YARMOUTH TOWN CLERK

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TOWN OF YARMOUTH
BOARD OF APPEALS
DECISION

FILED WITH TOWN CLERK: **September 5, 2019**

PETITION NO: **#4802**

HEARING DATE: **August 8, 2019**

PETITIONER: **Colbea Enterprises, L.L.C.**

OWNER: **Station Avenue LLC**

PROPERTY: **487 Station Avenue, South Yarmouth, MA**
Map & Parcel: 97, 3 (portion)
Zoning District: B1 & APD & ROAD

Deed Reference: Book 18308, Page 272
Lot 2 (portion) on Plan in Book 442, Page 48

MEMBERS PRESENT AND VOTING: Chairman, Steven DeYoung; Vice Chairman, Sean Igoe; Dick Martin; Tom Nickinello; and Richard Neitz. Also attending and speaking, but not voting, was alternate Tom Baron.

Notice of the hearing has been given by sending notice thereof to the Petitioner and all those owners of property as required by law, and to the public by posting notice of the hearing and publishing in *The Register*, the hearing opened and held on the date as stated above.

The Petitioner is Colbea Enterprises, L.L.C. The Petition is a companion application with Appeal #4801.

The Applicant is seeking to amend Decisions in Appeal Nos. 3453 and 3505 or in the alternative, new variance relief to divide off 7,305 +/- sq. ft. of land at the rear of the lot at 487 Station Avenue, South Yarmouth. The piece divided off will not be a separately buildable lot and will be combined with and used as set forth in Appeal #4801 ["Proposal"].

The Property is located in the B1 Commercial Zoning District, the Aquifer Protection Overlay District, and the ROAD Overlay District.

Relief is requested per the submitted plans and materials as follows: to maintain the side setback with no change (Section 203.5) and to retain parking in front of the building with no change (Section 301.4.1).

The Petitioner was represented by Attorney Andrew Singer; Andrew Delli Carpini, owner of Colbea Enterprises, L.L.C.; Robert McGann, Dennis Darveau, Larry Coburn, and Eric Simpson, of Colbea Enterprises, L.L.C.; Al Micale, Ayoub Engineering; Randy Hart, VHB Traffic Engineering; and Daniel Ojala and Danny Gonsalves, downcape engineering.

Also in attendance and speaking were Mark Grylls, Yarmouth Building Commissioner; Kathy Williams, Yarmouth Town Planner, and Steven Tupper and Colleen Medeiros, transportation staff from the Cape Cod Commission.

The Yarmouth Site Plan Review Team submitted a Site Plan Review Comment Sheet dated February 5, 2019. The Yarmouth Design Review Committee submitted a Design Review Comment Sheet dated January 29, 2019.

Robert Chamberlain spoke in favor of the Petition.

Dr. Warren Woods, the abutter to the west, and James Veara, on behalf of Davenport Realty Trust, a nearby property owner across Workshop Road, spoke and submitted letters and emails in opposition to the Petition.

The Board opened the hearing on the Proposal on May 9, 2019, which was continued for testimony on June 27, 2019, and August 8, 2019. The hearing was closed on August 8, 2019.

The Applicant submitted the following materials in connection with the Petition:

1. Application with attached Narrative Memorandum, prepared by Law Office of Singer & Singer, LLC;

2. Summary of Reasoning, prepared by Law Office of Singer & Singer, LLC;

3. Site Improvement Plan, prepared by Ayoub Engineering, dated January 18, 2019, and revised February 22, 2019, Sheet C-1;

4. Aerial Photographs of property and the Station Avenue corridor; and

5. By reference all of the materials submitted in connection with Appeal #4801.

The Applicant submitted the following testimony and the Board of Appeals found the following in connection with the proposal:

As a companion case with Appeal #4801, of which the materials submitted, testimony provided, and the Findings and Conditions of the Decision thereof are all incorporated herein by reference, the Applicant is proposing to divide the land at 487 Station Avenue in South Yarmouth in order to: 1) create a 7,305± sq. ft. parcel of undeveloped land that will be conveyed to the adjacent property (473 and 479 Station Avenue) and used in connection with the development proposed in the companion petition; and 2) maintain the existing site improvements and development (Today Real Estate) located on the remainder of the Property.

The Property is owned by Station Avenue LLC, and is shown as Parcel 3 on Yarmouth Assessor's Map 97. The adjacent properties at 473 and 479 Station Avenue are shown as Parcels 1 and 2 on Assessor's Map 97.

The Property has previously been the subject of two decisions of the Board of Appeals – Appeal Nos. 3453 and 3505. These variance decisions authorized parking in front of the building and the continuation of slight setback encroachments of the basement access bulkhead and exterior stairway on the south side of the Property when the foundation of the existing building was poured. The proposal for the land division will not create any new nonconformities nor impact or intensify any of the existing nonconformities. The existing building and parking and ownership will remain the same. As discussed with the Building Commissioner as Zoning Enforcement Officer, the Applicant is requesting further variance relief as necessary to create the small parcel of undevelopable land to convey to the adjacent property and to maintain the current development of the Property as existing.

