This meeting was held on the Zoom virtual meeting software for remote access, due to the Governor’s order suspending public assemblies, during the declared novel corona virus (Covid 19) emergency. The meeting was taped by Falmouth Cable TV, in accordance with long-standing practices.

All votes of the Board were taken by roll call.

Public Comment - None

Julian Suso, Town Manager, Rod Palmer, Building Commissioner and Noreen Stockman, Zoning Administrator were present.

Hurrie – With us tonight we have Town Manager, Julian Suso and Building Commissioner, Rod Palmer. Stockman circulated these issues to discuss tonight. I will make introductory remarks and then we can have discussion about each one.

Hurrie – It’s been a trend that detached garages are having living space added to the 2nd floor, and issues have been coming up about egress. The issue the Board has had is that a 2nd means of egress can be interior, and through the garage. We were recently provided a copy of the CMR’s by Palmer, which provides some discretion as to what is acceptable. In the past, the 2nd means of egress has been an exterior exit. The issue the Board has is that this type of project can be exploited.

Rod Palmer – I’m not sure if there is a specific question, there are many variables. Is there a specific example that you would like me to comment on, or would you like a general discussion?

Dugan – We now have an accessory apartment bylaw, and it appears that the applicants may try to put it in what appears to be an accessory apartment, but under another definition with a bedroom and additional living space, bathroom, kitchen, etc. To get around the Health Department, they remove a bedroom in the main house, which can now be transferred to the accessory structure. When it comes to the Building Department, they don’t consider it as “sleeping”, so they avoid having to put in 2 means of egress. Most of the time they are in a detached structure with multiple rooms.

Foreman –Sometimes these may not be able to qualify for an actual accessory apartment because they are too big. It’s another way around. It’s a way to create an apartment, without meeting the zoning bylaw criteria.

Palmer – We’ve seen this often, a lot of homes utilize accessory buildings for overflow especially for the summer months. In situations when they utilize an accessory building, if there are sleeping quarters, there should always be 2 means of egress, because it’s a dwelling unit. There are other types of accessory structures that have been converted into other things such as a workshop, office or study. You do not need to have 2 means of egress for those uses; you only need 1. If there is a specific area where people are sleeping, you would always have two forms of egress.

Foreman – If the Board of Health declares the space a bedroom, it seems your office should see it as a bedroom.
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Palmer – I agree with you, but it’s troubling. We regulate 780 CMR, and I recognize the space as you label it; if it’s labeled as a bedroom, that’s what I review the application for. The Board of Health regulates 105 CMR, and they have a different set of regulations. If it appears to be a bedroom, has a window, 70s/f or more of space, and a door, they will view it as a bedroom. It’s unfortunate that we have conflicting CMR’s, but that’s the way it is in Massachusetts, and it can be challenging.

Zylinski – Whether they are up in an art studio or office, there are vehicles underneath them. We have heard the arguments that we don’t need a 2nd means of egress. My question is, if the building becomes engaged downstairs, how do they get out, if there is only 1 means of egress?

Palmer – People that have something upstairs generally have a stairway; on the 2nd floor there is an emergency escape, i.e. a window. It’s not my responsibility to tell someone that they should have 2 means of egress if they don’t need it. The Building code states only single family dwelling are required to have 2 forms of egress.

Zylinski – Even though it’s under special permit, it still wouldn’t be in our purview?

Palmer – I would say it’s not, but I would defer to Frank Duffy. Here in MA for a single family dwelling, you need to have 2 forms of egress, but it says nothing about accessory structures having 2 forms.

Dugan—If they revise their plans to remove a bedroom from the main house to the accessory structure, wouldn’t they have to use that same set of plans when they apply to the Building Department?

Palmer – In a situation like that, there are 2 Building Permit applications, one for the proposed changes and one for the proposed change of use. There is also a permit required for the conversion or removal of a bedroom.

Barry – Since it’s a labeling issue, if they label it as an office, but then it morphs into a bedroom; what happens in that case?

Palmer – We can’t control that, but we would require a Building Permit application to convert that bedroom, so we have documentation. We can’t control what people list in an MLS ad.

Barry – What if someone applies to you under one thing but they turn it into living space? Now everyone has it figured out that it comes down to a matter of how you label something.

Palmer – When someone applies for a Building Permit, and they convert the use of the room, we expect that to remain, unless they reapply to change the use of that room.

Barry – If there is no enforcement, what is the difference?

Palmer – The only way to enforce it is to police it.

Barry – If they put one thing in writing, and do something else, that is false information on the application.

