

# TOWN OF FALMOUTH ZONING BOARD OF APPEALS PROCEDURAL RULES

## **1.00: Purpose and Context**

**1.01:** Pursuant to M.G.L. c. 40A § 11, these rules establish procedures for the operations of the Zoning Board of Appeals (the “Board”) and procedures for applications to the Board with the exception of applications for comprehensive permits. **(Please refer to the Falmouth Zoning Board of Appeals Comprehensive Permit Rules and Procedures).**

**1.02:** These rules must be read in conjunction with and implemented in a manner consistent with the Open Meeting Law (M.G.L. c. 30A, §§ 18-25), the Conflict of Interest Law (M.G.L. c. 268A), the Financial Disclosure Law (M.G.L. c. 268B), the Zoning Law (M.G.L. c. 40A) and Chapter 240 of the Code of Falmouth.

## **2.00: Definitions**

**2.01: Board:** The Board means the Zoning Board of Appeals established pursuant to M.G.L. c. 40A, § 12 and Chapter 240 of the Code of Falmouth. The Board is comprised of five (5) Regular Members and two (2) Associate Members appointed by the Board of Selectmen. The Board shall possess and exercise all powers given to it under the Constitution and laws of the Commonwealth and shall have and exercise such additional powers and duties as may be authorized by the Falmouth Home Rule Charter, bylaw or vote of Town Meeting. Any reference to the Board shall mean all Regular Members and Associate Members unless otherwise stated.

## **2.02: Members**

- a. Regular Members:** Members so appointed by the Board of Selectmen. Regular Members shall have the power and duty to fully participate in all matters of the Board as set forth in these rules.
- b. Associate Members:** Members so appointed by the Board of Selectmen. Associate Members shall have the power and duty to participate fully in all matters of the Board with the exception of voting on decisions on Appeals, Special Permits or Variances unless otherwise authorized by § 3.02 of these rules.
- c. Voting Member:** All members are Voting Members except in Public Hearings (or as otherwise specified below) when a Voting Member is either a Regular Member or an Associate Member who has been appointed by the Chair to vote pursuant to § 3.02 of these rules. A member shall vote on an Appeal, Special Permit or Variance only if present for the entire Public Hearing or continuation thereof.

**2.03: Public Hearing:** A Public Hearing is a legal proceeding held by the Board following notice to consider and act upon applications for Appeals, Special Permits and Variances pursuant to M.G.L. c. 40A § 6-15. Public Hearings shall be scheduled on a regular basis at a time and location as set forth in public notice. Four (4) voting members must be present to constitute a quorum.

**2.04: Open Meetings:** Meetings to consider other business before the Board may be held in accordance with § 1.02 of these rules at any time the Board is properly convened, at the request of the Chair or at the request of four (4) members. Written notice thereof shall be given to each member and posted with the Town Clerk no less than forty-eight (48) hours prior to a meeting. Four (4) members must be present at a meeting to constitute a quorum. All members are entitled to vote at meetings unless otherwise restricted by these rules.

### **3.00: Organization**

**3.01: Officers:** The Board shall elect, at least annually in July, (or the first meeting following the appointment of a Regular Member(s)), officers consisting of a Chair, Vice Chair and Clerk. Officers shall be Regular Members. In the event of a mid-term appointment by the Board of Selectmen of a Regular Member, or in the case of an officer vacancy, the Board shall hold an additional election at the next meeting of the Board. Upon a vote of no confidence, an officer may be removed as an officer and an additional election shall be held at the next meeting of the Board. The removal of an officer by a vote of no confidence requires receipt of notification by the officer that such a vote will be made at a subsequent meeting. A vote of no confidence shall be not be made without just cause as identified in the notification. A vote of no confidence requires a 2/3s vote of the Board. The powers of the officers are both granted by and limited by these rules. No officer shall possess individual authority unless such authority shall have previously been granted by a vote of the Board.