The Board of Appeals is authorized to grant variances in accordance with Section 102.2.2 of the Yarmouth Zoning By-Law ["Zoning By-Law"] and M.G.L. Chapter 40A, Section 10, upon finding that a literal enforcement of the Zoning By-Law would involve substantial financial or practical hardship to the Petitioner, that the hardship is owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures, but not affecting generally the zoning district, and desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Zoning By-Law.

The Applicant respectfully submits that the requirements and criteria for a continued variance to maintain the existing parking in front of the building and the setback encroachments of the bulkhead and stairs are met in this instance with respect to this land and this building and that the desired relief can be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Zoning By-Law because:

1. The building will continue to be conforming with the front, right-side, and rear setbacks and will be no closer to the southerly, left-side line than as previously approved by the Board of Appeals (slight setback encroachments of the basement access bulkhead and exterior stairway);

2. Building coverage on the remaining portion of the Property after the land division will continue to be conforming;

3. The septic system servicing the building will continue to be conforming to the nitrogen requirements after the land division;

4. All stormwater runoff will continue to be contained and infiltrated on site, and there will be no negative impact to drainage, septic flow or stormwater;

5. There will be no change to the existing parking in front of the building, and the number of parking spaces will remain conforming. As the Board found in Appeal No. 3453, "...the parking area as proposed [at that time] will not create the impression of over-building, will provide for parking in a safe and efficient manner, will not negatively impact on any abutters, and a portion of the property that had been devoted to motor vehicle parking use will be re-vegetated";

6. There will be no change in access to the Property, which is not over the Property frontage on Station Avenue, but rather over a driveway by way of easement entering from the north over the neighboring property at 495 Station Avenue, and no further demand on or impact to the driveway;

7. The findings and hardships that the Board determined in Appeal Nos. 3453 and 3505 remain the same even with the carving off of the small piece of land as requested;

8. In addition, granting this relief allowing the division and conveyance of the small piece of land as requested is integral to achieving the substantial environmental benefits of and mitigating the hardships associated and discussed in companion case Appeal #4801 and will aid in achieving the significant enhancements to environmental protection and reduction of environmental risk in connection with the proposal contained in that companion case;

9. The Property, though reduced in size, will remain in keeping with and will continue to complement the B1 Commercial District along Station Avenue, and there will be no detrimental impact on neighboring properties; and

10. The request to divide the small piece of land was reviewed by both the Yarmouth Design Review Committee and the Site Plan Review Committee in connection with the companion case. The Design Review Committee voted 3-0 in favor finding that the overall request is appropriate and satisfies the reviewed design guidelines.

During the public hearing, the Board requested additional information on the grant of variances and reviewed the cases submitted and discussed the same with the Applicant. The Applicant provided copies of the following MA Court Cases and analysis in connection with the Proposal: *Marashlian v. Zoning Board of Appeals of Newburyport*, 660 N.E.2nd 369, 374 {Mass.1996}, *Cavanaugh v. DiFlumera*, 401 N.E.2d 867, 871 {Ma App. Ct., 1980}, *Furlong v. Zoning Board of Appeals of Salem*, 64 N.E. 3rd, 268, 269 {Ma App. Ct., 2016}, and *Boyajian v. Board of Appeals of Wellesley*, Page 1237, 1238 {Ma. App. Ct. 1978}. The Board found credible the Applicant's testimony that these cases reflect positively on the Proposal in terms of (1) economic unfeasibility of use and re-use of the land absent the requested relief; (2) the need for a determination of substantial derogation and not just any derogation from the provisions of the Zoning By-Law in order to deny the requested relief; (3) the reduction in risk of existing harm and prevention of greater risk of future harm and (4) acknowledgment that some increase in traffic will not result in a significant increase in traffic to an already busy thoroughfare.

The Board's review is not based on application of the criteria discretely to each aspect of the proposal, but rather collectively to all of the land and structures involved in the proposal. The proposal represents one, overall, holistic redevelopment in order to achieve the benefits required by Section 406.5.3. The location in the APD requires an entirely separate set of criteria to be met than the same proposed development would require if only in the B1 Commercial Zone (in which the use is permitted by special permit). Protection of the special soils and aquifer status of the land are key. Section 102.2.2 of the Zoning By-Law authorizes dimensional and use variances "with respect to particular land or structures" and requires a hardship finding "owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures, but not affecting generally the zoning district in which it is located."

Literal enforcement of the provisions of the Town of Yarmouth's Zoning By-Laws would represent a substantial hardship to the Petitioner and Owners. The hardships faced in attempting to achieve all of the benefits are directly related to the soil conditions (water-sensitive natural formations), topography, shape of the land and historical development of the structures and sites involved (including those of the other gas station properties). The Property and the older gas stations to be closed/replaced are all located in the largest B1 zoned area in the Town of Yarmouth and one of the few areas of B1 zoned commercial land that is also located in the APD. Moreover, the Property is the only undeveloped parcel within this B1/APD zone. As a result of its location in both the B1 zone and the APD, the Property is unique. Specifically, the soil within the APD is unique, which mandates that a separate set of APD criteria be met. In order to meet the standard set forth in Section 406.5.3, the Applicant has proposed to shut down and deed restrict two old, non-confirming fuel station in order to protect the public drinking water. In order to

replace the two old fuel stations with a state of the art, safe and modern fuel station on the Property, the requested variances are required.

