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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: November 8, 1990 CCC#TR90042
TO: Mr. Jerry Selby
FROM: Cape Cod Commission
RE: Development of Regional Impact Hardship Exemption application
Cape Cod Commission Act, Section 23
APPLICANT: Mr. Jerry Selby
PROJECT: Shaw Realty Trust Commercial Development
Signal Hill Circle
Brewster, MA

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby approves the application of Mr. Jerry Selby for a Development of Regional Impact (DRI) Hardship Exemption under Section 23 of the Cape Cod Commission Act (the Act), c. 716 of the Acts of 1989, as amended, for a proposed commercial development on Signal Hill Circle in Brewster, MA. The decision is rendered pursuant to the vote of the Commission on October 25, 1990.

PROJECT DESCRIPTION

The proposal calls for construction of 29,940 square feet of mixed commercial/residential use in three buildings on a 3.3 acre site. A total of 15 commercial units with 15 accessory residential units above is proposed. The project is part of a 49-lot subdivision zoned for both commercial and residential use totaling approximately 54.3 acres. The site is adjacent to the intersection of Route 137 and Underpass Road in Brewster and northwest of the Cape Cod Rail Trail.

PROCEDURAL HISTORY

The original 49-lot subdivision received Brewster Planning Board endorsement on August 6, 1985. An Approval Not Required Plan endorsement was granted by the Planning Board combining Lots #1-8 within the subdivision for Shaw Realty Trust on September 5, 1989, with the condition that no occupancy permits would be granted until the roadway in front of Lot #1A was completed. The applicant applied for a building permit on May 3, 1990 and was referred to the Commission by the Brewster Building Inspector on May 7, 1990. Applications for a Hardship Exemption, DRI Exemption and Development of Regional Impact were filed with the Commission on August 14, 1990.

A public hearing for the Development of Regional Impact was scheduled for June 21, 1990 and continued until September 12, 1990. A duly noticed public hearing pursuant to Section 5 of the Act was conducted on all three applications (DRI, DRI Exemption, and Hardship Exemption) by a Cape Cod Commission Sub-Committee on September 12, 1990 in the Brewster Town Offices, Brewster, MA. The Sub-Committee made the recommendation at that hearing to close all hearings and to recommend to the full Commission to grant the Hardship Exemption with conditions and to recommend denial of the DRI Exemption request. A meeting between the staff and applicant was held on September 24, 1990 to discuss proposed conditions. Sub-Committee meetings to discuss the above were held on September 27 and October 11, 1990. At the September 27 meeting the Applicant withdrew the DRI Exemption request. The Sub-Committee gave a report to the full Commission on October 25, 1990 in Barnstable Superior Courthouse, Route 6A, Barnstable, MA. The Commission voted at this hearing to approve the Hardship Exemption request, subject to conditions which had been agreed upon by the Applicant and approved by the Sub-Committee.

Materials Submitted for the Record

Materials submitted by the Applicant include:

- Site and Architectural Plans (4 sheets), unnamed, dated May 17, 1990
- Site and Sewage Plan (2 sheets), Doyle Engineering Associates, Inc. dated March 15, 1990
- Quitclaim Deeds, Book 6961/Page 073, and Book 6961/Page 074
- Road and Utilities Agreement, Yankee Village Subdivision, dated November 10, 1989
- Building Permit Application #425, dated December 11, 1989, February 27, 1990 and May 3, 1990
- Locus Map
- Commonwealth of Massachusetts DEP Groundwater Discharge Permit letter dated September 8, 1986
- Agreement and Covenant for Yankee Village Subdivision, Book 4678/Page 077
- Letter withdrawing Exemption request dated September 27, 1990
- Letter from Barnstable Community Federal Credit Union, dated October 10, 1990

Additional Materials:

- DRI Referral Form from Mr. David Thyng, Brewster Building Inspector, dated May 7, 1990
- Brewster Planning Board letter documenting procedural history of subdivision, dated June 18, 1990
- Town of Brewster Environmental Impact Review By-Law
- Letter from Brewster Planning Board re: referral of Yankee Village Subdivision to the Cape Cod Commission
- Letter from Brewster Historic District Committee re: plan approval dated September 20, 1990
- Five (5) Cape Cod Commission staff reports, dated September 12, 21, 27, and October 11, 18, 1990.

Testimony

At the September 12, 1990 Sub-Committee hearing, the following oral testimony was heard from the Applicant, Commission staff and other interested parties:

The Applicant, Jerry Selby, first described the history of the project prior to referral to the Commission. Partial construction of the project had begun when the project was referred. Attorney Robert Cohen, representing the Applicant, then went on to describe the project location and proposed use. The project would consist of three buildings on 8 lots of the subdivision to be rented or leased as commercial or service business with accessory residential use above. Each unit would be sold or rented as one entity. He stated that the financial hardship of the Applicant was due to carrying costs totaling approximately \$1000/day. The bank had notified the Applicant that he was in danger of losing his financing due to inability to make payments. Two years had passed since construction had begun, with one mile of road construction complete. However, the covenant on the roadway had not been released by the town as the top course of pavement had yet to be completed and the first building was not as yet completed.

