

March 7, 2012

The Fairhaven Board of Appeals met on March 7, 2012 at 6:00 PM at the Fairhaven Town Hall. Members present were: Mr. Rene Fleurent, Jr., Mr. Kenneth Kendall, Mr. Al Silva, Mr. Fran Cox, Mr. Daryl Manchester and Mr. Peter DeTerra. The following petition was considered:

Petitioner: Jonathan Costa 395 Huttleston Avenue Plat 31A, Lots 309-310 Book 9008, Page 83 Certificate #9280
198-16 A Special Permit is required for a greenhouse with retail sales under 5 acres in a RA District.

The petition was read. There were 30 abutters notified. The petitioner read a prepared statement that is part of this record and intends is to operate a roadside stand as a seasonal retail nursery business. The operation will not be large, consisting of a growing area and small retail display area. The sales would be from May to the end of July and only on weekends. There will be no cutting and the operation will not go beyond the existing chain-link fence. Parking will be on site. There will be little impact to the neighborhood. He has spoken to many abutters and there is no opposition.

In Favor: Mr. Costa

Opposed/Questions: Mr. & Mrs. Mercer, 18 Kane Street, upon review of the site plan said they did not have any objections.

Motion to grant the Special Permit was made by Mr. Silva; seconded by Mr. Cox

Board members voting to grant the Special Permit: Mr. Manchester, Mr. Cox, Mr. Silva and Mr. Kendall.

Board member voting not to grant the Special Permit: Mr. Fleurent, Jr.

The Board voted 4-1 to grant a Special Permit for a greenhouse with retail sales under five (5) acres in a RA District as required in the By-Law Section 198-16 for the following reasons:

- 1.0 The request is in keeping with the requirements of the By-Law. Not granting the Special Permit would create a hardship.
- 2.0 Granting this relief will not derogate from the intent and purpose of the By-Law.
- 3.0 Granting this relief will not adversely affect the zoning district in which it is located.

Peter DeTerra,
Chairman

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Petitioner: Bernard J. Ristuccia 24 Nelson Avenue Plat 43, Lot 37-38 Book 9498, Page 120
198-18 Short 9' of the required 30' front setback, short 17' of the required 20' side setback, short 13' of the required 30' rear setback and
10% over the maximum allowed building coverage of 15% all within a RR District.

This is a continued hearing from February 7, 2012.

Motion to open the hearing was made by Mr. Cox; seconded by Mr. Kendall. Vote was unanimous.

A written request from Mr. Bernard J. Ristuccia was read requesting a continuance to April 3, 2011. The request is part of the record.

Motion to continue the hearing was made by Mr. Cox; seconded by Mr. Kendall. Vote was unanimous.

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Petitioner: Jeffrey Antil, Trustee Adams Street Nomine Trust 249 Adams Street Plat 23, Lot 93 Book 3945, Page 91
198-21 A Special Permit is required for expansion of a pre-existing non-conforming use.

The petition was read. There were 50 abutters notified. The petitioner stated he has operated a family run retail food store from the first floor of the location since 1994. A fire occurred in the apartments above the commercial location in August 2011 causing damage to the commercial business on the first floor. He would now like to create two apartments in the area once used for the commercial business. A letter of intent is part of this record. Letters in support of the petition from the Police Department and Fire Department were read and are part of the record.

In Favor: Mr. & Mrs. Antil and Gary Brackens, abutter.

Opposed/Questions: None

Motion to grant the Special Permit was made by Mr. Fleurent, Jr.; seconded by Mr. Cox.

Board members voting to grant the Special Permit: Mr. Manchester, Mr. Cox, Mr. Silva, Mr. Fleurent, Jr. and Mr. Kendall.

The Board voted 5-0 to grant a Special Permit for expansion of a pre-existing non-conforming use as required in the By-Law Section 198-21 for the following reasons:

- 1.0 The request is in keeping with the existing use within the neighborhood. Not granting the Special Permit would create a hardship.
- 2.0 Granting this relief will not derogate from the intent and purpose of the By-Law.
- 3.0 Granting this relief will not adversely affect the zoning district in which it is located.

