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

TO: JULIAN SUSO, TOWN MANAGER
FROM: FRANK K. DUFFY, TOWN COUNSEL
PATRICIA A. HARRIS, ASSOCIATE TOWN COUNSEL
SUBJECT: LITIGATION REPORT
DATE: 4/3/2019
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: 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: Case settled by agreement of the parties.

CASE: Carol Duclos, Trustee of the 315 School Street Nominee Trust v. ZBA
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. Trial scheduled.

CASE: Terrell Halewijn v. ZBA and Latitude 41 North, LLC
PROPERTY: 34 Oakwood Avenue
COURT: Land Court
DATE OF ENTRY: December 2018
ISSUE: Appealing decision of ZBA overruling a determination of the Falmouth Zoning Building Inspector that no violations of zoning exist at 34 Oakwood Avenue
STATUS: Pending.

CASE: Falmouth Hospitality, LLC v. ZBA
PROPERTY: Lantern Lane
COURT: Dept. of Housing and Community Development/Housing Appeals Committee
DATE OF ENTRY: July 2017
ISSUE: Appeal of Appeals Board decisions purporting to approve a Comprehensive Permit with conditions.
STATUS: Pending. Final oral arguments October 31, 2018 and case under advisement.

CASE: Vincent Geoffroy v. Heather Campion and ZBA
PROPERTY: 20 Sheridan Avenue, Falmouth
COURT: Land Court
DATE OF ENTRY: December 2018
ISSUE: Appeal of Appeals Board decision overturning the Building Commissioner's determination that a bulkhead and deck/elevated walkway requires a building and special permit.
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 Appeals Committee case is resolved.

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: Trial held December 14 and 17, 2018. Court ruled the private party, plaintiff lacked jurisdiction to appeal to ZBA and accordingly Building Commissioner's decision affirmed.

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 Land Court February 8, 2018 overturning Board of Appeals decision. Appeal filed with Appeals Court.

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: Excess funds distributed to FAHF and FHT per terms of the Affordable Housing Restriction.

CASE: Lawrence Lynch Realty Corp. v. ZBA, Rod Palmer, Building
Commissioner, Planning Board of Town of Falmouth
PROPERTY: 65 acres off Locustfield Road
COURT: Land Court
DATE OF ENTRY: July 2018
ISSUE: Appealing decision of ZBA, which denied plaintiff's appeal from the
Building Commissioner that plaintiff not entitled to construct a ground
mounted solar photovoltaic array on property.
STATUS: Stipulation of Dismissal filed March 2019. Town meeting passed a new
zoning bylaw, which resolved this problem.

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: Settlement Agreement filed with Court. Court approved settlement
agreement and dismissed action 1/19

CASE: Sandra Stosz and Mark Stowes v. ZBA and Helms Circle, LLC
PROPERTY: Alma Road "Little Pond Village at Falmouth Heights"
COURT: Barnstable Superior Court
DATE OF ENTRY: September 2018
ISSUE: Appealing a decision of ZBA to issue a comprehensive permit under
MGL 40B (affordable housing).
STATUS: Pending.

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. Third party filed post trial
motion to intervene. Motion denied by Superior Court. Denial appealed
to Appeals Court. Appeals Court affirmed Superior Court decision
dismissing the case.
SPECIAL COUNSEL: Michelle O'Brien, Esquire

BOARD OF ASSESSORS

NONE

BUILDING DEPARTMENT

NONE

CONSERVATION COMMISSION

CASE: Mark Albers and Cynthia Albers v. Conservation Commission
PROPERTY: 177 Fay Road, Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: November 2018
ISSUE: Appeal of Special Condition No. 1, which states "the coir fiber array shall not be installed/constructed as part of this Order of Conditions.
STATUS: Pending.

CASE: Patricia Dundulis v. Conservation Commission and Steven Balas and Michael Kachadoorian
PROPERTY: 64 and Lot 77 Muskegat Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: August 2018
ISSUE: Appeal from Commission decision granting an order of conditions to construct a dock in the waterbody known as Eel Pond.
STATUS: Pending.

CASE: Stephen and Ann Sherman v. Conservation Commission
PROPERTY: 28 Nichols Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: July 2018
ISSUE: Appealing a certain special condition (#1) of the order of conditions.
STATUS: Stipulation of Dismissal filed with the court 12/18.

