TOWN OF FALMOUTH Board of Zoning Appeals Minutes Tuesday, November 22, 2011

MEMBERS PRESENT – Fred Jay Meyer (Chair), Dennis Keeler (Vice-Chair), Stan Given, Willie Audet, Jim Thibodeau, Jonathan Berry (Associate), Don Russell (Associate)

MEMBERS ABSENT – none

STAFF PRESENT – Justin Brown, Code Enforcement Officer

1. Call to order:

The meeting was called to order at 6:30 pm.

2. Discussion and adoption of the minutes of the previous hearing(s).

Willie Audet moved to approve the minutes; Stan Given seconded. Motion carried 5-0.

3. Discussion and finding that all applications presented for this hearing are complete.

The Board did not find any applications to be incomplete.

Jay Meyer changed the order in which the applications would be heard.

4. Applications

d) 11 Payson Rd. Adam Rosenbaum representing Janet Akerblom and Dan Vogt - Conditional Use under Section 6.2 for an addition. Parcel U01-29, zoned RA.

Jay Meyer recused himself from this item because he is a neighbor. Dennis Keeler served as chair. Don Russell was a voting member on this item.

Adam Rosenbaum of CSI Builders represented the applicants. He explained that they want to build a small, rear, covered entry way. It meets all the setbacks.

Dennis Keeler opened a public comment period; there was no public comment.

Jim Thibodeau moved to approve the application; Don Russell seconded. Motion carried 5-0.

b) 20 Town Landing Rd. James Bonnvie - Conditional Use under Section 6.2 for an addition and garage. Parcel U17-60, zoned RA/LR.

James Bonnvie said they want to put a 40x24' addition on the home. It will meet all required setbacks and will be the lowest point of the home, in consideration of the neighbors.

Jay Meyer opened a public comment period.

Beverly Knudsen of Casco Terrace asked about the orientation of the addition. Jon Berry showed her a copy of the plan and indicated the setbacks.

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Cecelia Tobiason of Town Landing Road asked to see a copy of the plan. Jon Berry showed her a copy of the plan and indicated the setbacks.

Mike Deluca, the former owner of the property, said one of the conditions of the sale was that the addition would have no impact on the views of the surrounding neighbors. He said this addition conforms to that request.

Public comment period closed.

Jon Berry asked about the side setbacks; the home is within 4 feet of a side lot line.

Justin Brown confirmed that; the applicant is aware that he has to remain within the setbacks.

Willie Audet asked about the bulk of the addition. He was concerned with the length of the building, as the surrounding neighborhood is mostly smaller cottages.

Mr. Bonnvie explained that the rooflines are lower than the existing home. They are only adding one floor to the home.

Dennis Keeler asked about the addition; it is a garage with a second floor living space.

Mr. Bonnvie said yes; there is a dormer facing the middle section of the house.

Dennis Keeler asked about the height of the 38 foot stretch in the middle. Mr. Bonnvie said the existing structure is the 28 foot high section; the 38 feet is where the addition is coming out of the existing home. There are existing dormers. He described the location of each of the photos included in the Board's packets.

Dennis Keeler asked if they would still come off Town Landing Road; Mr. Bonnvie said yes.

Stan Given asked what they used as a scale reference to determine the top of the roofline.

Mr. Bonnvie didn't know; he would have to ask the architect. The shed in the picture is uphill from the property. The land slopes down. He indicated on the tax map the approximate location of the shed. It is a pretty steep slope.

Stan Given asked how the property lines were established on the site plan.

Mr. Bonnvie said he took it from the Town files from a previous renovation and he checked the measurements. There are yellow pins that mark the lines. He was comfortable with the measurements.

Jim Thibodeau asked about the existing building elevation. He asked how high they are raising up that one section. Mr. Bonnvie said they are bringing it up a floor, but it won't be any higher than what is already there. He didn't have the exact height.

Jay Meyer asked about the new living space, shown as 38 feet wide. The roofline on the side closest to the water goes the full 38 feet. He thought in the back there was a cut-out where the original roofline is being preserved.

Mr. Bonnvie said they are trying to respect the lot line. On the plot plan it shows a setback they have to maintain. He would want to have that dormer come across, but he has to maintain that 10 feet. This plan keeps it to 11 feet, in order to have an extra foot of clearance.

Jay Meyer observed that, while it is a large addition, they have been sensitive to the views and the height. Jim Thibodeau pointed out that there are no objections from the neighbors.

Dennis Keeler said that, while it has bulk, it has changes in shape and is not one massive shoebox. The rest of the Board agreed that they were pleased with the design of the addition.

