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THE CAPE COD COMMISSION

CAPE COD PLANNING AND ECONOMIC DEVELOPMENT COMMISSION

1ST DISTRICT COURT HOUSE, BARNSTABLE, MASSACHUSETTS 02630

TELEPHONE: 508-362-2511

DATE: September 5, 1990

TO: Mr. Raymond C. Chasse, Trustee of
E & R Realty Trust

FROM: Cape Cod Commission

RE: Hardship Exemption Request
Cape Cod Commission Act, Section 23

APPLICANT: Mr. Raymond C. Chasse, Trustee
of E & R Realty Trust

PROJECT: Harwich Commons, Harwich, MA

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (The Commission) hereby approves the application of Mr. Raymond C. Chasse, Trustee of E & R Realty Trust for a Hardship Exemption under Section 23 of the Cape Cod Commission Act (the Act), c. 716 of the Acts of 1989, as amended, for a shopping plaza known as Harwich Commons. The Decision is rendered pursuant to the vote of the Commission on July 19, 1990.

Project Description

This application is for a proposed 110,400 square foot retail shopping plaza. The site is located on the southeast corner of the intersection of Routes 137 and 39 in East Harwich. It is 789,634 square feet in area. The parcel number is #U3 and #U3-1 on Assessor's Map #87. The plaza will consist of fifteen stores, including two anchor stores (one containing 39,640 square feet and the other containing 40,000 square feet), one store containing 10,000 square feet and twelve stores, each containing 1,500 square feet. There are five aisles of parking, separated by landscaped islands. Access is off of Route 137 and 39.

The Harwich Planning Board gave the project site plan approval on March 6, 1990. The project received approval from the Harwich Zoning Board of Appeals for a special permit on March 28, 1990.

Procedural History

This application for a Hardship Exemption under Section 23 of the Act was filed with the Commission on May 23, 1990. A duly noticed public hearing on the application was conducted by the Commission pursuant to Section 5 of the Act beginning on June 21, 1990 at 3:22 p.m. in Rooms 11/12 in the Barnstable County Superior Court House, Route 6A, Barnstable, MA. Subsequent hearings were held on July 5, 1990 and July 19, 1990.

Materials Submitted For The Record

Materials submitted by the applicant include:

- Report by IEP, Inc. to the Harwich Building Inspector and Harwich Zoning Board of Appeals regarding Hydrogeologic Investigation for Harwich Commons, dated March 21, 1990;
- Agreement between Pleasant Bay Homeowner's Association and Raymond C. Chasse, sole trustee of CAC Trust, dated March 23, 1990;
- Letter from Janice E. Robbins, Wynn & Wynn, P.C., Attorneys at Law, enclosing copy of Order of Notice and Complaint regarding foreclosure, dated May 7, 1990;
- Letter from Robert D. Hall, Attorney at Law, to the Cape Cod Commission, dated May 21, 1990;
- Letter from Robert D. Hall, Attorney at Law, to the Cape Cod Commission, dated June 4, 1990;
- Preliminary West Elevation for Harwich Commons, prepared by Northside Architectural Associates, not dated, received by the Cape Cod Commission on June 19, 1990;
- Site and Sewage Plan - Harwich Commons, (4 sheets) prepared by the William Lieberman R.P.E., dated February 14, 1990, and revised on March 6, 1990 and March 25, 1990;
- Harwich Commons Sketch Plan - Pre-developed Conditions, prepared by William Lieberman, R.P.E., dated July 12, 1990;

- Plan Showing Proposed Roadway Improvements at the Intersection of Route 39 and Route 137 (2 sheets), prepared by Yankee Survey Consultant, dated July 23, 1989;

- Harwich Commons Sketch Plan (Revised per Cape Cod Commission and Commission Staff Direction) prepared by William Lieberman, R.P.E., dated July 12, 1990.

Materials Submitted by the Town of Harwich:

- DRI Referral Form, dated April 12, 1990;

- Town of Harwich Board of Appeals Decision #90-16;

- Town of Harwich Board of Appeals Decision #89-53;

- Town of Harwich Board of Appeals Decision #89-54;

- Town of Harwich Board of Appeals Continuation #89-55;

- Town of Harwich Board of Appeals Decision #89-55;

- Letter from Harwich Planning Board dated May 11, 1898 stating Board approval of site plan for C.A.C. Trust;

- Letter from Harwich Planning Board, dated June 1, 1989 stating Board approval of preliminary subdivision plan for Raymond Chasse;

- Letter from Harwich Planning Board, dated September 7, 1989 stating Board approval of definitive subdivision plan entitled Harwich Commons;