### **3.02: Powers and Duties of Officers:**

- a. Chair:** The Chair shall preside at all meetings and Public Hearings of the Board in accordance with these rules. The Chair shall decide all points of order after polling the Board. Notwithstanding the Chair's decision, a 2/3s vote of the members present shall overrule any points of order. The Chair shall call meetings and Public Hearings to order, shall call a vote when required and shall be recorded on all matters coming before the Board. The Chair shall appoint Associate Members as Voting Members, as may be required, for Public Hearings, or as otherwise required by these rules, should Regular Members be unavailable or unable to participate. The Chair shall appoint a substitute Clerk as necessary. The Chair is limited to representing the actions of the Board or any consensus thereof.
- b. Vice Chair:** If the Chair is unable to participate in any meeting or Public Hearing of the Board, the Vice Chair shall preside and shall assume all the duties of the Chair.
- c. Clerk:** Upon the opening of a Public Hearing, the Clerk shall read the notice of Public Hearing. The Clerk is also responsible for reading or summarizing all Town departmental referrals and appropriate correspondence at the Public Hearing pertaining to each case. If the Chair and the Vice Chair are both unable to participate in any meeting or Public Hearing of the Board, the Clerk shall assume the duties of the Chair and shall appoint Associate Members as necessary.

**3.05: Zoning Administrator:** The duties and responsibilities of the Zoning Administrator are outlined in the job description on file in the Personnel Office in the Town of Falmouth. The Zoning Administrator shall have the powers and responsibilities set forth in Chapter 240 of the Code of Falmouth as may be amended from time to time. Further the Zoning Administrator shall have the sole responsibility to gather information for the Board including, but not limited to, research, expert opinions, legal opinions and communications and decisions from other Town boards, departments and the Building/Zoning Commissioner. The Zoning Administrator is responsible for the distribution of information to all members to ensure that each member has all information pertinent to an application and the rendering of a decision. Any requests for information from any member shall be directed to the Zoning Administrator. The Zoning Administrator shall inform the Board of the inability to acquire, on a timely basis, the information requested. The Zoning Administrator shall prepare detailed agendas for Board Meetings and Public Hearings. Agendas shall detail all Public Hearings, continuations, action items and matters previously taken under advisement that shall be discussed or acted upon. Agendas shall be prepared one (1) week in advance. Where possible, the order of the agenda shall take into consideration the needs of the Applicants and the public. The Zoning Administrator shall write the decisions of the Board. The Zoning Administrator shall maintain all records of the Board.

The Zoning Administrator shall be delegated limited authority to grant Administrative Approvals. (See Section 5.05)

#### **4.00: Applications:**

- a. All completed applications for a Special Permit or a Variance are to be filed with the Town Clerk and submitted to the Board with the applicable fee in accordance with Chapter 240 of the Code of Falmouth on the form approved by the Board. Applicants shall comply with the instructions published from time-to-time by the Zoning Administrator which minimally shall require an Applicant to submit in advance of a Public Hearing all relevant legal, engineering and architectural support upon which the Applicant intends to rely.
- b. An Appeal of the decision or order of the Building Commissioner to the Board shall be made pursuant to M.G.L. c. 40A, § 8, by filing with the Town Clerk a notice of appeal within thirty (30) days from the date of the order or decision or failure to act that is being appealed. The reasons and grounds for the appeal must be specified in the notice of the appeal. A copy of the notice of appeal must be submitted to the Zoning Administrator with the applicable fee and the original decision or order of the Building Commissioner and any information relied upon by both the appellant and the Building Commissioner.
- c. All information submitted to the Board regarding an application shall be available for review by the public in the Zoning Office.

#### **4.01: Fee Schedule:**

- a. All applications for Appeals, Special Permits, Variances and Administrative Approvals are subject to fees that are published periodically.
- b. The Board shall charge the fees as prescribed under the Massachusetts Public Records Law for copies and applicable labor.

**4.02: Notification of Public Hearings:** Notice of all Public Hearings shall be scheduled pursuant to M.G.L. c. 40A § 11.

**4.03: Scheduling of Public Hearings:** All Public Hearings shall be scheduled pursuant to M.G.L. c. 40A § 8-15.

**5.00: Public Hearings**

**5.01: Public Hearings/General Matters:** Only the Zoning Administrator shall communicate with the Applicant or interested parties.