Stan Given moved to approve the application under 6.2; Willie Audet seconded. Motion carried 5-0.

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a) 338 Foreside Rd. Peter Thornton, Administrative Appeal of a decision of the Code Enforcement Officer regarding a lot split. Parcel U18-004-A, zoned RA.

Jon Berry was recused on this item.

Peter Thornton explained his application. He is here to appeal the decision of the Code Enforcement Officer to allow a lot split on 338 Foreside Road. It was tabled at the last meeting in order to answer the question on whether the lot of a previously approved subdivision could be split without Planning Board approval.

The Board discussed whether to address the merits or the timeliness of the application first. Jay Meyer explained that the Board has received two letters from Town Attorney William Plouffe since the application was last heard. One letter discusses the timeliness of an appeal and the other addresses the question of lot splits and a previously approved subdivision.

This hearing was delayed to allow Mr. Thornton time to review the letters in question.

c) 11 Maiden Ln. Donald M. Russell - Conditional Use under Section 8.3 to extend a garage roof. Parcel U16-071, zoned RA/LR.

Don Russell recused himself from this item as he was the applicant.

Don Russell presented his application. He wants to extend his garage roof for the same reasons as originally submitted to the Code Office in October 2008. The garage is 22x41'. A plot plan and photos depicting before and after conditions are included in the packets. These photos demonstrate a negligible effect on neighbors' water views. He contended that this application requires approval under section 8.3 only, and not under section 6.11 as stated in February 2009. He discussed errors he believed were made in the denial of his previous application and why he felt his application should be approved this time.

Jay Meyer opened a public comment period. He disclosed that the Board was in receipt of an email this afternoon from Robert Wood, requesting that the Board deny the application, and he provided Mr. Russell with a copy. Justin Brown said that he had received 5 emails on the issue and he distributed copies of them to the Board.

Pam Ryan of East Ramsdell Road submitted pictures by email to the Code Office. The photos are not doctored, as Mr. Russell contends. There are no changes from last time. She didn't want to lose the view she has and considers to be quite significant. She felt there were several ways to repair Mr. Russell's garage without extending the roofline; following one of these would meet both her goals as well as Mr. Russell's. She said that the trees Mr. Russell planted a year ago don't impact her view. She didn't know what kind of trees they are, but they are evergreens and are pretty tall. At Mr. Berry's question, she said she didn't know if they would grow up to impact her view. They weren't seedlings, but mature trees. She pointed out that the photos Mr. Russell submitted are from Maiden Lane, and not from her property. They don't represent her view.

Willie Audet asked about the new photos she submitted and where they were taken from.

Ms. Ryan said she took them with her phone; they were taken from her living room.

Willie Audet asked if she could see the ocean when sitting in a chair in her yard. Ms. Ryan said yes.

Willie Audet asked if she had other views of the ocean from her home. Ms. Ryan said yes; this is her primary view, but it is not her only view. She described the other photos and from where they were taken. She also explained the orientation of her home and which windows overlook what.

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Dorothy Ryan, a neighbor of Pam Ryan's, observed that nothing in the application has changed from the last time. She hoped the Board would consider it the same way. She lives next door to Ms. Pam Ryan, between her home and the water. Her view would not be affected by the garage.

John Moon, a resident of Middle Road said he is the photographer that took the pictures in Mr. Russell's original application. He felt the issue was much larger than Mr. Russell's application; it concerned what kind of community they want to be in Falmouth. He spoke about the "significant adverse impact" language. He argued that the photo submitted by Ms. Ryan is a telephoto photograph. He volunteered his services as a photographer to photograph Ms. Ryan's water view to show what exactly the impact would be. He spoke about one of the opposition letters. He spoke about the high property taxes on Mr. Russell's property. He argued that Mr. Russell wants a simple thing that harms no one. He asked the Board to quantify what they want from section 8.3.e. He asked the Board to approve Mr. Russell's application.

Robert Wood of Ramsdell Road has lived in Town for 33 years. The neighborhood was mostly constructed in the 1920's, and the homes are typically cottages. Most people bought their homes with the expectation that they would enjoy their water views without someone obtaining a variance from the Town in order to build something that blocked their views. He hoped the Board has read all the testimony from the previous application. He argued that the structural deficiency that Mr. Russell alleges in the garage has been there for a long time. He thought the real reason Mr. Russell wanted the additional height in the garage was to provide more room for him to work on his antique cars by putting in a lift. He hasn't seen any sagging in the roof. He estimated the impact on Ms. Ryan's view based on sightlines. He felt this application should not be approved until after the Council finishes their discussions regarding this ordinance provision and he urged the Board to wait until then.