- Letter from Harwich Planning Board dated November 30, 1989 stating Board denial of site plan for Lot 13, Harwich Commons;

- Letter from Harwich Planning Board accepting withdrawal of site plan for Lot 11, Harwich Commons, dated December 14, 1989;

- Letter from Harwich Planning Board, dated March 7, 1990, stating Board approval of site plan of Raymond Chasse;

- Letter from the Harwich Planning Board to Mr. Carbonell, Executive Director Cape Cod Commission, recommending approval of the Hardship Exemption Request for Harwich Commons, dated June 13, 1990;

- Letter from the Harwich Board of Selectmen, dated June 19, 1990, to the Cape Cod Commission, recommending approval of the Hardship Exemption request for Harwich Commons;

- Letter from the Harwich Board of Selectmen, dated July 17, 1990, to the Cape Cod Commission, recommending approval of the Hardship Exemption request for Harwich Commons and addressing the recommended conditions agreed upon by Mr. Chasse and the Commission staff.

Materials prepared by Cape Cod Commission Staff:

- Memorandum from staff to the Commission, dated July 1, 1990, outlining development issues and recommending conditions;

- Memorandum from Dorr Fox and Patty Daley to the Commission, dated July 5, 1990, regarding proposed conditions of approval;

- Memorandum from staff to the Commission, dated July 11, 1990, regarding conditions agreed upon by both Mr. Chasse and the staff.

Materials submitted by other parties of interest:

- Letter to the Cape Cod Commission from Heinz Werner, Ph.D., dated June 23, 1990, in opposition to the request for a hardship exemption;

- Letter to the Association for the Preservation of Cape Cod from Mary Lou Blute, dated July 13, 1990, recommending approval of the request for a hardship exemption;

- Letter from Susan L. Nickerson, Executive Director, Association for the Preservation of Cape Cod, Inc., dated July 16, 1990, suggesting a partial exemption for the project;

- Letter from Paul Sweetser, R.P.L., dated July 16, 1990, recommending approval of the hardship exemption request;

- Unsigned letter to the Association for the Preservation of Cape Cod, dated July 16, 1990, in opposition to the request for the hardship exemption;

- Letter from Stephen C. Jones, dated July 17, 1990, recommending approval of the hardship exemption;

At the June 21, 1990 hearing, the Commission heard the following oral testimony from the applicant, Commission staff and other interested parties:

Attorney Robert Hall represented the applicant, Ray Chasse, giving an overview of the proposed development. Attorney Hall represented that the petitioner had a significant hardship. Mr. Chasse has been involved for approximately 1 1/2 years in the regulatory process and has been under intensive scrutiny for this project at the local level. He has expended considerable sums of money to date and he has been unable to consummate leases on the units because of the uncertainty of the project completion. The bank has already commenced foreclosure proceedings.

Commission staff comments were made by Dorr Fox, Chief Regulatory Officer. Mr. Fox stated that the staff's position was that the petitioner had not sufficiently demonstrated a hardship. In addition, there are many issues which can be addressed through a full DRI review including traffic and site design issues. In response to a request of the Commission, he stated that these issues could be addressed by conditions to an approval of the request, which could be presented at a continued hearing.

The following interested parties spoke at the hearing on June 21, 1990:

- James Noonan, Harwich delegate to the Assembly of Delegates spoke in favor of the hardship exemption;
- Charlene Greenhalgh, Assistant Planner from Chatham expressed concern over the project's traffic impacts on the intersection of Queen Anne Road and Route 137;
- Shirley Gomes spoke in favor of the exemption on behalf of the Harwich Board of Selectmen;
- Susan Nickerson, Executive Director of the Association for the Preservation of Cape Cod spoke, stating that this project is an example of why the Cape Cod Commission is needed.

The public hearing was continued to July 5, 1990 at 3:00 p.m. in the First District Court House.

The hearing resumed at approximately 3:00 p.m. on July 5, 1990 in the First District Court House.

Dorr Fox, Chief Regulatory Officer, presented the staff report outlining issues which were indentified regarding the project, including the time frame for approval of the project, traffic, access, landscaping, parking lot design, water quality, lot coverage, solid waste/recycling and architectural design.

Attorney Robert Hall, representing the petitioner, spoke stating his client would agree to most of the conditions presented by the staff, but had concerns on a few of the items.

The following interested parties spoke at the hearing on July 5, 1990:

- Charles Schneiderhan, Harwich Selectman, spoke in favor of the petition;
- James Noonan, Assembly Delegate from Harwich, spoke in favor of the petition.

