
**TOWN OF FALMOUTH
OFFICE OF TOWN COUNSEL
MEMORANDUM**

TO: JULIAN SUSO, TOWN MANAGER
FROM: FRANK K. DUFFY, JR., TOWN COUNSEL
PATRICIA A. HARRIS, ASSOCIATE TOWN COUNSEL
SUBJECT: LITIGATION REPORT
DATE: 3/1/2018
CC: TOWN DEPARTMENTS AS NOTED

The following is the Legal Department's periodic report of pending cases and cases resolved since the previous report. Following the name of the case/action is the name of the Court or Agency involved, the nature of the case and the present status of the case. Special Counsel is noted where appropriate.

BOARD OF APPEALS

CASE: George N. Bagley, Elizabeth H. Bagley, Stephen Huban and Diane Huban v. ZBA and Midway Trap and Skeet Club of Falmouth, Inc.
PROPERTY: 284 Old Meeting House Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: January 2018
ISSUE: Appealing two decisions of ZBA regarding operations at Midway Trap and Skeet Club of Falmouth, Inc.
STATUS: Pending.

CASE: Fruit Orchard Trust, by its Trustees John J. Clymer and Evelyn V. Moreno v. Falmouth Zoning Board of Appeals and Ranne P. Warner, as Trustee for the Rose Garden Realty Trust of New York, NY
PROPERTY: 18 Woodriff Lane, Falmouth
COURT: Land Court
DATE OF ENTRY: February 2018
ISSUE: Appealing decision granting Ranne P. Warner, Trustee a special permit for an accessory apartment.
STATUS: Pending.

CASE: George N. Bagley, Elizabeth H. Bagley, Stephen Huban and Diane Huban v. ZBA and Midway Trap and Skeet Club of Falmouth, Inc.
PROPERTY: 284 Old Meeting House Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: January 2018
ISSUE: Appealing two decisions of ZBA regarding operations at Midway Trap and Skeet Club of Falmouth, Inc.
STATUS: Pending.

CASE: Matthew R. Gould, Davien B. Gould, Pierre Tillier and Gisella Tillier v. Zoning Board of Appeals, Falmouth Hospitality LLC, John J. Fay, III, Trustee; Robert A. Fay, Trustee of Fay's Realty Trust
PROPERTY: Lantern Lane
COURT: Barnstable Superior Court
DATE OF ENTRY: August 2017
ISSUE: Appeal of Appeals Board approval of 40B Development
STATUS: Case stayed until Housing Appeal committee case is resolved.

CASE: Richard and Kerry Dipietro, Individually and as Trustees of 8 Riverway Realty Trust v. ZBA
PROPERTY: 8 Riverway, North Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: August 2014
ISSUE: Appealing decision of ZBA denying plaintiffs a special permit to add a farmers porch and to construct an outside stairway.
STATUS: Pending.

CASE: Carol Duclos, Trustee of the 315 School Street Nominee Trust
PROPERTY: 198 Thomas B. Landers Road, East Falmouth, MA
COURT: Barnstable Superior Court
DATE OF ENTRY: July 2015
ISSUE: Appealing decision of ZBA after remand denying request for modification of use variance and alteration of nonconforming use.
STATUS: ZBA denied on remand. Plaintiff appealed Remand Decision. Case pending in Superior Court. Pre-trial conference was held January 19, 2018. Trial scheduled for May 30, 2018.

CASE: Diane and Barry Funfar and Linda Ohkagawa v. ZBA
PROPERTY: Wind Turbine 2
COURT: Barnstable Superior Court
DATE OF ENTRY: December 2015
ISSUE: Appeal of "Laches" Decision of the ZBA denying a cease and desist order for Wind 2.
STATUS: Motion for summary judgment filed with court, hearing held on May, 2017. On June 21, 2017 the Superior Court found there is no genuine issue as to material and fact affirmed the ZBA decision. Plaintiffs filed an appeal to the Appeals Court. Oral argument April 11, 2018.
SPECIAL COUNSEL: Diane Tillotson, Esquire

CASE: Robert J. Hudson, Jr. Trustee of Recovable Living Trust Agreement of Robert J. Hudson, Jr. v. ZBA and NewPort Exchange Corp. Q.I. for Andrew Reale
PROPERTY: 460 Grand Avenue, Falmouth
COURT: Land Court
DATE OF ENTRY: June 14, 2017
ISSUE: Appealing decision of ZBA which ordered removal of structure built without required permits.
STATUS: Pending. Discovery Phase.