**5.02: Consultant Fee:**

- a. Pursuant to M.G.L. c. 44, §53G, the Board is authorized to require an Applicant to post reasonable fees for employment of outside consultants.
- b. The Board may require the payment of a consultant fee at any time during the hearing or deliberations prior to a final decision by a an affirmative vote of four (4) Voting Members.
- c. The consultant fee may be required for opinions regarding, but not limited to, peer review of reports and opinions, and land use law.
- d. The Applicant shall pay the consultant fee to the Town to be put into a special purpose account established by the Board that may be drawn upon by the Board at one of its open meetings.
- e. The Board shall return any unused portion of the consultant fee, including interest accrued, if any, to the Applicant.
- f. Any Applicant aggrieved by the imposition of, or the amount of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.

**5.03: Hearing Process:**

- a. All Public Hearings are advertised and held in accordance with the Open Meeting Law;
- b. All application files are open to the public for review prior to and after the hearing;
- c. Everyone attending a Public Hearing is asked to show respect and courtesy by:
  - 1. Silencing cell phones and other electronic devices;
  - 2. Listening to Applicants, witnesses and the Board;
  - 3. Refraining from private conversations in the hearing room or outside of the hearing room;
  - 4. Refraining from making derogatory statements; and
  - 5. Exiting the hearing room quietly.
- d. All Public Hearings are recorded (and most are televised) to insure a true and accurate record.
- e. The Clerk shall read the application into the record and then read any referrals from Town Departments or correspondence from interested parties. The Applicant or her/his authorized agent will then briefly summarize the application and why

relief/approval should be granted in accordance with specific sections of the Zoning By-law. (Note: information provided less than one (1) week prior to a Public Hearing by any party may result in a continuance.). It is generally expected that the Applicant's presentation will not exceed 15 minutes in length. Some applications are sufficiently complex that more time is required particularly when there are multiple presenters. To ensure the opportunity for all Applicants to have the full opportunity to be heard on a given evening, should the presentation exceed 15 minutes in length, the Board shall take one or more of the following actions by majority vote of the Voting Members:

1. Inquire as to how much additional time the Applicant requires to complete the presentation and proceed if a limited amount of time is needed;
  2. Continue the hearing to the end of the meeting, depending on available time; or
  3. Continue the hearing to another date and time.
- f. The Zoning Administrator will provide any updates and alert the Board to any issues to be considered.
- g. Members will ask questions of the Applicant.
- h. The public will be asked for comment if applicable. It is generally expected that comments from the public in total will not exceed 15 minutes in length. Collective public testimony exceeding this period may result in the termination of public comment in order to accommodate the Board's hearing schedule. Individuals recognized by the Chair will be asked to step forward to the lectern (if physically able), identify themselves for the Board, including address, and state if in opposition, in support or seeking clarification. Only brief, unrepeatable testimony relevant to the zoning issues of the application will be allowed. It is the quality of the testimony, not the quantity that will be of greatest value to the Board in its deliberations. The Chair will help speakers comply with these requirements and may restrict individual testimony out of respect for other speakers. Statements are to be made to the Board. Speakers shall refrain from conversations with the Applicant or the audience. The Board may ask questions of the speakers. Please note public comment on Variance applications will be limited to the legal standards set forth in the statute and by-law. Brief rebuttal may be allowed by the Chair.
- i. At the close of testimony, the Board will thoroughly discuss the Application if necessary. Based on testimony and the Board's discussion, the Applicant may wish to modify the request or withdraw the request (see § 5.04). Following discussion, several options are available to the Board through the affirmative vote of four (4) Voting Members including:
1. **Continuation:** Should the Board determine that additional information is required; the Public Hearing would be continued to a date certain. The Applicant may be asked to supply the Board with further facts, which can be reviewed by the public in the Zoning Office. The Applicant could also request a continuance;
  2. **Vote to close the Public Hearing:** The Board will close the Public Hearing if it is satisfied that all relevant testimony has been received. The Board may

chose to leave the record open for a specific time period to receive written documentation for clarification and review. Once the Public Hearing is closed, no new testimony or information from interested parties will be allowed unless the Board immediately votes on its own initiative to reopen the Public Hearing, for the sole purpose to clarify any findings or conditions. However, the Board may seek clarification or advice from Town or Special Counsel without reopening the Public Hearing. After the Public Hearing is closed, the Board has several options including:

3. **Take action:** After a full discussion of the application, the Board shall make findings and conditions as appropriate, and then vote to approve or deny the application. Should there be an insufficient number of votes to either approve or deny an application, the application shall be deemed denied.
4. **Take the matter under advisement:** In cases where documentation is complex or new documentation has been provided at the Public Hearing or based on testimony, the Board may wish to further review testimony and documentation before rendering a decision. The Board will take action at a subsequent Public Meeting, but not at an advertised Public Hearing as all testimony has been received;
5. **Request a draft decision from the Zoning Administrator:** In some cases, the Board may vote to request the Zoning Administrator to draft a decision for review by the Board. The Board will take action at a subsequent Public Meeting, but not at an advertised Public Hearing as all testimony has been received.