The Applicant submitted, and the Board so found, that the land and structures involved are impacted by the unique shape of the land (the Property) as well as the soil conditions of the aquifer district in that the two existing gas stations are pre-existing nonconforming uses and the relocated site is the last vacant site in this B1 and APD area and that the pre-existing nonconforming structures and site developments, including underground storage tanks and multiple full in and out curb cuts on multiple roads, are unique improvements and circumstances in the APD such that it is economically and practically infeasible to achieve the improvement to the environment and the reduction in the threat of harm to the ground water absent the variance relief to construct the proposal as designed on the relocated site in the APD and this creates a substantial financial and practical hardship justifying the requested variance relief. It is important to note that two old, active and non-conforming fuel stations within the same B1 zone and APD will be consolidated into this new proposed location such that it is economically and practically infeasible to build this fuel station absent the variance relief. Moreover, this proposed project has been designed to ensure optimal safety for the fuel station. As a result, absent the requested variance relief, the fuel station would not represent the optimal safety standards for a fuel station. Moreover, the Applicant has redesigned the proposal with the input of Town officials and agencies in order to optimize the safety of the Property.

The Board found further that based on the established hardship and all of the materials submitted to the Board and for all of the reasons set forth in the discussion above as well as in companion case Appeal #4801, the requested variance relief as set forth below can be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Zoning By-Law, including without limitation, the overarching reduction in threat of harm to the aquifer and enhanced environmental protection resulting from the companion cases and no impact to those dimensional configurations of the Property (side setback and parking in front of the building) that originally required variance relief for the Property. In addition, the Yarmouth Design Review Committee voted to find that the Proposal is appropriate for the site and the commercial zone. The proposed use of the commercially-zoned property that is being divided out in this Petition, in conjunction with the adjacent land, is allowed (both by right and special permit) in the underlying B1 Commercial Zoning District. The two existing fuel station properties that are grandfathered and protected pre-existing nonconforming uses will each be transitioned to conforming uses and will no longer contain a now-prohibited use. The net result of the proposal is one less fuel service station than at present, one less site with a pre-existing nonconforming hazardous materials use, and one relocated site that will be less nonconforming to zoning and more protective of the environment than existing nonconforming conditions.

The two pre-existing nonconforming gas station uses in the APD are entitled to remain indefinitely and to remain in a more nonconforming status than the proposal before the Board. Even if these two sites can be upgraded in the future, they will each never be able to be as compliant and conforming as the relocated site due to their shapes and historical developments. The proposal will provide numerous benefits to the Town and the public, including amelioration of the continued risk to the aquifer that these two sites represent by closing these two businesses, eliminating the pre-existing nonconforming hazardous materials uses from these two properties, and restricting these two properties from such uses in the future, in exchange for the relocation a brief distance north along the same street in the same zoning and overlay districts with a new, smaller-capacity, state-of-the-art facility, a facility which is needed in this commercial zone and is authorized by the underlying zoning in the area.

The Applicant submitted, and the Board so found, that the land and structures involved are impacted by the unique shape and topography of the Property such that the proposed land division in connection with

the companion case can best be situated only as provided on the proposed plans to ensure the fuel station is optimized for safety and complies with the redesign of the site as requested by the Town. It would represent a substantial hardship and be economically and practically infeasible to require literal enforcement of the Zoning By-Laws. In granting the requested variances, the public good will be served by providing a safe, state of the art, modern fuel station. Moreover, the requested variances would not nullify or substantially derogate from the intent or purpose of the Zoning By-Laws because the proposal will provide a safe and modernized fuel station for the public. As a result, it is appropriate to grant the requested variances.

The Board took the following vote on the Proposal: Sean Igoe made a motion, seconded by Dick Martin, and voted five (5) in favor and zero (0) opposed to grant the requested Variance to divide the Property as shown on the submitted plan for purposes of conveying 7,305 +/- sq. ft. of land at the rear of the lot to the adjacent property and to reauthorize the continuation of the existing site improvements on the remainder of the Property, all based on the above Findings with no additional conditions.

No permit shall issue until 20 days from the filing of this decision with the Town Clerk. Appeals from this decision shall be made pursuant to MGL c40A section 17 and must be filed within 20 days after filing of this notice/decision with the Town Clerk. Unless otherwise provided herein, the Special Permit shall lapse if a substantial use thereof has not begun within 24 months. (See bylaw §103.2.5, MGL c40A §9) Unless otherwise provided herein, a Variance shall lapse if the rights authorized herein are not exercised within 12 months. (See MGL c40A§10). This Decision must be filed with the Barnstable County Registry of Deeds, Route 6A, Barnstable.

Steven DeYoung, Chairman