Jay Meyer clarified that section 8.3.e was put into the ordinance in 2006. The Board must enforce the ordinance as it is currently written.

At Dennis Keeler's request, Mr. Wood identified the location of his house. His view would not be affected. He was here to testify as a member of the neighborhood. He didn't see a significant need for the roof to be changed.

At Jon Berry's question, Mr. Wood stated that the objected to any improvement on Mr. Russell's property that had a significant impact on a water view, even thought it didn't impact his personal view. He was concerned with the precedent for other projects in the neighborhood if Mr. Russell was allowed to do this.

Jon Berry asked if he had any objective criteria. Mr. Wood said "significant" was a subjective term.

Andrew Sawyer of Foreside Road owns property that abuts the Yacht Club property. It appears that he can see Mr. Russell's property from his home. He was concerned about his property values. He wondered if the proposed addition would affect the view from his property, specifically his "lookout". He described the location of his home.

Willie Audet asked if his property has any protective easements on the view from his "lookout".

Mr. Sawyer said he does not. His neighbor has an easement from the Yacht Club for his view. Mr. Sawyer's view is over the Yacht Club boat ramp; he can see Handy Boat. The "lookout" is a stone structure, perhaps 5-6 feet high with a roof. He wasn't opposing the project per se; he just wanted to see what it was all about.

Mr. Russell showed Mr. Sawyer pictures of the proposed addition. He said it would not impact Mr. Sawyer's view.

Mr. Russell said that Mr. Wood testified three years ago that any sliver of view was significant to the residents of the neighborhood. Mr. Russell said that section 6.11 does not apply as the addition would

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not be habitable space. The reason for his application was to prevent a collapse of his roof similar to that suffered by a friend of his during an ice storm.

Jim Thibodeau asked what has changed in this application versus the previous application.

Mr. Russell said nothing. This application is based on section 8.3; the roof addition to the rear of the garage is designed to shed rain and ice similar to the front portion of the roof.

Dennis Keeler observed that the decision made three years ago was based on 8.3 and water views. There was discussion around 6.11. Justin Brown added that there was discussion around a variance as well.

Jay Meyer said that, in his reading of the minutes from three years ago, section 6.11 was not raised as an issue. 6.2.d was raised and was a material factor for him as well as Rich Bayer.

Dennis Keeler wondered how this application gets to a conditional use analysis, which 8.3 is. He and Justin Brown discussed sections 6.2, 8.3 and how to address this application. Historically, section 8.3 has been used as a stand alone.

Dennis Keeler read the language of section 6.2 "Except as provided in this subsection, a nonconforming structure or use shall not be extended or enlarged in any manner except as may be permitted as a variance..." As Mr. Russell is not asking for a variance, the garage can only be enlarged as permitted in this section. He didn't see how they get to 8.3.

Justin Brown said that he only put the application under 8.3 because of the history of the application. Based on all the testimony around this project with regards to the view, he didn't want to leave out 8.3

Dennis Keeler asked about the provision that prevents an applicant from bringing back a denied application within a year. He wondered if the applicant would have to wait a full year if the Council changed 8.3 six months after a denial was issued for this project.

Justin Brown thought he would have to wait the full year. Despite changes to the ordinance, it would still be the same application.

Jon Berry asked why Mr. Russell filed now.

Mr. Russell said that he filed now due to the recent discussions of section 8.3.e and the choice the Board made to send the discussion to the Council. He wanted the Board to discuss and approve the application based on its merits. He said a significant loss of water views had not been demonstrated as a result of this application. Both the former CEO and Justin Brown had been to the property and didn't feel it was a significant loss of water views.

Jon Berry pointed out that there are three suggestions for changes to the applicable ordinance section made by three different members of this Board currently before the CDC. He asked if Mr. Russell would concede Mr. Wood's point that the timing of this appeal called into question the objectivity of this Board.

Mr. Russell said no. He filed his appeal prior to the matter being sent to the CDC for discussion.

Jon Berry asked if Mr. Russell would object to tabling this appeal until the resolution of the matter. Mr. Russell said he would object.

Jay Meyer agreed with Jon Berry; he felt that Mr. Russell should have waited until the matter was resolved. He asked about the distance between the walls of the garage and the property lines. After some discussion it was established that the back wall of the garage is 5 feet from the property line; the garage is 3 feet away from the line on the uphill side.

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Jay Meyer asked if the photo submitted is the only evidence of what the garage will look like after the project is done. Mr. Russell said yes.

Jay Meyer said the proposal is to raise the ridge of the roof. Mr. Russell confirmed that; the plan is to have the same ridge and slope for that 15 foot portion as for the front part of the garage.