The hearing was continued to July 19, 1990, at 3:00 p.m. at Rooms 11/12 in the Barnstable County Superior Court House, Route 6A, Barnstable, MA.

The hearing resumed at 3:50 p.m. on July 19, 1990 at Rooms 11/12 in the Barnstable County Superior Court House. The following people spoke at this hearing:

James Falla read a letter from the Harwich Board of Selectmen addressing the Commission staff memorandum stating recommended conditions;

Dorr Fox presented conditions which were agreed upon by both the staff and the petitioner;

Attorney Steven Jones, representing the petitioner, presented the petitioner's hardship as financial, due to the impending foreclosure, and in relation to time, since the project has been under review for a substantial time period;

At the request of the Commission, William Lieberman, engineer for the petitioner, explained maps showing when areas of the site had been cleared of vegetation;

Susan Nickerson, Executive Director of the Association for the Preservation of Cape Cod, spoke suggesting a partial exemption for the project.

Jurisdiction

The proposed 110,400 square foot shopping plaza of E & R Realty Trust qualifies as a Development of Regional Impact under Section 12 (c) (6) of the Act, which requires review of "Any proposed retail or wholesale business, office or industrial development, as well as any private, health, recreational or education development which has a floor area as follows:

New construction: greater than ten thousand square feet . . ."

The application and notice of public hearing relative thereto, the Commission staff's notes and exhibits and all written submissions received in the course of the proceedings are incorporated into the record by reference.

Findings

The Commission has considered the hardship exemption application of E & R Realty Trust for the proposed commercial project, and based on consideration of such application, the information presented and Commission staff recommendations at the public hearing, makes the following findings pursuant to Section 23 of the Act:

1. There are foreclosure proceedings which have been filed against the petitioner for this project. The additional time required for a full DRI review will create further delay in securing tenants for the project. This securing of tenants may help in ending the foreclosure proceedings and may ensure that the project would be constructed.

2. The site in its current condition as a cleared, sandy area is an eyesore and nuisance to the community. Construction of the project will allow for some re-vegetation of the site and stop the blowing of sand throughout the surrounding neighborhoods. The current state of the site is a hardship to the residents of Harwich.

3. The proposed project will have substantial traffic impacts to the intersection of Route 137 and Route 39. While several improvements to this intersection were negotiated during the review by local boards, additional improvements need to be made, including the following:

- Curbing and/or guardrail should be constructed on the southwest quadrant of the intersection due to the steep grade between the intersection and the Harwich East parking lot;

- A minimum of a 4' grass shoulder should be placed along all of the widened portions of the intersection. It is most critically needed along the west side of Route 137, south of the intersection;

- Roadwork already started on the eastern leg of Route 137 needs to be completed.

4. Since 20% of the project's traffic will travel through the intersection of Route 137 and Queen Anne Road, significant impacts will result. Without improvements, by 1994, the Route 137 approaches are expected to have a negative reserve capacity for through and left-turning traffic. This will lead to significant delays for vehicles traveling through the intersection on Route 137. It also leads to drivers accepting unsafe gaps between vehicles to pull out

into the intersection or even forced flow conditions where drivers push their way into the traffic stream, forcing other vehicles to take evasive actions.

Although the negative reserve capacity will occur for the Route 137 approaches with or without the Chasse development, the additional traffic from the project will substantially exacerbate the unsafe conditions. The negative reserve capacity for the northbound left and through maneuvers will increase from 52 vehicles to 120 vehicles during the peak hour. The southbound Route 137 approach left and through maneuvers will increase from a negative reserve capacity of 408 vehicles to 524 vehicles during the peak hour.

The towns are currently pursuing an improvement alternative that includes minor widening, improved channelization, new lane markings and four-way stop sign control. The cost of these improvements is approximately \$96,500. Chatham has appropriated approximately \$25,000 towards this project; Harwich plans to use Chapter 90 funds for their portion.

It is important to understand, however, that these improvements will allow satisfactory operations for approximately 5 years. At that time, further improvements, including acquisition of right-of-way and signalization may be necessary. These improvements are estimated to cost an additional \$100,000 - \$200,000, above and beyond the initial expenditure of \$96,500.00.

The Harwich Commons project should be required to pay an equitable share of both the proposed improvements and a share of the needed future improvements. Based on the review of the likely impacts, a one-third share of the total cost of improvements is equitable.

5. There is an adjacent undeveloped property on Route 39. It is desirable that an access easement be provided from the Harwich Commons site to this property to allow for a limitation on curb cuts off of Route 39. This limitation is desirable to maintain acceptable traffic conditions.