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. Appeals Court reversed Superior Court's decision. Plaintiffs filed a FAR (Further Appellant Review) with Supreme Judicial Court.
SPECIAL COUNSEL: Michelle O'Brien, Esquire (for Regulatory Taking claim)

CASE: Ari Soroken, Trustee of the AMS Revocable Trust v. Conservation Commission
PROPERTY: 77 Fay Road, Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: October 2018
ISSUE: Appeal from Commission decision denying an application to construct a 175 long elevated walkway and 16 x 16 elevated platform to provide access from the residence to the beach and the waters of Vineyard Sound.
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. First Count claims decision did not issue within statutory deadline. Second Count appealing denial of Order of Conditions. Denying notice of intent to relocate boulders off shore in Buzzards Bay.
STATUS: Trial in first Count April 5, 2019. Decision in appeal of denial OOC stayed pending outcome of trial in Count I.

FALMOUTH FIRE RESCUE DEPARTMENT

NONE

HEALTH DEPARTMENT

NONE

HISTORICAL COMMISSION

NONE

MARINE ENVIRONMENTAL SERVICES

NONE

PLANNING BOARD

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: Stipulation of Dismissal with Prejudice filed March 2019.

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. Appeals Court reversed Superior Courts decision and remanded back to lower court December 8, 2017. Stipulation of Dismissal filed with Court 10/18.

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. Summary Judgment for the town 12/2018. (Case being handled by insurance counsel)

CASE: Falmouth Police Dept. v. Ryan P. Langnickel
COURT: Falmouth District Court
DATE OF ENTRY: 2018
ISSUE: Police petition to revoke license to carry firearm.
STATUS: After follow up status conference, license restored by agreement of parties.

CASE: Carli Taylor v. Officer Ryan Moore and Town of Falmouth
COURT: United States District Court
DATE OF ENTRY: August 2017
ISSUE: Plaintiff alleging civil rights violations of 4th and 14th Amendments to the US Constitution following arrest for OUI.
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. Mediation scheduled for November, 2018. Case settled by agreement of the parties 12/2018. (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: 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)

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: Settled by agreement of parties 7/2018.

CASE: Patricia and Frank Dundulis and Anthony Pentikis v. Board of Selectmen and Steven Balas and Michael Kachadoorian
PROPERTY: 64 and Lot 77 Muskegat Road, East Falmouth
COURT: Barnstable Superior Court
DATE OF ENTRY: December 2018
ISSUE: Appeal from Selectmen constructive grant of a special permit to construct a dock in the waterbody known as Eel Pond.
STATUS: Pending.

TOWN OF FALMOUTH

CASE: Brian Handy v. Town of Falmouth, et al
PROPERTY: Cranberry bog south of Carriage Shop Road
COURT: Land Court
DATE OF ENTRY: October 1999
ISSUE: Petition to register/confirm title to cranberry bog. Town owns abutting land subject to sanding rights.
STATUS: Pending.

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: Case with Town settled 7/2018, case pending with Robert B. Our, Inc. (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 – County Road, Megansett.
STATUS: Pending.

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

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

CASE: Town of Falmouth v. Amerisourcebergen Drug Corporation, et al
COURT: United States District Court of Massachusetts
DATE OF ENTRY: October 2018
ISSUE: Complaint filed against numerous pharmaceuticals and pharmacies for public nuisance; violations of racketeer influenced and corrupt organizations Act (RICO); negligence and negligent misrepresentation; civil conspiracy; and fraud and fraudulent misrepresentation; violations of Massachusetts General Laws, Chapter 93A, Sections 2 and 11 and aiding and abetting. (The misuse, abuse, diversion and over-prescription of opioids.)
STATUS: Pending. (Case being handled by Richard M. Sandman, Esquire of Rodman, Rodman & Sandman)

CASE: Trustees of Mill Farm Way Condominium Trust v. Stephanie J. Murray and Sandander Bank, NA, Massachusetts Housing Partnership Fund Board, Barnstable County Cape Cod Commission, Town of Falmouth and Falmouth Housing Trust, Inc.
PROPERTY: Mill Farm Way, Unit 7, East Falmouth
COURT: Falmouth District Court
DATE OF ENTRY: February, 2019
ISSUE: Unpaid common expenses (affordable unit).
STATUS: Notice of Voluntary Dismissal filed March 2019.

