



TOWN OF FALMOUTH
ZONING BOARD OF APPEALS
DECISION

APPEAL NO: 013-19

APPLICANT/OWNER: Joseph L. Hacker and Karen R. Schwalbe
237 Hatchville Road, Hatchville, Massachusetts

SUBJECT PROPERTY: 8 Solar Way, Hatchville, Massachusetts

Assessor's Map: Map 17 Section 01 Parcel 005 Lot 004

DEED/CERTIFICATE: Book 12312 Page 0147

SUMMARY: Appeal denied; Building Commissioner upheld

PROCEDURAL HISTORY

1. An application was filed with the Zoning Board of Appeals on March 8, 2019 appealing the decision of the Building Commissioner, by letter dated February 6, 2019, requiring removal of the pole barn structure within 30 days, at 8 Solar Way, Hatchville, Massachusetts (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 most recent tax list.
3. There was no previous Zoning Board of Appeals case for the Premises.
4. The advertised public hearing was opened on May 2, 2019. Board members present included Terrence J. Hurrie, Kenneth H. Foreman, Robert B. Dugan, Edward Van Keuren, and Gerald Potamis. Per request of the Applicant, the hearing was continued to July 11, 2019. Notice thereof was posted at the Town Clerk's office and on the Town's website. The "Agreement for Extension of Statutory Hearing,

Decision and filing Deadline” was executed by the Applicant and the Board, and filed with the Town Clerk on May 24, 2019.

5. The hearing was held on July 11, 2019, and continued at the request of the Applicant, to August 22, 2019. The “Agreement for Extension of Statutory Hearing, Decision and filing Deadline” was executed by the Applicant and the Board, and filed with the Town Clerk on July 29, 2019.

6. The public hearing was held on August 22, 2019, and then closed, following motion made by Mr. Dugan, seconded by Mr. Van Keuren, and unanimously voted. Minutes of the hearing(s) are on file with the Town Clerk, and in the office of the Zoning 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/Information from Applicant/Representative(s)

- Letter from Joe Hackler and Karen Schwalbe, dated March 8, 2019
- Letter from Karen & Joe to Rod (Palmer), dated October 12, 2016
- “A proposal to Alchemy Farm Cohousing Community regarding a proposed Pole Barn for Lot 4, Solar Way, Hatchville, MA 02536” comprising 12 pages, date stamped received Mar 8, 2019

Letters/Referrals/E-mails from Town Departments

- No comment from Planning Board on referral, dated 3/11/19
- “Agreement for Extension of Statutory Hearing, Decision and filing Deadline” was executed by the Applicant and the Board, and filed with the Town Clerk on May 24, 2019.
- “Agreement for Extension of Statutory Hearing, Decision and filing Deadline” was executed by the Applicant and the Board, and filed with the Town Clerk on July 29, 2019.
- Copy of plot plan “Site Plan for Lot 4, #0 Solar Way, Alchemy Farms, Falmouth, Mass.”, prepared by Warwick & Associates, Inc., 63 County Road, Box 801, North Falmouth, MA, dated 02/23/2016
- Copy of “Plan Review Record” for Solar Way, dated 10-3-16, reviewed by Gary Street, Falmouth Building Department
- Ten photos into the record from Rod Palmer, dated March 29, 2019
- Copy of “Building Permit #2016-006119, dated 12/9/2016, with attached 14 pages
- Copy of January 10, 1996 letter to Carol S. Martin, Town Clerk for a Planned Residential Development re Cape Cohousing Inc., by Brian A. Currie, Town Planner

Letters/E-mails from Abutters/Interested Parties

- Email from Jeffrey Oppenheim, Oppenheim & Nickerson, LLP (no longer representing Applicant)
- Copy “QuitClaim Deed”, for Cape CoHousing, Inc., 237 Hatchville Road, East Falmouth, Barnstable County, Massachusetts, granted to Joseph L. Hackler and Karen R. Schwalbe, for Lot #4, 237 Hatchville Road, East Falmouth, Massachusetts, recorded 06-02-1999
- Letter to Noreen Stockman, Zoning Administrator, from Earle Barnhart, dated 8/11/19
- Email from Hilde Maingay & Earle Barnhart, dated August 9, 2019 (dig safe and plan review)
- Email from Hilde Maingay & Earle Barnhart, dated July 12, 2019 (forward letter to the file, to AFNA members)

- 7/11/19 copy of Earle Barnhart, testimony, entered into the record
- July 11, 2019 letter to accompany testimony, by Hilde Maingay, with copy of slides shown to the Board members (6 photographs)
- Documents from Amy Larkin, dated stamped July 08, 2019
- Letter from Amy Richardson Larkin, dated July 7, 2019
- "AFNA –Lot 4 building—Time-Line of Events", provided from date 5/3/16 to 7/15/18, dated 5/3/19
- November 1, 2016 letter from Attorney Laura M. Moynihan, 200C Main Street, Falmouth, MA (discussing Hackler/Schwalbe interest in building a "barn for agricultural purposes"), with copy of Code of Falmouth 240-36
- Copy of MGL Ch. 40 A, §3 (with notations)
- Copy of Falmouth Code, §240-125
- Copy of "Alchemy Farm, Declaration of Covenants, Restrictions and Easements", filed with the Registry of Deeds, 11-20-1996 (10 pages)
- June 7, 2019 letter to Noreen Stockman from Earle Barnhart (regarding covenants, questions), with copy of covenants 3, 3.1, 3.2, 3.3
- "Some history leading to permit issued for pole barn on lot 4, Alchemy Farm", date stamped received June 06, 2019
- May 3, 2019 letter from Amy Richardson Larkin (re solar array)
- May 7, 2019 letter from Earle Barnhart, with attached testimony, dated May 2, 2019
- May 7, 2019 letter from Earle Barnhart re timeline of events, 5-3-16to 5-2-19

Plans submitted by Applicant/Applicant's Representative

- "Definitive Plan of Land in Hatchville, Falmouth, Mass. Alchemy Farm, 237 Hatchville Road", prepared by Wm. M. Warwick & Assoc. Inc., 213 Old Main Road, Box 801, North Falmouth, Mass, rev. dated 12/28/95
- "Plan of Land at Hatchville Road & Solar Way", prepared by BSS Design Engineering & Surveying, 164 Katharine Lee Bates Road, Falmouth, MA, dated March 29, 2012
- Copy of Section of Town GIS map, dated March 1, 2019, showing area zoning

May 2, 2019 Hearing:

Joseph Hackler, 237 Hatchville Road, Hatchville, Massachusetts, owner of 8 Solar Way, Hatchville, Massachusetts (the "Premises") appeared before the Zoning Board of Appeals, and stated that neighbors complained to the building department about the pole barn constructed. Mr. Hackler stated that he received an enforcement letter from the Building Commissioner, requiring removal of the structure. Mr. Hackler requested a continuance for the hearing, in order to pursue conversion of the structure to a residential use.

Following motion made by Mr. Foreman, and seconded by Mr. Van Keuren, the Board voted unanimously to continue the hearing to July 11, 2019. Notice thereof was posted at the Town Clerk's office, and on the Town's website.

July 11, 2019 Hearing

The Notice of Hearing was read into the record, and letters received into the record were acknowledged. Geoffrey Nickerson, Oppenheim & Nickerson, LLP, 156 Locust Street, Falmouth, MA, appeared before the Board, representing the Applicant. Mr. Nickerson stated that the Applicant is trying to convert the existing structure to a residence, and is working with a structural engineer and septic company. He stated that the Premises is part of a 1996 Planned Residential Unit Development (PUD), with a 12 building subdivision.

Mr. Nickerson stated that the application for the pole barn was signed off as an agricultural use in 2016, and falls under MGL c. 40A, Section 3, for agricultural use. He stated that the Applicant seeks to come back before the Board, with plans to convert the structure to a residence. In response to an inquiry, the Applicant stated that the electricity collected from the solar panels has been used by the Hacklers, and Coonamessett Farm.

The Board discussed the appearance of what appeared to be a hazardous condition with electric cords running through hay bales, and meters running, viewed at a site visit. The Board also noted a retaining wall that appeared to be poorly constructed, and unstable, that was part of the pole barn. The Board commented that the structure did not appear to provide a use for animals and feed.

Rod Palmer, Building Commissioner, stated that he did originally permit a structure, but that what was constructed was beyond the scope of the permit. He stated that the use was reported to be to house animals, but that the structure is incomplete, with a roof structure for solar panels, for net metering. Mr. Palmer reported seeing no animals, and determined that what was constructed did not comply as an agricultural use. Mr. Palmer also stated that he had no purview over covenants of the PUD. Mr. Palmer stated that the structure could be modified to either meet the permit issued, or converted to a dwelling with proper engineering, but that it needed to be according to a building permit. He stated that the structure is not as permitted, and that the remedy is to remove it.

Abutters Helga Maingay and Earle Barnhart, 28 Common Way, Amy Larkin, 8 Solar Way and Kathy Stigberg, 15 Solar Way, all appeared before the Board. Ms. Maingay showed slides of the existing conditions, and stated that any proposal also requires consent by the PUD Alchemy Farm Association. She stated that what was built was not what was represented to the Association. She stated that their covenant is explicit about storage of uncovered vehicles, and that a residential building is the only use allowed on the subject lot.

The collective concerns of the abutters related to the pole barn structure included the unsightly appearance, the industrial look and use as a commercial solar array, the lack of a residential use to comport with the neighborhood, the lack of responsiveness to requests to correct the structure, and the lack of quiet enjoyment.

Mr. Nickerson stated that they have heard the neighbors' concerns, but that it would be a hardship to require removal of the structure. He stated that the Applicant is working to build a house on the Premises, and that they request a continuance to come back with plans. Mr. Dugan made a motion to

continue the hearing to August 22, 2019, which was seconded by Mr. Van Keuren, and unanimously voted.

Notice of the continued hearing was posted in the Town Clerk's office, and on the Town's website.

August 22, 2019 Hearing:

Mr. Hackler appeared before the Board, and stated he is trying to come into conformance with the homeowner's covenants and the Town's By-Laws. He stated he would only be able to get a construction loan from a bank for a primary residence, and that he has not obtained financing to date.

The Board noted that this was an appeal from the decision of the Building Commissioner; that what was built was not what was permitted. The Board also noted the public comment reporting that the structure exceeds the height allowance for a dwelling.

No one further appeared on the appeal.

Mr. Dugan made a motion to close the hearing, which was seconded by Mr. Van Keuren, and unanimously voted. The Board proceeded to deliberate.

Findings:

The subject site, 8 Solar Way, Hatchville, Massachusetts (the "Premises") is sited in the Agricultural A Zoning District and the Great Pond Coastal Pond Overlay District. Approximately 25% of the southerly portion of the Premises is also sited in the Water Resource Protection District. The Premises comprises 11,091 square feet of area, in a district requiring a minimum of 45,000 square feet. The street frontage for the Premises is 55.53 feet according to the Deed on file, in a district requiring a minimum street frontage of 100 feet. The Premises was created as part of a 1996 Planned Residential Unit Development (PUD), with a 12 building subdivision. The Premises is currently improved by a pole barn, which, according to the survey on file, is sited 10.7 feet from the north, 13.6 feet from the west, 18.3 feet from the east, and 102 feet from the street to the south.

There was no previous Zoning Board of Appeals Decision.

1. The Board found that the pole barn did not constitute an agricultural use: the photovoltaic solar arrays on top of the structure were for the purpose of obtaining electricity for net metering, which the Applicant testified that he provided to Coonamessett Farm. Additionally, photographs submitted into evidence show meters, where the electricity was measured. There was no record of an electrical inspection.
2. The Applicant stated that the pole barn was to provide shelter for animals, their feed, and a hay loft; however, there were no photographs submitted into the record to show this use. The February 6, 2019 letter of the Building Commissioner stated that photographs taken by that office depicted "storage of solar panels, construction material, and debris". The letter stated "There is no evidence of agricultural use nor does the structure resemble the drawing you submitted with your application."
3. The Applicant was unable to bring the structure into compliance with the building permit that had originally been issued.

4. The Applicant stated that he sought to convert the pole barn to a residential structure, in order to bring it into conformance, however, he was unable to gain a financial commitment or building permit for that purpose. The Applicant did not present a path to convert the existing structure to a dwelling unit.
5. The abutters within the cohousing community stated that the allowed use on the Premises, according to their covenants, is a dwelling, and that the existing structure exceeds height limitations for dwellings, which would preclude the structure from becoming a dwelling.
6. The Board also found that the structure on the lot is an accessory structure, and that there is no principal structure.

NOW THEREFORE, BE IT RESOLVED, that the Zoning Board of Appeals, being of the opinion aforesaid, and acting under M.G.L. c 40A § 8 and 15, and Section(s) 240-202 of the General Code of Falmouth, following a motion made by Mr. Dugan, and seconded by Mr. Van Keuren, voted 5 to 0 to uphold the February 6, 2019 Decision of the building Commissioner, requiring that the pole barn structure be removed from 8 Solar Way, Hatchville, Massachusetts (the "Premises"), within 60 days of the date of filing this Decision.

Action: The Zoning Board of Appeals, by the signature below, certifies the vote of the Board, as follows, for the above referenced hearing:

Vote: 5 to 0 to uphold the Decision of the Building Commissioner, as represented to the Board, based on the Findings stated above.



Robert B. Dugan, Zoning Board of Appeals

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SEP 18, 2019 PM 3:22
TOWN CLERK

Date Filed With Town Clerk