- I. Public Hearings shall end at 9:30 P.M. unless extended by Board vote.

**5.04: Withdrawal of Applications:** The Applicant may withdraw an application without prejudice at any time prior to the publication of the notice of Public Hearing. An application may be withdrawn, with or without prejudice after the publication of the notice of Public Hearing only by an affirmative vote of four (4) Voting Members.

**5.05: Administrative Approvals:** Administrative Approvals involve minor requests from Applicants that would otherwise require a Special Permit or a modification of a Special Permit. The Administrative Approval process does not involve notification to abutters or a Public Hearing. There are three (3) types of Administrative Approvals as follows:

- a. **Board of Appeals:** The Board may condition a Special Permit decision to reserve the right to administratively approve specified changes to the permit. The holder of a Special Permit may request the Board to administratively approve an insubstantial change to an existing Special Permit. Administrative Approvals pursuant to this section shall be noticed in the public meeting notice and discussed and decided in an open meeting. (Note: A substantial change would require notification to abutters and a Public Hearing in order to modify an existing Special Permit.) An affirmative vote of four (4) Voting Members shall be required. The Voting Members need not be the same members who voted in the original decision.
- b. **Board of Appeals and Zoning Administrator:** The Board may condition a Special Permit decision and delegate to the Zoning Administrator the right to administratively approve certain details or minor changes to the permit. The

Zoning Administrator shall provide a written monthly report to the Board of all Administrative Approvals pursuant to this section.

**c. Zoning Administrator:** The Zoning Administrator shall be delegated limited authority to grant Administrative Approvals for residential or commercial requests that do not exceed the lot coverage criteria set forth in § 240-69 and where conditions become not more non-conforming as follows:

1. Where no new rooms are created;
2. Decks that are within existing setbacks;
3. Three (3) seasons rooms without heat or plumbing that are within existing setbacks;
4. Additions that do not change existing setbacks or create new rooms; and
5. Small residential accessory structures of no more than 200 square feet in size that do not include newly created habitable space, including sheds in front yards that are more than 50 feet from the street layout.

The Zoning Administrator shall provide a written monthly report to the Board of all Administrative Approvals pursuant to this section. Any person aggrieved by a decision or order of the Zoning Administrator, whether or not a party to the proceeding, or any municipal office or board, may appeal to the Board of Appeals, as provided in MGL c. 40A, § 14, within 30 days after the decision of the Zoning Administrator has been filed in the office of the Town Clerk. Any appeal, application or petition filed with said Zoning Administrator as to which no decision has been issued within 35 days from the date of filing shall be deemed denied and shall be subject to appeal of the Board of Appeals as provided in C. 40A, § 8.

**5.06: Minutes; Filing with Town Clerk:** The recording secretary shall prepare minutes of each meeting and Public Hearing to be reviewed by the Zoning Administrator and approved by the Board at a subsequent meeting. The Zoning Administrator shall file the approved minutes of each meeting and Public Hearing with the Town Clerk.

## **6.00: Dispositions**

**6.01: Voting requirements:** A vote of four (4) Voting Members is required in order to grant a Special Permit or Variance or to overturn an order or decision of the Building Commissioner or other Public Hearing action. Board Administrative Approvals shall require an affirmative vote of four (4) Voting Members. The Voting Members need not be the same members voting in the original decision. An action to reopen a Public Hearing pursuant to Reconsideration § 6.03 (below) or to take action as a result of a reopened Public Hearing requires an affirmative vote of four (4) of the Voting Members who participated in the original Public Hearing. For all other matters unless expressly stated herein, a majority the members present is required to take action.

