

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

APPEAL NO: 061-18

APPELLANT/OWNER: HEATHER P. CAMPION of Brookline, MA

SUBJECT PROPERTY: 20 Sheridan Avenue, Falmouth, Massachusetts
Assessor's Map: Map 47C Section 08 Parcel 027 Lot 001C

DEED/CERTIFICATE: Book 25776 / Page 217

SUMMARY: Board voted to Overturn the Building Commissioner's Determination and Grant the Appeal

PROCEDURAL HISTORY

1. Under a date of July 18, 2018 Attorney Charles M. Sabatt filed an Appeal with the Falmouth Town Clerk on behalf of the Appellant, pursuant to M.G.L. c. 40A §§ 8 & 14 and § 240-202 of the Code of Falmouth appealing the Building Commissioner's determination that the bulkhead and deck/elevated walkway are in violation of § 240-77 of the Code of Falmouth and requires a building permit on subject property known as 20 Sheridan Avenue, 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 September 6, 2018.
4. The public hearing was closed on November 1, 2018, wherein the Board consisting of Chairman Terrence Hurrie, Clerk Kimberly Bielan, Member Paul Murphy and Associates Gerald Potamis and Robert Dugan, sitting as voting members, made a decision to Overturn the Building Commissioner's determination regarding a violation of the bulkhead and deck/elevated walkway and requires a building permit. Minutes of the hearing(s) are on file in the Board of Appeals.
5. The appellant was represented at the hearing by Attorney Charles M. Sabatt who reviewed and discussed the appeal 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

08/28/2018 Attorney Robert Ament submitted to the file a letter from Attorney Charles M. Sabatt to Building Commissioner Rod Palmer dated April 25, 2018 with 5 Exhibits attached

08/28/2018 Attorney Robert Ament submitted to the file a letter from Charles M. Sabatt to Robert H. Ament dated July 17, 2018 with the Appeal filed with Falmouth Town Clerk attached

- 08/28/2018 Attorney Robert Ament submitted to the file a copy of a letter from Building Commissioner Rod Palmer to Heather P. Campion dated June 20, 2018 – letter of opinion; and attached was a copy of a letter from Building Commissioner Rod Palmer to Charles M. Sabatt, Esquire dated June 20, 2018 – letter of opinion
- 08/28/2018 Attorney Robert Ament submitted to the file a copy of a letter from Attorney Ament to Building Commissioner Rod Palmer dated March 8, 2018 with Exhibits A through K attached to said letter
- 08/28/2018 Email between Attorney Ament and Zoning Administrator, submitted by Attorney Ament, regarding no files in Building Department regarding subject appeal (Attorney Ament submitted files noted with a received date of 08/28/18 above)
- 09/04/2018 Letter via fax received 9/4/18 submitted to the file from Phillip T. Gross of 189 Clinton Avenue to the ZBA – letter states support of Ms. Campion (Appellant) and information regarding certification of the subject bulkhead (seawall)
- 09/06/2018 Michael B. McGrath, PE and PLS submitted to the file (during this hearing) a copy of:
- “Plot Plan of Proposed Seawall Repair prepared for Heather Campion for Lot C-1, #20 Sheridan Avenue in Falmouth” dated May 19, 2000 as drawn by Holmes and McGrath, Inc. that is stamped and signed by Michael B. McGrath, Inc., PLS
 - “Exhibit Plan” – Falmouth Harbor - as drawn by Holmes and McGrath, Inc. dated September 6, 2018 – plan is stamped and signed by Michael B. McGrath, PLS
 - “Plan of Waterfront Improvements prepared for Vincent Geoffroy For Lot 3 Girard Avenue in Falmouth” as drawn by Holmes and McGrath, Inc. – plan Sheet 1 of 1 is dated July 31, 2998 and stamped and signed by Michael B. McGrath, PLS
 - “Plan of Waterfront Improvements prepared for Brian J. McLaughlin for #79 Girard Avenue in Falmouth” drawn by Holmes and McGrath, Inc. – Sheet 1 of 1 dated June 16, 1998 – plan is stamped and signed by Michael B. McGrath, PLS
 - “Bulkhead Design and Existing Pier Details for #20 & #30 Clinton Avenue prepared for Dolor Mallette in Falmouth” as drawn by Falmouth Engineering, Inc. – Sheet 2 of 2 dated February 2, 2010 with a final revision date of 3/30/2010 – plans is stamped and signed by Michael J. Borselli, PE
 - “Plan Accompanying Petition of Dolor Mallette, 20 Sheridan Avenue – Plan of existing bulkhead in Falmouth Inner Harbor Falmouth, Barnstable County, MA” – plan has License Plan No. 13049 – certified by Michael J. Borselli, PE on 11/23/2012
- 10/18/2018 Attorney Robert H. Ament submitted to the file a letter to the Board of Appeals dated October 18, 2018 from Attorney Jackson C. Parmenter (abutter Geoffroy’s attorney)
- 10/18/2018 Attorney Robert H. Ament submitted to the file a letter from Michael B. McGrath, PE and PLS of Holmes and McGrath, Inc. dated October 18, 2018 with Exhibits A through N attached