6. The site has been previously cleared of nearly all vegetation. There is a need for intensive landscaping to visually enhance the project and surrounding area. While preservation of the natural landscape is impossible, intensive re-vegetation is desirable to restore the natural environment while allowing for the site's development.

7. The project is located in a Water Resource District. Certain commercial activities (food establishments, laundries, beauty salons) typically discharge large amounts of waste water, which can have a detrimental impact on groundwater quality. Such uses should be prohibited on the site. In addition, lot coverage of the site should be limited.

8. Shopping plazas generate large amounts of trash that can be recycled. A recycling program is desirable for this project.

9. The architectural design of the buildings on the adjacent ANR lots is good, as is the sketch designs for the proposed Harwich Commons. Consistency with these buildings and preliminary plans is desirable for the final plans of Harwich Commons.

Conclusion

Based upon the findings above, the Cape Cod Commission hereby concludes:

1. That a literal enforcement of the provisions of the Act would involve substantial hardship, financial and otherwise to the applicant and the Town of Harwich. This conclusion is supported by the finding that there are foreclosure proceedings currently occurring. The granting of the exemption may cure this problem by increasing the potential for future tenants. In addition, construction on this site will eliminate an eyesore in the community.

2. That desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent of the Act. This conclusion is supported by the fact that the applicant has agreed to the conditions listed below which mitigate the problems listed in the findings above.

The Commission hereby approves E & R Realty Trust, Ray Chasse, Trustee, a Hardship Exemption from the terms and provisions of the Act, pursuant to Section 23 of the Act, with the following conditions:

1. Time Frame for Approval of Project

- a) For the purpose of addressing concerns by Town of Harwich officials regarding the expeditious construction of the project and to encourage it to be completed in a timely manner, this exemption is valid for a period of one year from the date of the Cape Cod Commission vote. Construction under this exemption must commence within this year and be continued through to completion as continuously and expeditiously as is reasonable.
- b) If the Applicant fails to meet one or more of the conditions listed above, this exemption shall lapse and the proposed development shall be automatically deemed to be a Development of Regional Impact requiring review under the Cape Cod Commission Act.

2. Traffic

- a) With the intent of mitigating the impacts of this project to the intersection of Queen Anne Road and Route 137, this hardship exemption shall be conditioned upon the Applicant depositing the amount of \$32,000.00 in an escrow fund, which fund shall be dedicated to the sole purpose of performing work to improve the intersection of Route 137 and Queen Ann Road in East Harwich, Massachusetts. The Applicant shall make such contribution to the escrow fund pursuant to an escrow agreement, which shall be of form and content satisfactory to Counsel to the Cape Cod Commission, and which shall designate a bank or other fiduciary as the escrow agent. The Applicant's contribution to the escrow fund shall be irrevocable, and shall be a precondition to the issuance of any certificate of occupancy for the Applicant's proposed development by any municipal agencies. The contents of the escrow fund shall be released upon the vote of the Commission, and shall be dedicated to the improvement of the intersection of Routes 137 and Queen Anne Road.
- b) With the intent of further mitigating the impacts of this project on the intersection of Route 137 and Route 39, the Applicant shall make the following improvements:
- Provided the Town of Harwich agrees, curbing shall be installed along the southwest quadrant of the intersection due to the steep grade between the intersection and the Harwich East parking lot;
 - Provided the Town of Harwich agrees, a minimum of a 4' grass shoulder should be placed along all of the widened portions of the intersection. It is most critically needed along the west side of Route 137, south of the intersection;
 - Complete roadway improvements to the eastern leg of Route 137. The existing widening does not drain properly. Catch basins are currently above the level of the road and depressions exist. The roadway shall be leveled with Type I mix. Preparation for leveling shall include removing wooden forms (presumably placed around removed utility poles), removing temporary cold patch and replacing it with Type I binder, full depth patching of allegatored areas with Type I binder, sweeping with a vacuum type sweeper and applying a tack coat to the existing road surface. A wearing course of 1 1/2" (compacted

thickness) of Type I mix shall then be applied. A cross slope of at least 1/4" to 1' shall be maintained. This will bring the road surface approximately flush with the island. Care shall be taken that all runoff is directed towards catchbasins in order to eliminate ponding. The improved area shall extend to the "end road construction" sign located approximately 82' north of the centerline of Continental Drive.

- Complete remaining roadway improvements shown on plans. Cross slopes of all finished improvements shall be 1/4" to 1'. All runoff shall drain off the road surface. All roadway improvements must meet or exceed construction specifications of the existing roadway in addition to satisfying Harwich subdivision construction standards. Blind application of subdivision construction specifications to a collector roadway shall not be a substitute for sound engineering judgement in the pavement design process. All improvements which have not yet been surfaced and do not meet the above criteria shall be excavated and a uniform pavement foundation shall be provided which has been compacted in lifts as specified in the Harwich regulations.

