



TOWN OF FALMOUTH
ZONING BOARD OF APPEALS
DECISION

SPECIAL PERMIT NO: #043-19

APPLICANT/OWNER: William F. Curley, III Trustee of Green Meadow Realty Trust

40 Green Harbor Road, East Falmouth, Massachusetts

SUBJECT PROPERTY: 152 Broken Bow Lane, East Falmouth, Massachusetts

Assessor's Map: Map 34 Section 04 Parcel 031 Lot 030

132 Broken Bow Lane, East Falmouth, Massachusetts

Assessor's Map: Map 34 Section 04 Parcel 031 Lot 028

116 Broken Bow Lane, East Falmouth, Massachusetts

Assessor's Map: Map 34 Section 04 Parcel 031 Lot 026

100 Broken Bow Lane, East Falmouth, Massachusetts

Assessor's Map: Map 34 Section 04 Parcel 031 Lot 024

82 Broken Bow Lane, East Falmouth, Massachusetts

Assessor's Map: Map 34 Section 04 Parcel 031 Lot 022

81 Broken Bow Lane, East Falmouth, Massachusetts

Assessor's Map: Map 34 Section 04 Parcel 031 Lot 021

DEED/CERTIFICATE: Book 30916 Page 128

SUMMARY: Building Commissioner overturned for permits #:

2019-026936

2019-026937

2019-026927

2019-026933

2019-026932

2019-026929

PROCEDURAL HISTORY

1. On June 17, 2019, the Applicant filed an application with the Zoning Board of Appeals appealing the decision of the Building Commissioner to condition building permits, under M.G.L. c. 40A § 8 and 15, and 240-202 of the Code of Falmouth, at 81, 82, 100, 116 132 and 152 Broken Bow Lane, East Falmouth, Massachusetts (collectively, the “Premises”).
2. Notice was given, as required by M.G.L. Chapter 40 A, Section 9, including notices mailed to all persons deemed to be affected thereby, as they appear on the tax list.
3. The previous Zoning Board of Appeals cases for the Premises involved a 2017 Decision (#101-16) overturning the Building Commissioner’s determination that the Premises (previously identified as Lots 18, 22, 24, 26, 28 and 30) were unbuildable; thereby, the Board determined that the lots were buildable.
4. The advertised public hearing was opened on August 1, 2019, at which hearing, relevant testimony was heard.
6. The public hearing was closed on August 1, 2019, wherein the Zoning Board of Appeals, consisting of Terrence J. Hurrie, Kenneth H. Foreman, Edward Van Keuren, Robert B. Dugan, and Gerald Potamis, made a decision to overturn the decision of the Building Commissioner. Minutes of the hearing(s) are on file in the Board of Appeals.
7. The following documents and information are on file in the office of the Zoning 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)

- “Recent Permits Issued for Pre existing Subdivision Without Requiring Denitrification System”, with attached “Unofficial Property Record Card – Falmouth, MA stamped received by Zoning Board of Appeals, August 1, 2019
- Letter from Patricia A. McArdle & Associates, P.C., 44 Main Street, Mattapoisett, MA, dated August 1, 2019, with attachments (addressing 30 day appeal period from issuance of building permit)
- Letter from Patricia A. McArdle & Associates, P.C., 44 Main Street, Mattapoisett, MA, dated July 31, 2019, with attachments (addressing building Inspector’s failure to act, and Planning Board regulations)

Letters/Referrals/E-mails from Town Departments

Referrals were sent to the following departments: Assessors, Building, Conservation, Engineering, Health, Fire Department, Planning, Board of Selectmen, Water and Wastewater

- Planning, e-mail from Thomas Bott, Town Planner, dated July 16, 2019 (stating 1969 subdivision had exhausted its zoning protection, and would now require installation of I/A septic systems, according to current zoning By-Law)
- Zoning Board of Appeals Decision #101-16

- Legal: email from Frank Duffy, Town Counsel, dated June 26, 2019 and August 1, 2019

Plans submitted by Applicant/Applicant's Representative

Hearing:

August 1, 2019

Attorney Patricia McArdle, 44 Main Street, Mattapoisett, MA appeared before the Board, representing William F. Curley, III, Trustee of Green Meadow Realty Trust, 40 Green Harbor Road, East Falmouth, Massachusetts, owner of the Premises (the "Applicant"). Ms. McArdle stated that Broken Bow Lane is a 1969 subdivision. She reported that there was a Zoning Board of Appeals decision in 2016/2017, granting grandfathered status. She also noted that denitrification septic systems were not required from the Board of Health in 1969. Ms. McArdle stated that in March of this year, the Applicant applied for, and subsequently received building permits, to construct homes on 6 lots. She reported that the permits were conditioned that the septic systems had to be revised with denitrification systems. Ms. McArdle stated that these permits were issued by the Building Commissioner beyond the requisite 30 days, on the 52nd day.

Ms. McArdle reported that these denitrification septic systems were never previously a requirement. She did note that any proposed development with 5 lots (proposed) or more, or 5 acres or more, now has to have these systems. However, if this is the circumstance, the Planning Board then makes a determination as to whether or not the denitrification system is needed. She specified that the denitrification septic systems are not an automatic requirement, however, the Building Commissioner required them in the permit. Ms. McArdle proceeded to cite other lots, created in subdivisions of 5 lots or more, which were not required to have the denitrification systems. She also reported that Thomas Bunker, from BSS Engineering, was surprised to see this requirement on the building permits issued.