11/01/2018 During the hearing Michael B. McGrath, PE and PLS submitted a letter to the Board of Appeals dated November 1, 2018 who is representing the abutter Mr. Geoffroy and responded to Mr. Borselli's letter of 10/31/2018 that has Exhibits attached

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

07/18/2018 Attorney Charles M. Sabatt submitted to the file the Appeal filed with the Falmouth Town Clerk with five (5) Exhibits attached

09/06/2018 Attorney Charles M. Sabatt handed two (2) letters in at the hearing – both letters from Falmouth Engineering, Inc. – one dated January 19, 2011 to Mark Kasprzyk with Falmouth Conservation Commission and one dated January 18, 2011 to David Hill with Mass DEP

10/16/2018 Attorney Charles M. Sabatt submitted to the file a letter to Zoning Administrator Budrow dated October 15, 2018 as a cover letter to five (5) attached cases and Exhibits A through P (see file)

10/16/2018 Attorney Charles M. Sabatt submitted to the file the '*Recommended Final Decree in the Matters of Beverly Port Marina and City of Beverly*'

10/31/2018 Michael Borselli, PE with Falmouth Engineering, Inc. submitted to the file a letter to Zoning Administrator Budrow dated October 31, 2018 – the letter was in response to letter submitted to the file by Holmes and McGrath, Inc. dated October 18, 2018 – attached to Mr. Borselli's letter were copies of a "Plan" of abutting property owned by Vincent Geoffroy drawn, signed and stamped by Michael B. McGrath, PLS; a copy of a "Plan Accompanying Petition of Dolor Mallette, 20 Sheridan Avenue" plan of existing bulkhead in Falmouth Harbor – Sheet 3 of 3 dated January 13, 2011; and three (3) photos taken in 2010 of work being conducted at 20 Sheridan Avenue.

11/01/2018 Attorney Charles M. Sabatt submitted to the file during the hearing two (2) copies of the plan for 20 Sheridan Avenue as drawn by Michael J. Borselli, PE – plan notes abutter Geoffroy's land shown

Letters/Referrals/E-mails from Town Departments

08/22/2018 ZBA staff submitted to the file a copy of the "Plot Plan and Detail for #20 and #30 Clinton Avenue" prepared for Dolor Mallette in Falmouth by Falmouth Engineering, Inc. dated February 2, 2010 with a revision date of 3/30/2010 (Sheet 1 of 2) stamped received by Conservation Commission on March 30, 2010; and a copy of the "As-Built Site Plan for #20 Sheridan Avenue" prepared for Dolor Mallette Falmouth, MA as drawn by Falmouth Engineering, Inc. – Sheet 1 of 1 dated January 3, 2011 with a date stamp 'received' by the Conservation Commission on January 19, 2011 – both plans are stamped and signed by Michael J. Borselli, PE

Hearing – September 6, 2018:

Attorney Charles Sabatt explained that the appellant is appealing an order of the Building Commissioner dated June 20, 2018 in which the Building Commissioner determined that a repair to the appellant's seawall made in 2010 on Falmouth Harbor violates the Falmouth Zoning bylaw and requires a building permit under the Massachusetts State Building Code. The Order ordered the appellant to apply to the Board of Selectmen for a special permit under the Zoning bylaw for maintenance of the existing bulkhead and to obtain a building permit. Attorney Sabatt explained that in 1995 the Department of Environmental Protection Agency (DEP) issued an amnesty license under Chapter 91 that licensed the existing seawall and a pier and permitted under its terms maintenance repairs of the seawall to keep the existing seawall in good condition. He explained that in 2009 the seawall was beginning to deteriorate and was possibly in danger of collapsing. Falmouth Engineering was retained and proposed repair of said seawall with vinyl sheeting and cap to encase and stabilize the seawall. The Falmouth Conservation Commission reviewed the proposal and in 2010 an Order of Conditions was issued allowing the repair as applied for. In June of 2010 work commenced during which it was discovered that the seawall was not straight up and down, but on an angle and supported by toe stones. Plans were revised and the Conservation Commission agent was notified of said change and performed a site visit and approved the revision with field minor modifications – work was completed that summer. In the fall of 2010 the (DEP) was notified by the northerly neighbor that he was opposed to the repair and sheeting. DEP said a Chapter 91 license was needed. The application for the license was prepared in January 2011 and the plan dated January 13, 2011 showing the existing bulkhead and cap was appended to the application submitted to DEP and was presented to the then Building Commissioner Eladio Gore for review and certification as to zoning. Attorney Sabatt asked that 301 CMR 9.34 (1) requires that an applicant, in this case the appellant, obtain a certification from the local zoning enforcement officer stating that the proposed activity does not violate local zoning bylaws. He further stated that the DEP relies upon such a certification from the local zoning enforcement officer as a precondition to issuing a license under Chapter 91. In this instance, the Building Commissioner, Mr. Gore signed the certification in the DEP application stating that "I hereby certify that the Project described above and more fully detailed in the applicant's waterways license application and plans is not in violation of local zoning ordinances and bylaws." The "As-Built" shows it was permitted and it is on the final license plan and the Planning Board made a determination that plans have been filed with reference to the plan of January 13, 2011. The application is a matter of record and the Building Commissioner certified there were no violations; DEP certified and issued the Chapter 91 license.

Attorney Sabatt informed the Board that the direct abutter, Mr. Geoffroy, was notified about the original Conservation Commission filing, the Notice of Intent and the DEP filing and never filed an appeal or raised any objection. The DEP process involving a contest by the appellant's northerly abutter took nearly two (2) years, but in that two (2) year period Mr. Geoffroy never filed any objections or intervened. Mr. Geoffroy attempted to get a dock at his bulkhead and that application was denied. In 1999 Mr. Geoffroy obtained permission from the Conservation Commission and a Chapter 91 License allowing him to remove his existing stonewall and replace it with a new timber bulkhead and timber piles. He was required to obtain a special permit under the Falmouth Zoning bylaw because his project was new construction, unlike the repair undertaken at the appellant's site. At some point Mr. Geoffroy put out an unlawful float and put his boat in a location that prevented the appellant from tying up his own boat. In the Spring of 2016 the Conservation Commission wrote an enforcement letter to Mr. Geoffroy to remove the illegal float. Mr. Geoffroy in 2016 then put in a cleat and ties in the appellant's dock so that the appellant could not use the southerly side of their dock – it was only then (after the

enforcement action from Conservation Commission) and he had to remove the illegal float in 2016 that Mr. Geoffroy began to complain about the appellant's bulkhead. Attorney Sabatt noted that in 2017 the appellant filed suit and obtained an injunction which enjoined Mr. Geoffroy from tying up to the appellant's dock. Attorney Sabatt concluded stating that Mr. Geoffroy is eight (8) years too late and if he had concerns he should have objected or appealed in 2011.

Building Commissioner Rod Palmer spoke to the Board in explanation saying that the original permit Chapter 91 license filed and signed by then Building Commissioner Eladio Gore was for a repair. After a site review (conducted by Mr. Palmer – he did not state when exactly) he stated that in his opinion the repair was found to be more than a repair – it was a construction. He further stated that the owner should have had a special permit by the Board of Selectmen. His opinion was the overall width of the elevated walkway was larger than originally permitted and the dock was not what was originally described.

The Board discussed issues with Mr. Palmer (see minutes in file). The Board asked Attorney Sabatt if it is his contention that the certificate to DEP stops the Commissioner from enforcing the bylaw.

Attorney Sabatt responded that the Building Department certified to DEP that there were no violations and nothing that he could find authorizes the Town to rescind that certification – the Building Commissioner at that time made a determination that this construction was lawful under zoning and was a lawful repair and signed the certification to a state agency that has jurisdiction over tidelands and that the agency in turn relied upon the certification in issuing its Chapter 91 License. He did not see how the Town can rescind that – and eight (8) years later.

Chairman Hurrie before recognizing Attorney Parmenter, attorney for Mr. Geoffroy, reminded the parties that this hearing is about the appeal of the Building Commissioner's determination and not a part of the matters currently before the courts by the appellant and abutter.