Palmer – The application is a legal document. If they take it upon themselves to change without pulling a Building Permit, it’s impossible to know if that was done.
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Barry – I’ve seen plans labeled bedrooms, and then see another plan with the rooms switched around. It seems suspicious because they are relabeling, to get what they want. If you’re not going to enforce, people will do what they want, and get what they want.

Dugan – When we issue a special permit, does that deed restriction show up on your permits, so that you can see if one has been issued?

Zylinski – In the event that we approve something, and it’s misused, and something catastrophic happens, can we [The Town] be held responsible for that?

Palmer – I would say we don’t have liability.

Foreman – I think there should still be alignment. If we are issuing a special permit, I think we have the right to say that they have 2 means of egress.

Hurrie – The other issue we are seeing is that they have every amenity under the sun, full sized sink, full fridges etc., but they aren’t calling it an accessory apartment. I’m starting to think about restricting the amenities so they aren’t living space. The Board has conditioned these types of things in the past. We’ve always treated deed restrictions as a last resort, knowing how much of a burden that is on the property.

Dugan – I think it gives us more teeth because it gets recorded, and runs with the property. I think it gets in a very iffy situation with the Town. If there was a fire and they see a special permit, because it was recorded, which says one thing, and then the Building Department says another thing, I think the Town could be liable. We frequently get permits that we give, and then they come back for a modification, and the plans have changed. We know that when the changes are in for 10+ years, it has now become legally nonconforming. I could give a bunch of examples driving by, and thinking that doesn’t look like what we gave permission for. On Municiity it should be easy enough to code it to show the restrictions, because they aren’t coming back. We always get different explanations from the applicant. There needs to be a process so that everyone is working together. I’ve been on the other end, where I have to put a complaint in as an abutter, and it’s difficult to fill out that form you have. In most cases they just want the person to comply with the bylaws. There are no more anonymous complaints, and people don’t want to worry about retribution, especially the older population. It’s very tough. Most people think if there is a violation, the Town would send them a letter.

Palmer – If the special permit requires the removal of a shed, and it’s missed, there is no statute of limitations; that will never be a protected structure. We receive complaints over the phone every day about neighbors. If there is a violation that cannot be seen from a public roadway, for me to knock on their door, would be violating their privacy. If I see a violation from a public way, I would feel more comfortable with knocking on their door.

Dugan – It was in open view in my case. I was told that even though they could see it, I had to still come in and fill out a complaint form.

Barry – Why can’t someone make a complaint and their address and names be kept anonymous? I worked with a lot of complaint systems, and we had ways of keeping information private.
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Palmer – I think with the Freedom of information Act, I don’t know if you can.

Barry – You can. If someone tells you one thing, and does something else, they gave false information.

Zylinski – Wouldn’t you agree that the public and complainants have constitutional rights?

Palmer – I believe that if a complaint is not in writing, I could be accused of singling that person out. When I have that document in my hand, I can let that person know that I am here to investigate a complaint.

Zylinski – Is that a personal preference or legal opinion?

Palmer – If there is an open permit, I have the right to go to that property at any time. If the permit is closed, and there is a suspicion, and I can’t see that violation in open view, I wouldn’t be comfortable just going there.

Morse – We have someone that comes before us and they have labeled a room as anything but a bedroom. They have a shower/bath and a possible kitchen. Is it acceptable to say we don’t like the plans, and we are rejecting it, because we are concerned it will become something else? Should we be saying no more than what we are?

Foreman – As far as Palmer is concerned, he would say any bedroom under the Board of Health would require 2 means of egress. It seems simple, we require it for anything that is a bedroom.

Barry – I have seen where there was an email that says you can take 5 bedrooms and make it into 2 and it related to privacy and 4’ cased openings.

Foreman – We aren’t going to control all of that. If we have something where the Board of Health counts it as a bedroom, we should consider that in a special permit.

Palmer – We accept them as they are labeled.

Foreman – Can you check with the Board of Health?

Palmer – Most of our Building Permits are reviewed by the Board of Health, and more often the Board of Health will recognize a room that is labeled an office as a bedroom. I don’t have that ability; it’s black and white for me. There have been times that an office on the plans have been reviewed, after I’ve signed off, and the Board of Health had viewed it as a bedroom.

Foreman – I think we have latitude if they are coming to us for a special permit.

Zylinski – Does it ever happen that when we set the standard, and it comes back before you, and it’s changed, but a permit is issued, what happens then?