Jay Meyer asked him to confirm that it would increase the volume of the garage. Mr. Russell said yes, it will but it is not habitable space.

Justin Brown asked Dennis Keeler if he found any section of the ordinance that covers this particular application.

Jay Meyer disclosed that the Board has emails or letters from Robert Wood, Pam Ryan, Dorothy Ryan, Jennifer Gregg, and David and Phyllis Brunner, all in opposition to the project.

Mr. Russell said that Ms. Gregg lives on East Ramsdell and her view would not be impacted.

Jay Meyer closed public comment.

Jon Berry found the timing of this application to be offensive. The Board has worked incredibly hard on this issue. Weighing in on this application at this time calls into question their objectivity through the process that is going forward with the Council and the CDC. He has already heard questions on whether this Board has an agenda on this issue.

Willie Audet discussed the testimony of neighbors who do not have views that are impacted. He pointed out that Ms. Ryan has other views. He was comfortable voting in favor of the application because he didn't believe it was significant. It is a *di minimis* improvement on his property.

Jay Meyer asked if the Board felt the need for a site walk. They decided to deliberate first.

Dennis Keeler felt they were having another reconsideration of the appeal; nothing has changed and he wondered why they are having this discussion again. He felt this has run its course. In looking at this again he wondered how they even get to 8.3. First they have to find the conditional use; if there is no conditional use there is no 8.3. In 6.2 it states that a non-conforming structure shall not be enlarged except by variance or under this section. This application doesn't fit under this section and there is no request for a variance here.

Justin Brown said that the code office has an application for people to apply under 8.3 as a stand alone application. He thought Dennis Keeler had a good point that it needs to be tied to something.

Jon Berry thought it was a practice of the former Code Enforcement Officer to put it into an abstract "8.3 other" if it impacted a water view, but he agreed that there is no 8.3 other – it has to be tied to something.

Dennis Keeler didn't see a need for a site visit. He didn't see how his position would be different than it was the last time.

Stan Given agreed with Jon Berry's comments regarding the timing of the appeal. His decision on this application would be based on the impact to Ms. Ryan's view, as it was last time, and not on the testimony on others.

Jim Thibodeau agreed with Stan Given. His vote last time was based on Ms. Ryan's testimony. He thought they based their consideration last time on section 6.2.d, which covers a non-conforming structure other than a single-family detached dwelling. That section requires a site plan review by the Planning Board. He thought this was how they got to section 8.3.

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Dennis Keeler pointed out that 6.2.d states that the structure may be enlarged "provided that the extension or enlargement is not located between the lot lines and the required setback lines"; this garage is located in the setback so it would not be allowed.

Willie Audet said that it would only be allowed by a variance.

Jim Thibodeau would like to see notices go to properties within 500 feet of this property and hear testimony from those people. He considered this a significant impact last time, and he still does. The roof can be repaired, structurally upgraded and made water tight without being raised.

Jay Meyer said the deciding factor for him was not the view issue, but that it should be under 6.2. He read the language of that section again. The only subsection that applies is 6.2.d, but this application cannot come under that because the garage is within the setbacks. The only way to do what the applicant wants is by a variance. He suggested that the Board find that it lacks merit in that it is not allowed under section 8.3. He pointed out that in *Brackett v. Town of Rangeley* it states that "the underlying policy of zoning is to gradually eliminate nonconforming structures and uses...".

At the request of the Board Justin Brown explained the ordinance provisions and office practice for notices to be sent to abutters.

The consensus of the Board was that a site walk was not necessary.

Dennis Keeler moved to deny the application; Stan Given seconded.

Dennis Keeler clarified that he felt it didn't fit under section 8.3, and even if it did, his analysis from three years ago still applied, since nothing has changed.

Motion carried 5-0.

a) 338 Foreside Rd. Peter Thornton, Administrative Appeal of a decision of the Code Enforcement Officer regarding a lot split. Parcel U18-004-A, zoned RA.

Jon Berry had previously recused himself on this application.

Jay Meyer pointed out that the Board must first find whether this is a proper appeal; there is a question of timeliness. If they find that it is proper, then they can discuss the merits of the case.

Dennis Keeler asked if Mr. Thornton felt the timeline was consistent with his recollection of events.

Don Russell felt it would be nitpicking to deny this based on the timeliness issue.

Mr. Thornton agreed that it wasn't filed within the 30 days, but it was only a few days over. He felt he could argue good cause, which would allow him the 60 day timeframe. Nothing has been done with the lot; no building permits have been taken out. Nothing would be impacted if it was reopened at this point.