Thomas Bunker, engineer, appeared before the Board, and stated that the Coastal Pond Overlay District went into effect in 1988. He stated that there had never been a situation where there was a requirement to put in a denitrification system just because the lot was in a Coastal Pond Overlay; even lots that are larger than 5 acres, or parcels larger than 5 lots. For example, Bonnie Lane is in the Waquoit Bay overlay, which is over 5 lots and 5 acres, and had no denitrification system requirement. Seacoast Shores is also within this overlay district, and similarly had no requirement. He reported that the denitrification systems have only been required due to proximity to a wetland, or with the proposal of an Accessory Apartment.

The Board inquired as to whether, in any of the examples provided, were they building more than one structure at a time. The Board expressed an understanding that the creation of a new subdivision would require installation of the denitrification septic systems.

Mr. Bunker concurred on the creation of a new subdivision.

Ms. McArdle stated that the denitrification septic systems are intended for a new subdivision; the lots at issue are existing lots. She pointed out that the Board previously determined that these lots are grandfathered. She surmised that the Building Commissioner thought that the denitrification systems were triggered by the number of lots proposed for development.

The Town Planner has submitted a letter to the ZBA, stating that a subdivision requires denitrification systems. Ms. McArdle noted that the By-Law requires denitrification systems for proposed subdivisions. She reported that no other lot(s) have been required to have this denitrification system, and that the requirement here is arbitrary and capricious. She reviewed that the denitrification system is not required for the district, and that this was confirmed with the Health Agent.

Brian Bourque appeared before the Board, and stated he is certified building inspector, as well as a former employee of Falmouth's building department, where he worked for eight years. He stated that the denitrification system requirement is a misinterpretation, and that is clearly for new subdivisions, and reviewed by the Planning Board. He stated that it is not within the Building Commissioner's authority to require the denitrification system. Mr. Bourque reported that he went through permits for the last two years, to see what developments of more than 5 acres or 5 lots, required denitrification systems. He reported that not one development was required to put these denitrification systems in. Mr. Bourque also noted that the denitrification systems require monitoring and maintenance over the life of the system, adding to the expense.

The Board considered that the issue was that there was no construction on these lots in this subdivision. They noted the Town Planner's letter reporting that the subdivision was in 1969, but that the zoning protection is exhausted, as it is beyond the 8 years from the lot endorsements, requiring meeting current By-Laws.

Ms. McArdle noted that the development is half built. She stated that the determination for denitrification systems lacked due process, and that this requirement for denitrification septic systems would have to have been specified at the time of lot creation. She referred the Board to By-Law §240-99 A. for the subdivision requirements.

Mr. Bourque noted that the Bylaw does not say that this requirement for denitrification systems is triggered at the request for a building permit.

The Board inquired as to whether there were any restrictive covenants when the subdivision was laid out. Mr. Curley replied that that he was not aware of any covenants or homeowner's association. He also stated to the Board that he inquired about the septic systems before he bought the property, and was told that denitrification systems were not required. He reported that only the Planning Board could issue denitrification systems as a condition.

The Board inquired as to whether the Building Commissioner had not taken action within the required thirty days. Ms. McArdle confirmed this.

Mr. Bourque also stated that the Building Commissioner did not provide a By-Law section in which to appeal, and that the Building Code is very clear that a permit must be acted on within 30 days. He stated that per the State Building Commissioner, after 30 days, if the local Building Commissioner hasn't issued a building permit, you can start work, with no conditions.

The Board inquired as to whether there was information regarding why the permit was issued after 52 days, but there was no answer.

No one further appeared in support of, or opposition to, the petition.

Mr. Foreman made a motion to close the hearing, which was seconded by Mr. Van Keuren, and unanimously voted.

FINDINGS

The previous Zoning Board of Appeals case for the Premises involved a 2017 Decision (#101-16), overturning the Building Commissioner's determination that the Premises (previously identified as Lots 18, 22, 24, 26, 28 and 30) were unbuildable. The Board determined that the lots were buildable.

The Zoning Board of Appeals carefully considered the facts and evidence submitted for the hearing, and made the following findings:

1. The Building Commissioner did not act on the building permit application within the requisite 30 days.
2. The By-Law does not empower the Building Commissioner to require denitrification septic systems; this action is required by the permit granting authority.
3. There is no requirement for a special permit for the construction referenced herein, and therefore no special permit granting authority requiring the installation of a denitrification septic systems for the Premises.

NOW THEREFORE, BE IT RESOLVED, that the Zoning Board of Appeals, being of the opinion aforesaid, and acting under the provisions of the Code of Falmouth, voted 5 to 0, following a motion made by Mr. Potamis, and seconded by Mr. Van Keuren, to overturn the determination of the Building Commissioner requiring denitrification septic systems be installed at 81, 82, 100, 116 132 and 152 Broken Bow Lane, East Falmouth, Massachusetts (the "Premises"), determining that the denitrification septic systems are not required.

By the signature below, the Zoning Board of Appeals certifies the vote of the Board, for the above referenced hearing:



Robert B. Dugan, Clerk, Zoning Board of Appeals

RECEIVED
AUG 28, 2019 AM 9:24
TOWN CLERK

Date Filed With Town Clerk