Palmer – If a special is granted and they decided to remove a window, move a door, they have to fill out a revision form and that will show the changes. If that property has a special permit, we do our best to send it back to Stockman so that an amendment to that special permit can be done. I send it upstairs, and Stockman will note if it’s Administrative, or has to go back to the Board.
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Hurrie – I think everyone is aware of the FEMA regulations, and the 50% construction value rule. The most extreme examples are in the velocity zones. Applicants are becoming more novel with the structure. It comes into play where the lots are small, and you are up against that 20% lot coverage and the setbacks. You may create a new nonconformity with the structures that are being used to support the structure. We have been requesting that the design team send us a letter to ensure the 2nd floor can be supported.

Foreman – The applicant will say the foundation is fine, but we don’t know that.

Palmer – For single family dwellings that are 1 story, older homes, a lot of these were built on cinder blocks. For these older homes that we have no record of, we always require those foundation to be analyzed by a structural engineer, and observe the conditions. They will articulate in a letter whether or not they would support a second story. We have always required that.

Hurrie – We do try to get that letter too. We look at the worksheet, and for some, they are right against that 50%. I challenge anyone to build a house at that cost; they are over the 50%.

Palmer – That’s a challenge and it’s nationwide. These homes that are being improved, the FEMA regulation is that they don’t exceed 49.99%; the difference is 1 penny. Most people try to stay under the 50%. We have a worksheet here, and that is for a justification. In most places, that 50% is recognized on the Building Permit application and it’s just a number. We have gone above and beyond here in Falmouth, and it’s a document that is signed by the homeowner and contractor. For me to analyze and challenge every expense would be impossible. We issue thousands of permits. We assume that all of these applications that come in are true and accurate.

Hurrie – How about when they are shoring up the structures, do you look at that?

Dugan - In some cases they may be putting in steel rods and the new foundation will be more non-conforming?

Palmer – Most of these modifications are done with engineering piles, because foundations are settling. I don’t know that I have seen a plan reinforcement that the foundation becomes thicker, and encroaches into a setback, but I would send that for a special permit.

Dugan – For an accessory structure is there a minimum distance that that structure has to be from a main home?

Palmer – No, we don’t see accessory structures very close to homes, but no, there isn’t. If a garage is built less than 5’ from a single family dwelling it has to have a fire rated wall. There are no laws that prevent someone from doing that.

Hurrie – After an applicant gets a special permit it, what’s the process of your review when they come before the ZBA and then go to you for a permit?

Palmer – If an applicant has a special permit they would include that on their Building Permit and we would ask that they attach a copy of the special permit. We typically send a copy of the Building Permit and the plan upstairs to the ZBA; there may be a few that slip through the cracks. They go upstairs and
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Stockman will verify that the plans are correct. They come back downstairs, and move along to all of the other departments. Once approved, we wrap up the Building Permit application, and stamp one set of plans, and attach a site plan, and take pages with the conditions to that set of plans, that go back to the applicant.

Dugan – When the permit goes in do you rely on the applicant to say they have a special permit?

Palmer – We expect the applicant to provide us with that information.

Dugan – What if they check “no”, or don’t include the special permit? When you enter that address of the property, do you see anything on the screen that shows the property is under a special permit?

Palmer – It still gets reviewed by the Building Department; it would get denied, because there was a zoning violation, and would get sent back to the ZBA. Very rarely is there a Building Permit issued that would require a special permit.

Zylinski – Has a building permit ever been issued on a property when there is an appeal being heard by the Board?

Palmer – No, not to my knowledge.

Zylinski – What happens when someone holds information back?

Palmer – There are a set of building plans, site plans; if something is purposely left out more than likely there would be a cease and desist order. It’s the responsibility of the applicant to be truthful in their application and most of the time they are.

Zylinski – In the event that they are less than truthful to you, it’s my opinion that if there is a line that the Building Department chooses not to cross for whatever reason, and the Applicant knows that, how do we keep them from exploiting that?

Palmer – When the inspectors do an inspection, they will not do an inspection if those plans are not on site, and they do their very best to make sure what is being done is what was approved. I think in Falmouth we do the best we can; they are thorough.

Zylinski -We provide a list of conditions, and there is no room for interpretation. Most complaints that come are from people saying the conditions aren’t being met.

Foreman – It’s my understanding that you can check Municity, I think it’s a flaw that you rely on the applicant, because we rely on you. I think that you should check Municity; projects have gone forward that shouldn’t have. You could argue that it’s here and there and most people are doing it right. It undermines the whole process. We need to make sure that the people that are doing these projects respect the zoning process.

Hurrie – Conditions are negotiated between the Board and Applicant, and when there is lack of enforcement, it erodes trust within the Town. It hurts us as a Board when the conditions aren’t enforced.
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Foreman – We realized that you don’t have the manpower to check everything, but I believe the whole thing is complaint driven. I think we should follow up.