Attorney Jackson C. Parmenter, on behalf of abutter Vincent Geoffroy, stated that there was much talk about whether the Building Commissioner was misled or duped. Mr. McGrath is here to demonstrate that that is what happened – the Campions submitted an application to repair the seawall, there was a change on the site and we believe the as-built is not an accurate depiction of what did happen on the site.

Michael B. McGrath, PE and PLS with Holmes and McGrath, Inc. explained to the Board that he has some overlay plans that he drew/shot that shows that the projection is much greater into Falmouth Harbor than the suggested eleven inches on the plan Mr. Borselli created – he said it is in fact four (4) feet difference. He noted that in the plans he drew, the seawall was vertical and the plan that was represented as drawn by Michael Borselli shows the historic wall to be approximately two (2) feet into the harbor, Mr. McGrath states he believes it was not. He said there is a circumstance where the plan does not represent what happened and that he (Mr. McGrath) believes the building inspector could have been very easily misled.

The Board discussed the plans with Mr. McGrath.

Attorney Parmenter spoke to the Board and explained he believes there are two (2) key issues. First, were the Campions required to obtain a special permit from the Town? They obtained a Chapter 91 license. He said a Chapter 91 license is not a building permit – *Willis v. Falmouth ZBA* states a Chapter

91 license does not equate to a building permit – the applicant states the work was for a repair so it didn't require a building permit. Attorney Parmenter suggested that the filling, excavating, drilling, rip-rapping within a tidal area to alter the shoreline was what was done and was beyond what was required by DEP. He said the Second issue is that the certificate obtained by the Building Commissioner is somehow a decision similar to a permit from which my client should have filed an appeal within thirty days – this certification is not a decision – *'Richardson v. Chilmark ZBA'* says what is a decision. What happened was an endorsement on a plan by a building official and they attempted to repeal that – Mr. Geoffroy does not have a permit or a decision where a notice to aggrieved parties is required. MGL c. 40A § 7 states when structures are constructed without a building permit, there is a ten (10) year statute of limitations to bring an enforcement order and we (Geoffroy) is well within that period. Attorney Parmenter concluded by saying Appeal should be denied.

Attorney Parmenter was asked about the timeframe it took for his client to file a complaint with the Building Commissioner – and if 'laches' comes in to play. He responded by saying that a violation exists – laches should not apply to the Building Commissioner's enforcement order because he is within the ten-year statute to enforce said violation. He said Mr. Geoffroy didn't realize until litigation transpired (civil matter before the courts currently) that it was constructed incorrectly and that he had no reason to believe this structure was not properly permitted.

The Board discussed and requested additional information from the parties on if a certification is binding the Town and for any case law discussed herein.

Member Bielan made a motion to continue the hearing to November 1, 2018 at 6:30 PM. Member Potamis seconded the motion. Motion carried 5 – 0.

Hearing – November 1, 2018:

Attorney Charles M. Sabatt reviewed the appeal and the hearing held on September 6, 2018 and discussed new information that he submitted to the file.

Attorney Parmenter spoke in rebuttal to the appeal stating that the work conducted did require a building permit and that action can be taken as the request for enforcement was within ten (10) years of said work and that the six (6) year timeframe is not relevant as there was no building permit issued.

Michael McGrath spoke on behalf of abutter (Geoffroy) and pointed out what he thought to be discrepancies in the plans from 2011 by the project engineer.

Board discussed the testimony and new information submitted to the file (see above).

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

Member Bielan made a motion to close the hearing. Member Dugan seconded the motion. Motion carried 5 - 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:

History: The subject property located at 20 Sheridan Avenue in Falmouth, Massachusetts was the subject of a Chapter 91 License application in January of 2011 with work conducted by Falmouth Engineering, Inc. and is now the basis of this Appeal #061-18. The appellants own 20 Sheridan Avenue that has a seawall that has existed for over 20 years and was permitted by a Chapter 91 Amnesty License #4029. In 2010, the previous owners (Mallette) of subject property applied for a Notice of Intent with Falmouth Conservation Commission seeking permission to repair the seawall by installing a vinyl sheet piling seaward of the stone seawall and new timber decking on top of the existing wall designed to fortify the structure. Approval by the Conservation Commission was granted by way of an Order of Conditions and work commenced in June of 2010 and was completed in the summer. In September of 2010 the Department of Environmental Protection (DEP) determined that Mr. Mallette should apply for a new Chapter 91 license for said repair. In May of 2011 a 'draft' license was issued and the Mallette's northerly abutter objected and a proceeding with DEP was held. A license permitting the seawall repair by means of the bulkhead and deck/elevated walkway was issued in March of 2013. During this time the Conservation Commission, on December 28, 2011, issued a Certificate of Compliance for said repairs.