CASE: Cornelius K. Hurely, Jr., Individually and as Trustee of the C.K.H. Trust and Sheila H. Canty, Trustee of the Canty Family Trust v. Susanne H. Keohane, Trustee of the Harold J. Keohane Irrevocable Income Only Trust I; Harold J. Keohane individually and in his capacity as Trustee of the Keohnae Santuit Realty Trust; Patricia H. Keohane; Falmouth Zoning Board of Appeals; and Kimberly Bielan, Kenneth Forman, Terrence Hurrie, Edward Van Keuren, Paul Murphy and Mark Cook, as they are the members of the Falmouth Zoning Board of Appeals
PROPERTY: 80 Santuit Road, North Falmouth
COURT: Land Court
DATE OF ENTRY: March 2016
ISSUE: Appealing decision of Zoning Board of Appeals affirming 80 Santuit Road is a buildable lot.
STATUS: Decision of the Court February 8, 2018 overturning Board of Appeals decision.

CASE: JP Morgan Chase Bank, National Association v. Patricia M. Culline, ZBA, Falmouth Housing Trust, Inc., Cool It!!!, LLC and Mill Farm Condominium Trust
PROPERTY: Unit 15 Mill Farm Way Condo
COURT: Barnstable Superior Court
DATE OF ENTRY: December 2017
ISSUE: Interpleader to determine distribution of surplus funds following foreclosure of mortgage on deed restricted affordable housing unit.
STATUS: Pending

CASE: Robert Laird v. Town of Falmouth and ZBA
PROPERTY: Wind Turbine I
COURT: Barnstable Superior Court
DATE OF ENTRY: September 2015
ISSUE: Appealing decision of ZBA affirming an order of the Building Commissioner that the former sec. 240-166 of the zoning bylaw applies to Wind 1.
STATUS: Town has filed Motion to Dismiss case as moot. Plaintiffs have filed Motion for Summary Judgment. Hearing scheduled for April 24, 2018.
SPECIAL COUNSEL: Diane Tillotson, Esquire

CASE: The Climate Foundation v. ZBA and John Gardner
PROPERTY: 3 Little Harbor Road, Woods Hole
COURT: Land Court
DATE OF ENTRY: May, 2016
ISSUE: Appealing decision of ZBA denying plaintiff status as an exempt educational use.
STATUS: Pending.

CASE: Sean Revenaugh v. ZBA
PROPERTY: 50 English Street, Teaticket, MA
COURT: Barnstable Superior Court
DATE OF ENTRY: May, 2016
ISSUE: Appealing decision of ZBA denying request for special permit to allow the operation of a home-based business.
STATUS: Trial scheduled for April 17, 2018.

CASE: Town of Falmouth v. Andersen and ZBA
COURT: Barnstable Superior Court
PROPERTY: 211 Blacksmith Shop Road
DATE OF ENTRY: August 2013
ISSUE: Appealing decision of ZBA finding wind turbines are a nuisance at the property.
STATUS: Case dismissed.
SPECIAL COUNSEL: Michelle O'Brien, Esquire

CASE: Town of Falmouth v. Funfar and ZBA
COURT: Barnstable Superior Court
PROPERTY: 27 Ridgeview Drive
DATE OF ENTRY: August 2013
ISSUE: Appealing decision of ZBA finding wind turbines are a nuisance at the property.
STATUS: June 20, 2017 Superior Court affirmed decision of Zoning Board of Appeals and ordered Wind I and Wind II to cease operation. Board of Selectmen voted to not appeal this decision.
SPECIAL COUNSEL: Michelle O'Brien, Esquire

BOARD OF ASSESSORS

NONE

BOARD OF SELECTMEN

CASE: Ballymeade v. Board of Selectmen, et al
PROPERTY: Ballymeade
COURT: Barnstable Superior Court
DATE OF ENTRY: April 2015
ISSUE: Plaintiffs filed an application for preliminary injunction to prevent town from billing them for costs associated with connecting Ballymeade to town water tank at Falmouth Tech Park.
STATUS: Pending by agreement – no injunction. Case scheduled for oral argument June 22, 2018.