Jim Barnes, attorney for Marybeth and David Bachman, the owners of the lot in question, stated that they don't have any issue with the facts, including the chronology, as laid out in Attorney Plouffe's letter. Mr. Thornton is using the August date as the date when he received notice; he in fact received official notice in April. Mr. Barnes said the Board should use that timeframe to start any appeal period. That is Mr. Thorton's best-case scenario, since he knew about the lot split even before then, but he did receive written notice on April 13. He said in Mr. Plouffe's letter, the Board is provided leeway in making their decision. According to that letter, if April 13 is when Mr. Thornton had written notice of the decision, he had 30 days from then to file an appeal. He didn't do that. He then had 60 days, if the Board wanted to apply a reasonable timeframe standard, as some courts have allowed. He didn't do it in 60 days. Mr. Thornton has argued for a subjective timeframe based on special circumstances, and has provided the Board with some court cases in support of that. They

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don't have special circumstances here; all they have is Mr. Thornton filing an appeal 5 months later. Without any egregious act giving rise to special circumstances, he felt the Board needed to deny that subjective timeframe as well.

Jim Thibodeau asked Mr. Barnes what financial hardship is caused to his clients by Mr. Thornton's delay in filing his appeal.

Mr. Barnes said that his client has the lot under contract, pending the sale of the house. She needs the assurance that the decision cannot be reversed and that the contract she has is good. If the decision is reversed, it will create a lot of financial hardship for her. That situation should not be relevant to the decision they have to make. The Board has to find whether there was any egregious action that would create a special circumstance under which Mr. Thornton would have more than the 60 days to file an appeal.

Dennis Keeler thought, in the emails exchanged between Mr. Thornton and Amanda Stearns between April 13 and May 4, it seemed Mr. Thornton was thinking about appealing. He asked if Mr. Thornton looked at appealing at that time and then decided not to.

Mr. Thornton said he thought about it, talked about it, but it was summer and he didn't make a decision at the time. He felt that, since nothing had been done on the property, he could appeal it.

Willie Audet asked if the lot has been divided and recorded.

Mr. Barnes said the surveyor has done his work and the pins have been set, but nothing has been recorded.

Jay Meyer asked if Mr. Thornton remembered when the "For Sale" sign went on the property.

Mr. Thornton said the sign would have been what prompted him to go to the code office.

Mr. Barnes said the sign went up in July 2011 but Mr. Thornton knew about the lot split earlier than that; Mr. Thornton was in discussions with the real estate agent as early as March of that year. He was asked if he had interest in purchasing that lot.

Justin Brown read the email from Amanda Stearns dated April 13.

Willie Audet asked whether that constituted when the appeal period started. Jay Meyer pointed out that there was further communication in August.

Denis Keeler moved that the Board refuse to hear the appeal, because it was improperly filed. It was not filed in the timeframe set forth by the ordinance. Stan Given seconded.

Dennis Keeler felt it was clear, and that Mr. Thornton acknowledged that it was clear, that as of April 13 a decision had been made. Landowners need to get final resolution on an issue, so that they can move forward. The ordinance provides 30 days, 60 days based on good cause. In this case he didn't feel it was timely; it was outside 60 days and Mr. Thornton clearly knew that appeal was a possibility.

Stan Given pointed out that, even if the sign going up was what prompted him to do something, it was still filed more than 90 days after that. This isn't a timely appeal.

Jim Thibodeau agreed; there is a good reason for having a time limit for appeals.

Don Russell disagreed; he felt it was nitpicking. If someone was really being injured, it was one thing. If there is no harm being done, it's nitpicking.

Jay Meyer agreed that there has to be a line beyond which people can move forward. Even if they applied the more lenient 60 day limit for good cause, it was clear to him that there was written notice to Mr. Thornton on April 13; he saw a sign go up in July and received an email on August 3

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explaining the appeal process. He still did not file an appeal until October 3. Even using the August 3 date, Mr. Thornton is still outside of the 60 day timeframe.

Mr. Thornton asked if they are going to hear the merits at all.

Jay Meyer said no, they are not opining one way or another on those issues if they find that it is not properly filed.

Motion carried 5-0.

5. Election of a new chair

Dennis Keeler moved that Jay Meyer continue as chair for 2012.

Jim Thibodeau moved that Dennis Keeler continue as vice-chair for 2012.

Stan Given seconded both motions.

Both motions carried 5-0.

6. Discussion regarding a December meeting

The Board discussed their options. It was decided to combine the January and December meetings by moving the January meeting to January 10, 2012.

7. Other Business

There was no other business before the Board.

Adjourn

Meeting adjourned.

Respectfully submitted,

Melissa Tryon Recording Secretary