Barry – How many written complaints did you receive last year, and how many actions actually took place?

Palmer – We receive many complaints, we follow it through, but there is due process to resolve simple matters. We work diligently with every complaint, and try to follow it through, and generally it ends up in litigation. We do our best to move forward with complaints. Not every complain is satisfactory to the complainant. There is always one unhappy party. We do take complaints relative to pools, even without a written complaint, because that’s a safety issue.

Foreman – I’ve seen one where it was obvious from the street that lot coverage was over the limit, and the abutter ended up moving out.

Palmer – Without documentation how do I act? I can’t ask the homeowner to prove it, so how do I enforce it?

Dugan – I think you have an easy out with properties that have a special permit. All of the plans have to be recorded. I am concerned with the disconnect about Municity. There should be someone assigned to compare the plans. Many of our conditions are only 1 page. We are seeing some cases that Building Permits have been released before they submitted specific items. You don’t reach all of the checks, you don’t get the permit. The Comprehensive Permits are different – they can go 6-9 months, and there will be calls into the zoning office of why something was done and it shouldn’t have been done. All of our decisions say if there is any change, they have to be referred to the Board. I do think the Town has a liability.

Foreman – It would be nice to leave this meeting with the understanding that Palmer’s office would check permits on Municity.

Suso – We want the process to continue to improve; let us take a look at Municity, and continue to fine tune things. We have challenges and need to move forward. For instance where concerns come to the ZBA, I would ask if you could funnel those to Stockman, and she could sort them and transmit them to me. I’ll ask Palmer to explore and get back to me and then send them back to Stockman.

Zylinski – Would it be possible to do this periodically?

Palmer – I have no issues to meet within 6 months. I would add that it’s extremely important that the applicant is aware of how important it is that they meet these conditions. I think it starts there.

Stockman – I think a lot of the applicants are represented by someone, and they aren’t part of the building permit process.

Foreman – It’s the builders that need to know and be careful.

Dugan – In most cases you do get the developer, and I think it’s them that take advantage of the loopholes. The CO is what really has teeth.
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Zylinski – We don’t have the authority to enforce, we depend on that from you.

Foreman – That puts the ball back in your court that conditions need to be met.

Palmer – We will continue to try to improve the process.

Hurrie – What’s your process; do you respond back to that person that put the complaint in?

Palmer – Yes, we do, and we keep the complainant in the loop. But as I said earlier, it could take up to a year. Even if there has been no resolution, we still contact them.

Hurrie – Upon receipt of a complaint do you write something up confirming receipt?

Palmer – We contact them and have a conversation with them to make sure we have a clear understanding.

Dugan – I have to go through Municity on the public side, and it seems that they have always notated if there was a complaint and any status. The prior zoning enforcement agent comments seem to have disappeared; have they disappeared out of the private side?

Palmer – I’m not sure, I would have to look. Dickinson understands that nothing shall be deleted. I would have to look into that.

Morse – Earlier you talked about due process rights, but have you had an occasions where you had to have an administrative warrant to access the property?

Palmer – They are challenging and difficult to receive without merit.

Zylinski - Who establishes merit?

Palmer – A judge. I’ve had 2 requests, in a different town, and they were denied. Here in Falmouth I have never had to request one.

Barry – What were the cases?

Palmer – There was a property that I believed was converted from a single-family dwelling to a 2-family. I tried to achieve an administrative warrant, and was told it wouldn’t be granted on the evidence that I had, so we didn’t go any further. That would be a better question for Town Counsel to answer.

Hurrie – There seems to be a disconnect after the public hearing process, after they have received the permit.

Palmer – I think we touched on this earlier, there isn’t a permit issued without a sign off from Stockman. Foreman had asked if all zoning applications were in Municity and I misspoke; Zonings are all in there.

Zylinski – Has there been any cases where someone had a special permit, and the permit was issued before the appeal period is up?

Palmer – No, I don’t believe so; I wouldn’t have issued the permit.
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Dugan – Hasn’t there been one that someone went forward within the 20 days?

Stockman – If an approved project was appealed to a court, they have the right to go forward at their own risk.

Palmer – They would not have gotten a building permit.

Dugan – We have conditions that drywells be added and inspected while open; does that go through you or the Engineering Department?

Palmer – That’s another challenging one.

Dugan – My concern is that it’s on the plans, they put the pipe in but they don’t actually put it in. So we are now putting that language in that they need to be inspected while open. Does your inspector have to do that?

Palmer – Because I don’t know what the formula is, it would make better sense that the drywells be installed and certified by the project engineer.

Zylinski – It shows that information on the site plans.