BUILDING DEPARTMENT

NONE

CONSERVATION COMMISSION

CASE: Eugene Caruso, Executor of the Estate of Angeline M. Caruso v. Conservation Commission and Town of Falmouth
PROPERTY: 191 Edgewater Drive West, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: September 2013
ISSUE: Appeal from Commission decision denying variance to construct a single family residence within wetland resource areas. Complaint includes a Regulatory Taking claim against Town of Falmouth.
STATUS: Superior Court upheld Conservation Commission decision. Regulatory Taking claim settled by Agreement.

CASE: Joanne Delapa, Trustee Delcor Realty Trust v. Conservation Commission
PROPERTY: 418 Menauhant Road, Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: October 2016
ISSUE: Appeal from Commission decision denying an application to construct a dock.
STATUS: Superior Court affirmed Conservation Commission decision. Plaintiff appealed to Appeals Court. Pending.

CASE: Janice Smyth v. Conservation Commission and Town of Falmouth
PROPERTY: 250 Alder Lane, North Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: February 2013
ISSUE: Appeal from Commission decision denying variance to construct a single family residence within wetland resource areas. Complaint includes a Regulatory Taking against the Town of Falmouth.
STATUS: Superior Court affirmed ConCom's decision 2/7/14. Jury awarded judgment for Plaintiff in the amount of \$660,000 in the regulatory taking claim. Board of Selectmen have authorized appeal. Appeal pending.
SPECIAL COUNSEL: Michelle O'Brien, Esquire (for Regulatory Taking claim)

CASE: Perch Pond Preservation, Inc. v. Conservation Commission
PROPERTY: Perch Pond, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: December 2016
ISSUE: Appeal of the Commission decision denying notice of intent to dredge Perch Pond.
STATUS: Stipulation of Dismissal filed April, 2017.

CASE: Thomas F. Ward, Trustee of 77 Muskegat Road Nominee Trust v. Conservation Commission
PROPERTY: 77 Muskegat Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: April, 2017
ISSUE: Appealing special conditions of the Order of Conditions that was issued to plaintiff on January 11, 2017.
STATUS: Pending.

CASE: John R. Zizza v. Conservation Commission
PROPERTY: 82 Waterside Drive, North Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: November 2017
ISSUE: Appeal of Conservation Commission decision denying notice of intent to relocate boulders off shore in Buzzards Bay.
STATUS: Pending.

FALMOUTH FIRE RESCUE DEPARTMENT

CASE: Town of Falmouth v. Elm Arch Inn
COURT: Falmouth District Court
DATE OF ENTRY: February 2018
ISSUE: Defendant failed and neglected to pay the arm monitoring fee.
STATUS: Pending.

CASE: Town of Falmouth v. Joseph Ferra
COURT: Falmouth District Court
DATE OF ENTRY: February 2018
ISSUE: Defendant failed and neglected to pay the arm monitoring fee.
STATUS: Pending.

HEALTH DEPARTMENT

NONE

HISTORIC DISTRICTS COMMISSION

NONE

MARINE ENVIRONMENTAL SERVICES

CASE: Bestrev Ltd. as Owner and Operator of S/V Best Revenge 5
(Complaint for Exoneration)
COURT: United States District Court (Boston)
DATE OF ENTRY: January 2018
ISSUE: Settlement of claims arising out of boat fire on July 11, 2017 in Falmouth Inner Harbor, which damaged town property and shellfish propagation program.
STATUS: Mediation scheduled for May 25, 2018.