TAX COLLECTOR/TREASURER

NONE

WATER DEPARTMENT

NONE

**TOWN OF FALMOUTH – LITIGATION REPORT
SUBMITTED BY LABOR COUNSEL
NORRIS, MURRAY AND PELOQUIN, LLC
(formerly Collins, Loughran and Peloquin, PC)
April 2019**

POLICE

CASE: Falmouth Police Superior Officers (Sergeant Rogers), NEPBA Local 61 and Town of Falmouth
COURT: AAA
DATE OF FILING: July 23, 2018
ISSUE: Sergeant ordered to weekly check in while on paid injury leave in accordance with Dept procedure; Union claims the check-in is not in accordance with past practice.
STATUS: Arbitration Hearing scheduled for December 6, 2019.

CASE: Falmouth Police Federation and Town of Falmouth (Swaps Grievance)
COURT: AAA
DATE OF FILING: June 28, 2018
ISSUE: Officer denied a swap pursuant to supervisor's discretion; union claiming contract was violated.
STATUS: Award issued on January 9, 2019 in Town's favor sating that Town did not violate the applicable CBA when lieutenant refused to grant swap request.

CASE: Falmouth Police Federation and Town of Falmouth (Comp. Time)
COURT: DLR
DATE OF FILING: June 28, 2018
ISSUE: Union claimed Town violated compensatory time practice by granting leave only if staffing is above the minimum at time shift starts.
STATUS: DLR issued Order to Show Cause why matter should not be deferred to grievance and arbitration procedure. Response due April 26, 2019.

FIRE

CASE: Falmouth Firefighters, Local 1397 IAFF and Town of Falmouth
COURT: JLMC
DATE OF FILING: August 21, 2018
ISSUE: CBA issues in dispute.
STATUS: Interest Arbitration scheduled for May 16, 2019.

CASE: Falmouth Firefighters, Local 1397 IAFF and Town of Falmouth
COURT: Grievance over new facial hair policy
DATE OF FILING: August 28, 2018
ISSUE: Union contends Town has to bargain over facial hair policy designed to insure safe seal when FF wearing masks
STATUS: Grievance at Town Manager's level.

TOWN OF FALMOUTH – LITIGATION REPORT SUBMITTED BY LABOR COUNSEL MIRICK O'CONNELL April 2019

CASE: AFSCME v. Town of Falmouth
COURT: Dept. of Labor Relations (DLR)
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: DLR held an investigative conference 8/22/2018. On December 20, 2018, the DLR issued a complaint against the Town alleging the Town violated Chapter 150E by denying the Facilities Manager comp time and call back pay since July 1, 2018. A hearing is scheduled on the charge on August 6, 2019 before the DLR.

CASE: Town of Falmouth v. AFSCME
COURT: Dept. of Labor Relations (DLR)
DATE OF FILING: 2018
ISSUE: Town filed a charge of repudiation of the collective bargaining agreement and arbitration award against AFSCME regarding the reclassification of the Facilities Manager.
STATUS: DLR held an investigative conference 8/22/2018. On December 20, 2018, the DLR dismissed the Town's charges. The Town appealed the DLR finding to CERB, which dismissed the Town's appeal on February 28, 2019. The Town has filed with the DLR a notice of appeal to the Appeals Court.

CASE: AFSCME v. Town of Falmouth
 COURT: American Arbitration Association
 DATE OF FILING: 2018
 ISSUE: AFSCME filed a demand for arbitration charging Town for not paying the reclassified Facilities Manager call back pay. The Town did not do so because the reclassified Facilities Manager is classified as exempt.
 STATUS: Arbitration hearing scheduled in the Fall.

CASE: AFSCME v. Town of Falmouth
 COURT: American Arbitration Association
 DATE OF FILING: 2017
 ISSUE: AFSCME grieved the Town's termination of Dispatcher Jill Allen.
 STATUS: Case will be dismissed if Union delays arbitration any longer and takes no action by September 24, 2019 per LRC.

**SPECIAL COUNSEL
 LEGAL FEES
 FY 2019
 7/1/18 – 4/3/2019**

Blatman, Bobrowski & Haverty, LLC (Falmouth Hospitality v. ZBA)	\$ 19,719.38
Collins Loughran & Peloquin, PC (Labor)	\$ 6,435.00
Norris, Murray & Peloquin, PC (Labor)	\$56,045.00
Mirick, O'Connell, Demallie & Lougee, LLP (Labor)	\$ 12,613.51
Pierce Atwood, LLP (Smyth v. ConCom \$8,957.13) (Wind Turbines \$2,517.07)	\$ 13,126.70
TOTAL	\$107,939.59