Peter DeTerra,
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Petitioner: Jesse Perry, Jr. Trustee of the Jesse Perry Jr. Declaration of Trust 36 Balsam Street Plat 43C, Lot 23 Certificate #21031
198-18 Short 11' on the north and 6' on the south of the required 20' side setback and 1% over the maximum allowed lot coverage of 15% all within a RR District.

The petition was read. There were 26 abutters notified. The petitioner was represented by Rick Charon, P.E. of Charon Associates, Inc of Rochester, MA. Plans were presented for review. Mr. Charon stated that the trust was formed in 2005 but the family has owned the property since the 1950's. The owners were before the Board in 2005 and received an approval for a proposed renovation. Conservation Commission approval was also granted. However one of the owners became ill and the project did not proceed. Also within that timeframe there was a house fire and the FEMA maps were changed significantly affecting the flood zone requirements for the property. The house must now be razed and a new house that will be in compliance with FEMA requirements will be constructed. The same footprint will be used. The hardship for reconstruction is the new flood zone requirements on this small lot.

In Favor: Mr. Perry and Ms. Vieira, 30 Balsam Street.

In Opposition/Questions: None

Motion to grant the Variance was made by Mr. Fleurent, Jr.; seconded by Mr. Cox.

Board members voting to grant the Variance: Mr. Manchester, Mr. Cox, Mr. Kendall, Mr. Silva and Mr. Fleurent, Jr.

The Board voted 5-0 to grant the Variance of eleven feet (11') on the north and six feet (6') on the south of the required twenty feet (20') side setback and one percent (1%) over the maximum allowed lot coverage of fifteen percent (15%) all within a RR District as required in the By-Law Section 198-18 for the following reasons:

- 1.0 The lot is small and the flood zone setbacks require a Variance. Not granting the Variance would create a hardship.
- 2.0 Granting this relief will not derogate from the intent and purpose of the By-Law.
- 3.0 Granting this relief will not adversely affect the zoning district in which it is located.

Peter DeTerra,
Chairman

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Petitioner: John W. Folino Jr. 15-28 Arsene Way Plat 28 and 30A, Lots 2A, 1A Book 4537, Page 24
Clarification of a Special Permit issued on July 5, 2011

The petition was read. There were 29 abutters notified. The petitioner was represented by Attorney Chip Mulford, New Bedford. A written statement was reviewed and is part of this record. A brief history of the business was discussed. Planning Board has reviewed parking spaces at the business bays and there are more spaces than zoning requires. Mr. Folino would like to sell the business bays to business owners that own service oriented businesses and allow them to do retail sales with showrooms for goods associated with their business. The Building Commissioner's understanding of the Special Permit issued in July 2011 is that there could be limited retail sales but no retail businesses per se. Therefore, a business with a showroom area may constitute a retail business which was prohibited in the Special Permit. Specific types of businesses were discussed. A clarification is required.

Tile Craft owners, Mr. & Mrs. Buzniak spoke in favor of allowing a limited showroom area where customers could see the products they would like installed either by Tile Craft or other contractor or homeowner. They say at present they see 4 to 5 customers a day at most.

The Zoning Enforcement Agent, Wayne Fostin stated clarification is required with guidelines for enforcement.

Mr. Fleurent understood the need for limited retail with a service business. The products sold should be part of the business and open to a limited public. Attorney Mulford stated that concept is correct. The business must be service oriented and offer only products that are within the scope of the business' use, installing what they sell.

Motion to clarify the original Special Permit issued on July 5, 2011 to allow limited retail with a service oriented business, including a showroom for a service based owner in the business of installing what they sell and no auto repair businesses allowed was made by Mr. Fleurent, Jr.; seconded by Mr. Cox.

Members voting for the stated clarification: Mr. Kendall, Mr. Fleurent, Jr., Mr. Silva, Mr. Cox and Mr. DeTerra.

The vote was 5-0 in favor to allow limited retail with a service oriented business, including a showroom for a service based owner in the business of installing what they sell and no auto repair businesses allowed.

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Chairman

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Petitioner: Donna McKenna Arsene Street Plat 28, Lots 8, 8A, 9 Book 1490, Page 201 and Book 3326, Page 266
Administrative Appeal Administrative Appeal of building permit for wind turbines.

The petition was read. There were 24 abutters notified. Attorney Ann Ponichtera DeNardis represented the petitioner. Chairman DeTerra questioned if the Board should hear the petition because of the timeframe of submitting the petition as it relates to the issuance of the building permit in July 2011. Town Counsel Attorney Crotty recommended the Board hear the matter and make its determination or chance Superior Court remanding it back to the Board. Attorney DeNardis submitted written documents as part of the petition and she discussed each item singly during her presentation. The documents are part of this record. Attorney DeNardis brought nine zoning and building code issues before the Board challenging the validity of the building permits issued for the wind turbines now being constructed as a municipal project on town owned land on Arsene Street that is now leased to the wind turbine developer Fairhaven Wind LLC. At issue is the timing of a building permit issued July 21, 2011 to Gordon Deane, Fairhaven Wind, building permit applications, an amended building permit issued November 4, 2011 and missing and/or improper signatures on the permit. Additionally the petitioner believes an independent structural engineer's report, which was not done, was required prior to issuance of the permit. Another issue is the zoning requirement of a minimum of ten acres for the project, that the petitioner believes is only seven acres due to lot 9 not being part of the prior-Town Meeting approved parcel. Attorney Thomas Crotty counseled the Board that of the nine issues brought by the petitioner only four were under the jurisdiction of the Board because only four were related to zoning while the remainder were building code issues which must be heard by the State Building Code Board of Appeals and not the local zoning Board of Appeals. Mr. Crotty stated that lot 9 is part of the parcel, explaining that lots comprise parcels and as long as the lots are contiguous and are held by a common owner they are considered one parcel. The parcel in question has contiguous lots and is owned by the Town and is 27 acres in total. As to the project being a municipal versus a commercial project, Mr. Crotty explained that initially the proposed project was a commercial project and had passed all the requirements for such under the By-Law. Now as a municipal project, it is also in compliance because the project meets present regulations for such under the State requirements. The Building Commissioner responded to many of the questions raised by the petitioner as they relate to the issuing of the permit and the amended permit. It is not unusual for contractors to change on jobs thus the amended permit. The dates on the building permit application appear to be conflicting because one date is the date the application is received and the other is the issuance date. The Building Commissioner does not sign an application. There are different construction plans on file because of field changes which are not uncommon in the building trade. Attorney Crotty stated a sound study was initially done and then re-done in September 2011 which was why new plans were issued. One of the turbines was moved due to that sound study and thus the new plans. Attorney DeNardis stated the September 2011 sound study was not new data but rather at look at the old data. Additionally, Attorney DeNardis stated repeatedly that there is a clear conflict of interest in allowing Attorney Crotty to advise both the Building Commissioner who is named in a lawsuit by the petitioner and others, and the Board of Appeals.

The Board discussed the matter.

Motion to approve the request was made by Mr. DeTerra; seconded by Mr. Fleurent, Jr.

Mr. Cox stated he was not ready to vote but rather would like independent counsel as there is some merit to the conflict of interest as presented by Attorney DeNardis. Discussion ensued. Mr. DeTerra withdrew his motion.

Motion to request an independent counsel and continue the hearing to the meeting of April 3, 2012 was made by Mr. Cox; seconded by Mr. Silva. Board members voting to approve the motion: Mr. Kendall, Mr. Cox, Mr. Silva and Mr. DeTerra
Board member voting not to approve the motion: Mr. Fleurent, Jr.

The board voted 4-1 to request an independent counsel and continue the hearing to April 3, 2012.
Attorney DeNardis consented to the April 3, 2012 continuance.

Peter DeTerra, Chairman