Hurrie – We have been putting in a condition to have the Assessor’s be allowed in to view the property for taxing purposes. Once the CO has been issued you wouldn’t be able to get in there.

Stockman – There have been conversations with Palmer, Favulli (Assessing) and myself, and I think it’s frustrating for Assessing because they want to make sure they are capturing improvements for assessing purposes. Zoning doesn’t do any enforcement.

Palmer – That’s challenging, there have been some recommendations that at the final inspection we have someone there from the Assessor’s. I’m not opposed to it, but I think it should be independent.

Zylinski – How would that work legally? Would that create a disconnect?

Suso – It would behoove us to have Town Counsel involved within this process. I don’t think that the law provides coverage for that.

Foreman – From our point of view, it goes mostly to the bedroom count.

Stockman – The intent was to require the homeowner to let that happen. If the decision is not appealed, they are accepting the condition. I think it would be worthwhile to check with Town Counsel.

Zylinski – If the Building Department goes into do a final inspection, why are we requesting it?

Stockman – The intent is if people are doing substantial work, if the Assessor can’t get into inspect the property, they can’t accurately assess it.

Dugan - Once the project is completed, the CO is given, and then a form letter is sent out. We have had times that the assessor’s records have a different layout than the plans being submitted to us. Once the occupancy is done, that’s it. Maybe we do have to check with Town Counsel.
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Hurrie - The ZBA has required documents prior to final sign off of construction, including height certifications or As-builts. You know that if the Board is requiring these documents that there is a serious issue; either you’re up against the max height of 35’, or you’re dealing with a setback that needs to be preserved, and can’t be encroached upon. There have been circumstances where we don’t get that required information. Without that information we don’t know if what was actually built was what was approved.

Palmer – We received an As-built for every foundation for verification of setbacks; they are all posted in Municity.

Hurrie – What about height certifications?

Palmer – I go back to the applicant to make sure they understand the importance of the conditions. We do our best to recognize those, and those conditions are highlighted.

Zylinski – Isn’t that checked at framing?

Palmer – Yes and that’s where you want to verify the height, in case there is a problem. We only accept height certifications from a land surveyor.

Zylinski – Or your own measurement?

Palmer – No, I won’t go and measure it; it has to come from a registered land surveyor.

Dugan - I know that you have brought this up that you haven’t received any of these, what has been your experience?

Stockman – When you have someone proposing to build to the height max, to date height certifications that have been requested haven’t been received. If they are over the allowed height, there is no action that the Board can take.

Dugan – Have you been getting height certifications at framing?

Stockman – No.

Zylinski – So once that’s checked off then they get the go ahead?

Palmer – I would suggest you check Municity for the documents that you haven’t received.

Dugan – Even though they are in Municity, how would we know when something has been completed?

Palmer – If there is something in a special permit that there be a height certification, we will have that condition written on the back of the Building Permit and it will be posted to Municity so that when the clerk puts the information in for the framing inspection, they will know that a height certification is required.

Foremen – It seems simple enough. How would we know when to check? It would be nice for the zoning office to know that it’s been done.
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Dugan – There’s no way to know when to check. I don’t think it’s that hard when you are 50’ away from the office, all you have to do is call or email to check with the office. If they don’t have it, put it on the applicant, and have them submit it before a sign off. It’s a recorded document. I know your department is under a lot of strain, but how many people have filed an affidavit for the accessory apartments? My guess is that there is no one checking those to see if they have been submitted. It should have stayed with the ZBA office; someone has to make sure that these properties are legal.

Palmer – When we receive those documents we can stamp it in received, and put a copy in Stockman’s mailbox.

Barry – How does somebody who’s in the public know when a Building Permit has been submitted?

Foreman – The building card is supposed to be posted at the site.

Barry – They are not being posted.

Palmer – The building permit does have to be visible. Sometimes it’s taken down and forgotten to be put back up. I think most homeowners forget to put them up, but the boxes typically have the plans in them.

Barry - I see a lot of construction without the “B’s” being posted.

Dugan – I have been on sites that the doc boxes were empty, and there were no building permits posted.

Barry – You have people doing things by the rules, and other people that aren’t.

Palmer – If someone had a question they can always call the office.

Zylinski – Is it permissible to instruct the Building Commissioner to do something that was opposed by the Board in order to keep the permitting process moving forward? Can someone circumvent the system?

Suso – It’s hard to ask a hypothetical question like that, but not since I have been here.

Hurrie – We don’t need a concrete date, but we were taking about a 6 month review, which would take us to September.

Meeting Adjourned 9:00

Respectfully submitted,

Ashley DeMello, Office Assistant

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