CASE: Joseph LaFreniere v. Ben Lynch, Program Chief of the Waterways Regulations Program of the Department of Environmental Protection and Gregg Fraser, Harbormaster of the Town of Falmouth
PROPERTY: Mooring in Falmouth Inner Harbor
COURT: Middlesex Superior Court
DATE OF ENTRY: February 2018
ISSUE: Appealing decision of Harbormaster denying Plaintiff's change of vessel request for a mooring in Falmouth Inner Harbor.
STATUS: Pending.

PLANNING BOARD

CASE: Matthew R. Gould, Davien B. Gould, Pierre Tillier and Gisella Tillier v. Planning Board, Falmouth Hospitality LLC, John J. Fay, III, Trustee, Robert A. Fay, Trustee of Fay's Realty Trust
PROPERTY: Lantern Lane
COURT: Land Court
DATE OF ENTRY: July 2014
ISSUE: Appeal of Planning Board approval of request for subdivision modification.
STATUS: Land Court entered judgement on 7/14/2016 affirming decision of Planning Board and dismissing plaintiffs' other claims as premature. Plaintiffs appealed decision to Appeals Court. Appeals Court affirmed Judgement of Land Court. Plaintiffs' Petition for Further Appellate Review with Supreme Judicial Court was denied. Final Judgement entered dismissing the case.

CASE: Hugh F. McGourty, Jr. et als v. Planning Board and Brian E. Sandlin, Trustee and Trent Toran-Sandlin, Trustee
PROPERTY: 209 Maravista Avenue, Teaticket
COURT: Land Court
DATE OF ENTRY: December 2016
ISSUE: Appealing decision of Planning Board allowing Defendants, Brian E. Sandlin and Trent Toran-Sandlin to subdivide said property.
STATUS: Pending.

CASE: Nathan Ellis Highway, LLC (Cavossa) v. Planning Board
PROPERTY: 210 Nathan S. Ellis Highway, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: July 2015
ISSUE: Appealing decision of Planning Board approving in part, denying in part, request for special permit for waste disposal contractor use.
STATUS: Pending.

CASE: William V. Stafford, David F. Stafford, Jayne R. Duggan, Jayne R. Duggan v. Planning Board and Louis Larry a/k/a Louis Larrey, Trustee of the Symon Realty Trust
COURT: Barnstable Superior Court
PROPERTY: Route 28A, North Falmouth
DATE OF ENTRY: February 2016
ISSUE: Appealing the decision of the Planning Board granting special permit for planned residential development.
STATUS: Action dismissed upon Defendant, Larrey's Motion to Dismiss. Decision appealed. Pending.

POLICE DEPARTMENT

CASE: Brian and Kimberly Hunt v. David Massi, James Porter and Town of Falmouth
COURT: United States District Court
DATE OF ENTRY: March 2013
ISSUE: § 1983 civil rights police misconduct case.
STATUS: Federal court allowed Motion to Dismiss (filed by Defendants) and dismissed all remaining claims. There is still a state tort of malicious prosecution pending. (Case being handled by insurance counsel)

CASE: Carli Taylor v. Officer Ryan Moore and Town of Falmouth
COURT: United States District Court
DATE OF ENTRY: August 2017
ISSUE: Plaintiff alleging violation of 4th and 14th Amendments to the US Constitution.
STATUS: Pending. (Case being handled by insurance counsel)

CASE: Robert Jude Wilber v. Officers Robert Curtis, Brian Kinsella, Michael Rogers and Michael Simoneau
COURT: U.S. District Court
DATE OF ENTRY: January 2015
ISSUE: Claiming MGL c. 12, § 11I and 42 USC §1983 (civil rights violations and common law torts regarding false arrest and other related claims).
STATUS: Court entered summary judgment for town and police officers. Plaintiff filed a Notice to Appeal with the First Circuit Court of Appeals. US Court of Appeals affirmed district court grant of summary judgment on federal and state civil rights claim, but vacated summary judgment on state law claims and remanded case to Barnstable Superior Court for jury trial of state law claims. (Case being handled by insurance counsel).