3. Access

To encourage and enable the limitation of future curb cuts onto Route 39, the Applicant agrees, if requested, to grant for reasonable consideration, satisfactory to the applicant an easement for future access to the adjacent undeveloped property via the access road to Harwich Commons Shopping Center from Route 39. Such proposed easement is located as shown on the plan of Harwich Commons by William Lieberman dated July 12, 1990.

4. Landscaping and Parking

The Applicant shall complete landscaping based upon the following conditions, as illustrated on the plan of Harwich Commons by William Lieberman dated July 12, 1990, prior to the issuance of a building permit:

a) Trees in parking islands and along interior roadways:

- Trees shall be planted 30' on center;
- Trees shall be planted in double rows in islands;
- Trees shall be 2-3" caliper in size;
- Japanese Zelkova (*Zelkova serrata*) should be used at perimeter of main parking area and along entry drive;

- Little Leaf Linden (*Tilia cordata*) should be used for all interior parking lot bays;
- Low growing vegetation shall be placed in areas where vehicular sight distance is of concern;
- Flowering trees shall be placed at Route 39 entrance (varieties of dogwood, cherry or pear);
- Flowers, flowering bushes or flowering trees should be planted in pedestrian mall planters;
- Five trees shall be planted per every 1500 square feet (50% evergreen) in the back retention area. Existing trees in these areas of 2" caliper or greater shall count towards this requirement.
- 15 trees shall be planted in the green area north of the building.

b) Shrubs and Ground Covers

- Traffic islands may be planted with all species listed on existing plan except crown vetch which is extremely invasive. Vetch may be used in other areas however;
- Since Mountain Andromeda & Japanese Yews do not do well in parking lot environments (glare, heat, etc.), Rugosa Rose & Beach Plum shall be used instead.
- Green areas that exceed 10,000 square feet (excluding parking islands and Route 39 access area) should be hydroseeded with a wildflower or wildgrass mixture.

c) Parking:

- All islands and dividers (including ends) shall be ten feet wide at minimum;
- Ten foot wide planted dividers shall be located every 180 feet or 20 spaces to break up extremely long and monotonous rows of cars within the front parking lot. One Linden tree shall be planted in each traffic divider;

5. **Water Quality**

Due to the location of the project within a Water Resource District, the following commercial uses, which discharge large amounts of water which can have a detrimental impact on groundwater quality shall be prohibited:

- restaurants, including any establishment serving food or beverages;
- dry cleaners and laundromats (however, establishments providing only for drop off service where work is done off-site is permitted);
- beauty salons.

6. Lot Coverage

In order to protect the intent of the Water Quality District and ensure that landscaped areas will be retained, impervious surfaces on the site will not exceed forty percent and building coverage will not exceed twenty percent, except for the access easement as provided for in condition #3.

7. Solid Waste/Recycling

a) The owners and tenants shall be required to separate cardboard from all other wastes generated by the development and provide contracted removal to material brokers for eventual recycling, thus avoiding land disposal and incineration. The applicant shall have the right to apply for relief from this condition in the event that market conditions do not permit compliance.


b) All dumpsters shall be surrounded by evergreen vegetation or opaque fencing as a visual screen.

8. Architectural Design

The Applicant shall prepare final elevation drawings for Commission staff approval, based upon the following conditions, prior to the issuance of a building permit:


- Natural siding shall be used for the exterior of the structure. It is strongly recommended the wood clap boards be used. Concrete block, concrete brick, metal buildings, drivit, vinyl siding are examples of materials which are not acceptable. The structure under construction on the ANR lots adjacent to the site shall serve as an example;
- Variations in the roof lines and facades shall be designed, as shown on the perspective drawing of the project as provided by the applicant. The structures under construction on the ANR lots adjacent to the site shall serve as an example;

- No roof signs shall be permitted. Wall signs shall be limited to the panel below the eaves of the roof, as shown on the perspective drawing submitted by the Applicant. These signs shall not exceed thirty-two (32) square feet (per Harwich by-law) or one (1) square foot per linear foot of store frontage, whichever is smaller, and shall not exceed three (3) feet in height. Only externally illuminated signs shall be permitted (including both wall and free-standing signs), as is consistent with the Harwich Zoning by-law.



Richard S. Armstrong, Chairman

9/25/90
Date:



Notary
My Commission Expires
SEPTEMBER 25, 1992

9/25/90
Date: