that a 3' berm will be created, with plantings along the property line off East Falmouth

Highway to buffer headlights from parking vehicles parking on-site and shining across East Falmouth Highway onto residential properties (see 'Landscape Plan' with a revision date of May 16, 2018); and plantings along the east side of Audubon Circle will buffer the site from that future roadway. Furthermore, the Board finds that the proposed lighting on subject property, according to testimony by the applicant's representative, will be low lighting so that there will be no distracting illumination onto East Falmouth Highway or impact residences on the south side of East Falmouth Highway (see 'Lighting Plan' with a revision date of May 16, 2018).

The Board finds that the proposed parking spaces on subject property, totaling 90 on-site spaces and 14 spaces proposed through an easement with Mahoney's, is appropriate for the subject property and use of two (2) establishments and the two-bedroom dwelling. The Board further finds that the parking during certain hours will be shared parking between the two (2) establishments and that the two-bedroom dwelling will have a designated parking space shown as #17 on the "Layout Plan" with a revision date of May 16, 2018 (noted herein). Furthermore, the Boards find that the this special permit and variance approval will be contingent upon the applicant receiving an easement for 14 parking spaces accessible from Audubon Circle (a proposed access shown on "Layout Plan" for proposed and other properties currently owned by Mahoney's Too Cape Cod & Island LLC) and that said easement agreement will be for no less than five (5) years; and that if amenable to Mahoney's, the easement will include the relocation of the 'end cap' to the easterly side of Audubon Circle as a buffer from parking vehicles off Audubon Circle as discussed by the Board and applicant's representative.

The Board finds that the overall project proposed herein, including landscaping and lighting, for subject property and the construction of a retail brewery operation will enhance the subject property and better utilize the subject property. The Board further finds that the proposed retail brewery will bring an additional option for the East Falmouth community in an area that is limited in options.

In addition to the above findings, the Board finds that the proposed razing of the existing 'kitchen' detached structure, the continued use of the two-bedroom dwelling and the addition of a retail brewery with the exiting restaurant 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 removal of one detached structure, construction of a retail brewery structure as there will be no new nonconformities created and the existing nonconformity(s) will not be increased through the approval of this special permit and modification of variance.

B. The site is suitable for the proposed use as the property is primarily zoned Business 2, with a small portion in the rear zoned Agricultural A, as the proposed retail brewery is an allowed use in a Business 2 zone and there will be no detriment to the existing restaurant on subject property.

C. The applicant has addressed the concerns from the Fire Department and Engineering Department on traffic flow and safety through the proposed curb cuts and parking on subject property.

D. The visual character of the subject property will be greatly 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 proposed septic system will be reviewed and approved by the Board of Health prior to issuance of a building permit.

F. There are adequate utilities to subject property by virtue of an existing dwelling and restaurant on subject property. However, the Applicant will be required to contact the Town Water Department, DPW and State Highway Department regarding the requirement of any permits necessary to complete the proposed project as approved herein.

G. The proposed construction of a retail brewery and the continued use of a two-bedroom dwelling on subject property discussed and represented herein will have no effect on the supply of affordable housing in Falmouth.

H. There was a Site Plan Review Decision submitted to the file from the Planning Board and the Board of Appeals took into consideration said Decision and conditions.

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 recognition of the two-bedroom dwelling, removal of detached kitchen structure, construction of a retail brewery and improvements to parking and landscaping 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 Hurrie 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 and Variance Modification** to Bad Martha Farmer’s Brewery, LLC (herein referred to as Applicant) under Section(s) 240-3 C. of the Code of Falmouth to raze existing detached kitchen structure, recognize existing two-bedroom dwelling and construction of a retail brewery on subject property where Oyster’s Too operates known as 876 East Falmouth Highway, East Falmouth, Massachusetts. This variance and special permit modification shall be subject to the following conditions:

1. The removal of detached kitchen structure, construction of retail brewery structure, all setbacks, lot coverage, parking and parking spaces, septic and use of subject property and proposed parking easement shall be as represented to the Board and as shown on plans submitted and reviewed by the Board entitled as follows:

“Front #876 East Fal. Hwy Bad Martha” floor plan – hand drawn – of existing detached kitchen on same property as Oyster’s Too Restaurant – plan has a Board date ‘received’ stamp of 04/19/2018;

“Site Plan” prepared for Bad Martha Brewery 876 East Falmouth Highway, East Falmouth, Massachusetts as drawn by BSS Design, Inc. consisting of:

- ‘Existing Conditions and Demo’ with a final revision date of 4/19/18, is stamped and signed by Thomas J. Bunker, PLS and a Board date ‘received’ stamp of May 17, 2018;
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“Bad Martha Brewery 876 East Falmouth Highway, East Falmouth, MA” architectural plans drawn by Architectural Innovations consisting of Drawing A4-4 ‘Proposed Basement Floor Plan’ dated 03/16/2018 and with a Board date ‘received’ stamp of March 23, 2018; A1-3 ‘Proposed Floor Plans’ dated 2/06/2018 with a Board date ‘received’ stamp of March 9, 2018; A2-3

'Proposed Elevations' dated 2/6/2018 with a Board date 'received' stamp of March 9, 2018; and A3-3 'Proposed Elevations' dated 2/6/2018 with a Board date 'received' stamp of March 9, 2018.

2. The applicant shall be required to submit a final Landscape and Lighting plan and a final Site Plan prior to the issuance of a building permit. The revised plan shall incorporate all the changes represented and discussed including, but not limited to, designated parking sign(s) for two-bedroom dwelling and if amenable to Mahoney's, the relocation of end cap on proposed additional parking at Mahoney's lot. The revised plans shall be submitted prior to the issuance of a building permit.
3. There shall be no more than 171 seats within the existing Oyster's Too restaurant and no more than 94 seats allowed within the operation of the proposed retail brewery (includes inside and outside seating).
4. All parking spaces on subject property and proposed easement area shown shall be striped and maintained.
5. All landscaping on subject property shall be maintained in good condition.
6. The approval of the proposed retail brewery structure and operation approved herein shall be contingent upon the applicant securing an easement from Mahoney's Too of Cape Cod & the Islands, LLC for the additional 14 parking spaces as shown on the "Site Plan" noted in Condition 1 above. The easement agreement shall be for no less than five (5) years; shall be signed and filed with the Registry of Deeds; and a copy submitted to the Board of Appeals prior to the issuance of a building permit.
7. 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.
8. The Applicant shall meet the requirements of the DPW Water Division.
9. 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.)
10. 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: **021-18**

Applicant: **BAD MARTHA FARMER'S BREWERY, LLC of Edgartown, MA**

Owner: **Cherrystones, Inc. of East Falmouth, MA**

Subject Property: **876 East Falmouth Highway, East Falmouth, Massachusetts
Map 32 Section 05 Parcel 001A Lot 002**

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 Variance and 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

JUN - 8 2018

FALMOUTH TOWN CLERK

AD@950ak

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.