RECREATION DEPARTMENT

NONE

SCHOOL DEPARTMENT

CASE: Sharon Lessard v. Falmouth Public Schools
COURT: MCAD
DATE OF ENTRY: October 2016
ISSUE: Claiming discrimination related to age.
STATUS: Pending. (Case being handled by insurance counsel)

CASE: Phyllis Pina v. Falmouth Public Schools
COURT: MCAD
DATE OF ENTRY: March 2011
ISSUE: Claiming discrimination related to health issue.
STATUS: MCAD found lack of probable cause. Case dismissed. (Case being handled by insurance counsel)

CASE: Kara Quinn v. Lilia Davis
COURT: Barnstable Superior Court
DATE OF ENTRY: December, 2017
ISSUE: Claiming defamation in performance evaluation.
STATUS: Pending. (Case being handled by insurance counsel)

TOWN OF FALMOUTH

CASE: Neil Andersen and Elizabeth Andersen v. Town of Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: September 2012
ISSUE: Claiming private nuisance, taking, emotional distress as a result of the release of public records related to wind turbines.
STATUS: Trial held May 2017. Verdict for Defendant, Town of Falmouth. Plaintiffs filed a motion to set aside judgment and grant a new trial. Motion was denied, verdict stands. (Case being handled by insurance counsel)

CASE: Brian Elder, et al v. Town of Falmouth
PROPERTY: 161 Blacksmith Shop Road
COURT: Barnstable Superior Court
DATE OF ENTRY: March 2013
ISSUE: Claiming loss of property value and personal injuries related to wind turbines.
STATUS: Pending. (Case being handled by insurance counsel)

CASE: Mary Jane Hunt v. Robert B. Our, Inc. and Town of Falmouth
PROPERTY: Personal Injury
COURT: Barnstable Superior Court
DATE OF ENTRY: January 2018
ISSUE: Claiming injuries sustained in a fall because of construction of a new sewer line near Spring Bars Road, between Worcester Court and Davis Straits.
STATUS: Pending. (Case being handled by insurance counsel)

CASE: Roberta M. Hutchinson v. Town Manager of Town of Falmouth and Representative Dylan Fernandes
PROPERTY: 77 Gifford Street
COURT: Wrentham District Court
DATE OF ENTRY: July, 2017
ISSUE: Claiming there was excess water charge on her bill.
STATUS: Hearing scheduled October 5, 2017. Judgment of Dismissal rendered by the court on Oct. 5, 2017.

CASE: Linda Ohkagawa v. Town of Falmouth
PROPERTY: 821 West Falmouth Highway, West Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: February 2015
ISSUE: Claiming Wind 2 at the WWTF constitutes a nuisance and a trespass onto the property of the plaintiff.
STATUS: Pending. (Case being handled by insurance counsel)

CASE: Carol S. Petit, Trustee of Beach House Realty Trust v. Town of Falmouth
COURT: Land Court
DATE OF ENTRY: August 2013
ISSUE: Land Court registration case – Megansett.
STATUS: Pending.

CASE: Henry Pollock v. Town of Falmouth
COURT: Land Court
DATE OF ENTRY: August 2013
ISSUE: Land Court registration case – Megansett.
STATUS: Pending.

CASE: Suzanne M. Sullivan v. Town of Falmouth
COURT: Land Court
DATE OF ENTRY: November, 2013
ISSUE: Land Court registration case – Megansett.
STATUS: Pending

TAX COLLECTOR/TREASURER

This office is now handling all Tax Taking cases.

CASE: Board of Trustees of Pond View Park Condominium Trust v. Condominium Unit 10 of Pond View Park Condominium and David L. Hinds, Trustee, ALDLUC Realty Trust, Town of Falmouth Collector of Taxes
PROPERTY: Pond View Park Condominium, Unit 10 (536 Main Street)
COURT: Falmouth District Court
DATE OF ENTRY: May 2017
ISSUE: Lien Foreclosure
STATUS: Defendant defaulted. Motion for judgment pending.