The Board finds that the Building Commissioner is the one who makes a determination if work requires a special permit from the Board of Selectmen, or any other Regulatory Board – see § 240-98 A. of the Code of Falmouth. The Board further finds that if a building permit was necessary for the work conducted on the subject bulkhead and deck/elevated walkway, the Building Commissioner (then Eladio Gore) would have required a special permit from the Selectmen and a building permit prior to sign off of the Chapter 91 certification. Furthermore, the Board finds that the appellant relied upon the certification submitted to the Department of Environmental Protection as required under Chapter 91.

The Board finds that under 310 CMR, DEP required the certification as a pre-condition to the issuance by it of a Chapter 91 license and that as a result the DEP relied upon the certification as well.

The Board finds that the appellant and her representatives submitted credible evidence that the work conducted on the bulkhead and deck/elevated walkway was originally approved by Conservation Commission through an Order of Conditions, amended and a Certificate of Compliance issued in 2011. The Board further finds that the 'draft' approval for the work conducted on the bulkhead and deck/elevated walkway from DEP for the Chapter 91 license #13049 was objected to by an abutter and adjudicated and eventually approved by DEP in March of 2013.

The Board finds through testimony that the abutter (Geoffroy) was notified of the Notice of Intent and had been present on site for some of the work conducted. The Board further finds through testimony that the abutter (Geoffroy) has, in the past, used the structure for his own use. Furthermore, the Board finds through testimony that the abutter (Geoffroy) did not appeal or request enforcement until such time that he (Geoffroy) installed an illegal float and was required to remove it, at which time he [Mr. Geoffroy] installed a cleat on the appellant's bulkhead without the appellant's permission that led to an action being filed by the appellant in Barnstable Superior Court against said abutter.

The Board finds that the request by the abutter (Geoffroy) for enforcement by the Building Commissioner is unreasonable and inequitable and that the work conducted in 2010 was approved by Conservation Commission, the Building Commissioner and the DEP. The Board further finds that there is no authority to uphold an enforcement action that would have the effect of rescinding the Building Commissioner's 2011 certification to the DEP, or does it find any facts or circumstances that would warrant a reversal of the original determination. Furthermore, the Board finds that there was no proof submitted that the Town requires a building permit for structures such as this within tidewaters or tidelands.

The Board finds, according to testimony, that the abutter's attorney believes the request to the Building Commissioner for enforcement is appropriate and within the abutter's right based on the ten (10) year noncompliance of a structure timeframe under M.G.L. c. 40A § 7 and § 240-3 B. of the Code of Falmouth. The Board further finds that there has been no proof submitted that the Town requires a building permit for structures such as this (within tidewaters). Furthermore, the Board further finds that previous owner of subject property relied on the process and approval by Conservation Commission in the form of a Certificate of Compliance as well as a Certificate from DEP, that the work was in fact correct and appellants relied on same compliance in purchase of subject property.

The Board finds that the response letter from Michael J. Borselli, PE, dated October 31, 2018 was submitted with supporting documentation and photos that refutes testimony by Michael McGrath, PE, PLS regarding repair work to the subject bulkhead and the accusation that Mr. Borselli misled the then Building Commissioner (Eladio Gore).

The Board further finds that the abutter is not barred from a determination of laches seven (7) years after the work was conducted because of a lack of a building permit. The Board further finds that there was no evidence submitted establishing that a building permit was in fact required for the work conducted and represented by the appellants herein.

Member Bielan made a motion to Grant the Appeal and Overturn the Building Commissioner's Determination. 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 of Heather P. Champion, Overturning the Building Commissioner's Determination that the bulkhead and deck/elevated walkway are in violation of § 240-77 of the Code of Falmouth and requires a building permit.** The subject property of this appeal is 20 Sheridan Avenue, Falmouth, Massachusetts.

Decision of the Falmouth Zoning Board of Appeals Continued:

Appeal Number: **061-18**

Appellant/Owner: **Heather P. Campion of Brookline, MA**

Subject Property: **20 Sheridan Avenue, Falmouth, Massachusetts
Map 47C Section 08 Parcel 027 Lot 001C**

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 and Overturn the Building Commissioner’s Determination as stated above.



Terrence Hurrie, Chairman, Board of Appeals

RECEIVED

NOV - 9 2018

FALMOUTH TOWN CLERK

WOC 4:00 pm

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.