**6.02: Decisions:** Decisions shall be signed by the Chair, or if unable the Vice-Chair, or if unable the Clerk. Draft decisions shall be made available for review by the Voting Members prior to signature. In the event an application is requested to be withdrawn without prejudice before or after testimony in a public hearing, the Board herein allows the Zoning Administrator, after Board's approval of said document, to sign the decision of withdrawal and file the decision with the Town Clerk.

**6.03: Reconsideration:** Upon written request for reconsideration from an aggrieved party and with a signed waiver from applicant extending the fourteen day (14) requirement of a decision being filed, the Board may vote to reopen a Public Hearing prior to the filing of a decision with the Town Clerk, only in the case where a serious procedural defect (for example improper or ineffectual notice of the original Public Hearing) has prevented, in the sole opinion of the Board, a full and fair Public Hearing. Action to reopen must be taken by an affirmative vote of four (4) of the Voting Members who participated in the original Public Hearing. A reopened Public Hearing must satisfy the notification requirements of M.G.L. c. 40A § 11. Action taken during or as a result of the reopened hearing requires an affirmative vote of four (4) of the Voting Members who participated in the original Public Hearing.

## **7.00: Miscellaneous**

### **7.01: Interactions with Other Boards/Town Manager/Zoning**

**Administrator:** Only the Board as a whole has the ability, through the Zoning Administrator, to interact with other boards including, but not limited to, the Board of Selectmen, Planning Board and Town Manager. No individual member or officer is granted this authority. However, the Board may delegate certain interactions to subcommittees or individual members. It must be remembered that the Zoning Administrator is a Department Head and is responsible to the Town Manager.

### **7.02: Board Practices:**

- a. **Openness:** All matters regarding the Zoning Board of Appeals should be discussed in an open meeting by and between the members. The members shall inform the Zoning Administrator of all discussions/meetings with other Boards or Departments and the Zoning Administrator shall keep all members apprised of said discussions/meetings.
- b. **Recusal:** Members should protect themselves from receiving information about a pending or upcoming application or appeal outside of a Public Hearing. Members who inadvertently receive such information should recuse themselves from the Public Hearing on the matter. Note, members who are also Town Meeting Members are allowed to fully participate at Town Meeting in any Article that may have bearing on an application or appeal unless such participation would violate the procedural due process rights of an Applicant or interested party. The Board or Applicant may ask a member to recuse at the time of a hearing; however, ultimately it is the member's own decision whether or not to recuse. A refusal to recuse could lead to court intervention including an injunction or appeal.
- c. **Preparation:** Members should take all appropriate steps to be prepared for Public Hearings including but not limited to:
  1. Review of all application files and documents prior to the Public Hearing;
  2. View sites; and
  3. Discuss applications and appeals with the Zoning Administrator.

Should a Regular Member feel unprepared for a particular Public Hearing, she or he should ask the Chair to appoint an Associate Member.



**7.03: Board Policies:** From time to time the Board may establish certain policies that may provide guidance to the Board in the consideration of future applications. Said policies may also provide guidance to Applicants and assist in the enforcement of Board decisions. Policies may only be established in an open meeting of the Board and require the affirmative vote of four (4) members. The Zoning Administrator shall maintain a catalogue of policies.

**7.04: Amendments of these Rules:** These rules shall be amended only upon a majority vote of the Board. Members must receive proposed amendments at least two (2) weeks prior to voting. All amendments shall be dated and filed with the Town Clerk.

**NOTE: PLEASE REFER TO THE TOWN OF FALMOUTH ZONING BOARD OF APPEALS RULES AND PROCEDURES FOR COMPREHENSIVE PERMITS!**

Vote of the Board: Member Ken Foreman made a motion to approve the Board of Appeal's Procedures as amended and written. Member Paul Murphy seconded the motion. Motion carried 6 – 0.

(Members present and voting: Chairman Kimberly Bielan, Vice Chairman Kenneth Foreman, Clerk Terrence J. Hurrie, Member Edward Van Keuren, Member Paul Murphy and Associate Mark Cool.)

Date Approved: March 5, 2016



Terrence J. Hurrie, Clerk of the Board of Appeals

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Date filed with Town Clerk: \_\_\_\_\_

FALMOUTH TOWN CLERK

*AM@10:45 AM*