WATER DEPARTMENT

NONE

**TOWN OF FALMOUTH – LITIGATION REPORT
SUBMITTED BY LABOR COUNSEL
COLLINS, LOUGHRAN AND PELOQUIN, PC
March 2018**

POLICE

CASE: Falmouth Police Patrolmen’s Federation and Town of Falmouth
COURT: JLMC
DATE OF FILING: August 14, 2017
ISSUE: Contract expired 6/30/17, after several negotiation sessions the union has filed a petition with JLMC.
STATUS: Tentative agreement reached, pending memorandum of agreement and ratification.

FIRE

CASE: Falmouth Fire Fighters Local 1397 v. Town of Falmouth
COURT: American Arbitration Association
DATE OF FILING: July 1, 2016
ISSUE: Union alleges that the Town violated the Memorandum of Agreement for the 2014-2017 Collective Bargaining Agreement by its step placement of certain members who had been promoted. The Town contends that the MOA did not change the CBA language or practice under which members who are promoted get placed on a step and then advance steps in their new rank.
STATUS: The case has been settled.

AFSCME (UNITS A & B)

CASE: AFSCME Local 1636 Grievance: Class Action (Gregg Frasier, Chuck Martinsen) v. Town of Falmouth
COURT: Labor Relations Connection
DATE OF FILING: May 18, 2017
ISSUE: MES employees were suspended from police detail work after an incident; they claim to be entitled to these assignments.
STATUS: Arbitration hearing scheduled for November 29, 2017. Case settled – demand for Arbitration withdrawn.

CASE: AFSCME Local 1636 and Town of Falmouth: Prohibited Practice Charge
COURT: DLR
DATE OF FILING: July 18, 2017
ISSUE: MES employees were suspended from police detail work after an incident; they claim to be entitled to these assignments.
STATUS: In-Person Investigation to be scheduled. Settled; grievance withdrawn.

CASE: AFSCME Local 1636 and Town of Falmouth: Prohibited Practice Charge
COURT: DLR
DATE OF FILING: September 5, 2017
ISSUE: MES employees were suspended from police detail work after an incident; they claim to be entitled to these assignments.
STATUS: In-Person investigation to be scheduled. Settled; grievance withdrawn.

LABORER'S DISTRICT COUNCIL

CASE: Laborer's District Council v. Town of Falmouth
COURT: American Arbitration Association
DATE OF FILING: January 24, 2017
ISSUE: Dismissal of a DPW employee for threatening a co-worker.
STATUS: The arbitrator issued an Award on February 16, 2017, ordering the employee reinstated with back pay and benefits and the Town is reinstating the employee.

**TOWN OF FALMOUTH – LITIGATION REPORT
SUBMITTED BY LABOR COUNSEL
MIRICK O'CONNELL
March 2018**

CASE: AFSCME v. Town of Falmouth
COURT: Dept. of Labor Relations
DATE OF FILING: 2017
ISSUE: AFSCME represents the DPW employee who filed a charge against the Town in connection with the reclassification of the Facilities Manager. Union alleges the Town has engaged in bad faith bargaining in connection with the implementation of the arbitration award, which required the Town to reclassify the Facilities Manager.
STATUS: Pending.

**SPECIAL COUNSEL
LEGAL FEES
FY 2018
7/1/17 – 3/1/2018**

Blatman, Bobrowski & Haverty, LLC (Falmouth Hospitality v. ZBA \$15,631.65) (Wind Turbines \$925.00)	\$16,556.65
Collins Loughran & Peloquin, PC (Labor)	\$83,875.00
Hemenway & Barnes, LLP (Wind Turbines)	\$23,282.55
Mirick, O’Connell, Demallie & Lougee, LLP (Labor)	\$18,178.02
Pierce Atwood, LLP (Smyth v. ConCom \$70,821.45) (Wind Turbines \$10,608.27)	\$81,429.72
TOTAL	\$223,321.94