The Applicant stated that the Exemption request was based on project impacts which would not extend beyond the immediate area. He felt that traffic concerns of the staff were arbitrary because the tenants were still unknown, and the nature of the businesses would be service-oriented.

Commission staff recommended that both the Hardship Exemption request and DRI Exemption request be denied, and that the project be reviewed as a DRI due to regional issues relating to traffic, water resources and landscape design.

The Sub-Committee recommended at this hearing to close all three hearings, and recommend to the full Commission to grant the Hardship Exemption request with conditions to be worked out with staff. The conditions were to focus on the following issues: a contribution towards traffic improvements, a detailed landscape plan, Historic District Committee approval, complete septic information, and an easement for school grounds access. The Sub-Committee further recommended to close the DRI Exemption hearing and to recommend denial of the Exemption request to the Commission.

The Commission staff met with the Applicant on September 24, 1990 to discuss proposed conditions pursuant to granting the Hardship Exemption. Sub-Committee meetings were held on September 27 and October 11, 1990 to further refine the proposed conditions. The Applicant withdrew his DRI Exemption request on September 27, 1990. Mutual agreement was reached on all conditions on October 11, 1990.

The Sub-Committee gave a report to the full Commission on October 25, 1990 in Barnstable County Superior Courthouse, Route 6A, Barnstable, MA. The Commission unanimously approved the Hardship Exemption request subject to conditions which had been agreed upon by the Applicant and approved by the Sub-Committee. The Commission also recommended some minor changes to the text of the conditions which the Applicant agreed to.

JURISDICTION

The proposed commercial development 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...which has a floor area...greater than ten thousand square feet."

This proposed development is not exempt from DRI review under Section 22(e), which states that "this Act shall not apply to a lot or lots shown on a subdivision plan endorsed by a planning board prior to July 1, 1989, in accordance with section 81V of Chapter 41 of the General Laws, if the planning board has released the security held by it to ensure

completion of construction of ways and the installation of municipal services...prior to the effective date of this act." Although the original 49-lot subdivision received planning board endorsement in 1985, securities on the subdivision roadway have not been released.

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

FINDINGS

The Commission has considered the application of Mr. Jerry Selby for the proposed commercial development in Brewster, MA, 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. The Applicant had demonstrated substantial financial hardship to the Commission. The Applicant provided testimony that he had carrying costs on the project in excess of \$1000.00/day. One building was already under construction and the Applicant also had responsibility for completing roadway construction. Due to procedural delays, the hearing on this project was delayed for several months. Therefore, construction could not proceed on the remainder of the project and no income was being generated.
2. The Applicant had submitted incomplete information to the Commission on septic system design. In addition, expected wastewater generation from this project was of sufficient levels to warrant connection to and a reasonable contribution towards construction of a sewage treatment plant should one be required for the entire 49-lot subdivision in the future.
3. This project is visible from the Cape Cod Rail Trail, which is a regional recreational resource. The Applicant removed all existing vegetation from the site. The Commission finds that the Applicant should address revegetation of the site and provision of adequate buffers to screen the project from the Rail Trail.
4. The Commission finds that potential traffic impacts generated by the project could be significant, given the proposed uses of the site. Adverse traffic impacts from the proposed development are expected to affect operations on Route 137, which is a regional primary route, as well as expected impacts on the following area intersections:
 - Route 6A/Route 137
 - Route 6A/Route 124
 - Route 137/Route 124
 - Route 137/Underpass Road
 - Route 6A/Underpass Road
5. The Commission finds that the recreational needs of future residents on the site could be enhanced by providing access to an adjacent school playground. An existing water line easement could be investigated as a possible access point to the school.

CONCLUSION

The Commission concludes that a literal enforcement of the provisions of the Act would involve substantial financial hardship to the Applicant. This conclusion is supported by the finding that the Applicant had made a considerable investment in the project prior to referral to the Commission. The Commission further concludes that desirable relief may be granted without substantial detriment to the public good and without nullifying or

substantially derogating from the intent or purposes of the Act, providing that the Applicant complete the following mitigation measures to offset the negative impacts of the project:

- 1). Septic system design is to be revised for three proposed buildings as indicated on plans dated May 17, 1990. The revised septic plan is to be submitted to the Brewster Board of Health for review and approval. Written verification of this approval shall be submitted to the Cape Cod Commission.
- 2). The Applicant is to surrender the Massachusetts Department of Environmental Protection Groundwater Discharge Permit #0-298 granted on September 8, 1986 for the Seasons of the Cape hotel.
- 3). The Applicant shall agree to connect to a sewage treatment plant if one is required for the Signal Hill subdivision in the future. The applicant shall bear a reasonable cost for such connection. The plant's equitable value, reasonable fee for connection, as well as fair share of costs of construction to be provided by the Applicant shall be determined by the Cape Cod Commission.
- 4). The Applicant shall submit a detailed landscape plan to Commission staff for review and approval. The plan shall address the following site and landscape design issues:
 - a. provision of an evergreen buffer along the rear property line to screen the development from the Cape Cod Rail Trail.
 - b. revegetation of the buffer along the property frontage with a mixture of evergreen and deciduous trees and shrubs. Tree planting is to be at a spacing of 20 feet-on-center and of 2" minimum caliper size. The width of the buffer is to be approximately 20-30 feet measured from the subdivision roadway pavement edge.
 - c. A 4-foot wide sidewalk shall be provided within the subdivision roadway right-of-way along the length of the project frontage. The sidewalk shall be integrated with the buffer planting listed in (b) above.
 - d. relocation of dumpsters to a location removed from direct view of the rail trail and appropriately screened.
 - e. on-site parking shall be limited to a total of 105 spaces.
- 5). In order to minimize potential traffic impacts, the following conditions are required:
 - visibility of the project from the street shall be limited through the above landscaping requirements
 - freestanding individual business signs shall not be posted along the site frontage; however, one detached group sign shall be allowed within the open space separating the three proposed buildings and the roadway (Signal Hill Circle) shown on the plans by the Applicant. The foregoing shall not be construed so as to prohibit signs being placed on the exterior surfaces of such three buildings provided that such signs are in conformance with applicable ordinances and by-laws of the Town of Brewster for a Planned Business District. Signage shall conform with regulations for this District with the exception of the provision allowing projecting or roof signs. Signs

on the surface of buildings shall be limited to one (1) wall or awning sign per commercial/business unit

- retail use shall be restricted to a maximum of 50% of the total first floor area of all three buildings
(this restriction shall be removed if a future traffic study completed for the subdivision indicates that restriction of retail is unnecessary)

- a maximum of two units may be combined for any single retail use

6). With the intent of mitigating the impacts of this project to Route 137 and other area roadways, the Applicant shall deposit an amount up to \$15,000.00 in an interest-bearing escrow fund, which fund shall be dedicated to the purposes of a traffic study for the Signal Hill subdivision and/or mitigation required. The contents of the escrow fund shall be released upon the vote of the Commission, and shall be dedicated to the improvement of Route 137 and area roadways. 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. The Applicant agrees to make one \$5000.00 payment to the fund as each of the project's three buildings is completed. The \$5000.00 payment shall be a condition precedent to the issuance of an occupancy permit in respect of such completed building by any agent of the Town of Brewster. If, as and when the Commission shall cause a comprehensive traffic study of the entire subdivision to be made, and thereafter proceeds to assess each lot owner his/her proportionate share of the cost of such study and the mitigation deemed necessary by the Commission, any amount paid by the Applicant in excess of his proportionate share of such cost as determined by the Commission shall be returned within a reasonable period of time to the Applicant with interest. The escrow fund is to be held for a maximum period of ten (10) years. If no improvements or traffic study is commenced within ten years from the date of filing this decision with the Registry of Deeds, the Applicant's entire contribution to the fund, together with accrued interest thereon, shall be returned to the Applicant or his heirs, successors or assigns.

7). The Applicant shall negotiate with the owners of lots 15 & 16 of the Signal Hill subdivision to secure an easement for access to an adjacent school playground. The location of this easement will be identical to the location of the 10-foot water line easement that presently exists on lots 15 & 16. A staggered post system shall be installed by the Applicant to prevent vehicle access over the easement. A recordable easement shall be submitted to the Cape Cod Commission prior to the issuance of any certificate of occupancy for each of the three proposed buildings by any municipal agencies. This shall be submitted along with proof of recording such easement with the Barnstable County Registry of Deeds.

The Cape Cod Commission hereby grants Mr. Jerry Selby a Hardship Exemption from the terms and provisions of the Act, pursuant to Section 23 of the Cape Cod Commission Act, with the seven conditions listed above.



Richard S. Armstrong, Chairman

11/5/90

Date



Notary  Commission Expires May 7, 1995.

11/8/90

Date

MAHARAJA REALTY TRUST
 200 HILL CIRCLE - BOSTON, MA
 617-552-1111
 617-552-1112

RETAIL — 1200-9984-50+FRACS
 INDUSTRIAL — 1600-0796-15
 APARTMENTS-2/1A1-N72D-30
 TOTAL SPACES 810 = 95
 TOTAL SPACES 810N = 109
 PARKING REQUIRED

BUILDING AREA	11220 SF
BUILDING A - FIRST FLOOR - 1248 SF x 5.6200 SF	7000 SF
BUILDING A - SECOND FLOOR - 748 SF x 5 = 3740 SF	3740 SF
BUILDING B - FIRST FLOOR - 6200 SF	6200 SF
BUILDING B - SECOND FLOOR - 6200 SF	6200 SF
BUILDING C - FIRST FLOOR - 6200 SF	6200 SF
BUILDING C - SECOND FLOOR - 6200 SF	6200 SF
TOTAL SF - FIRST FLOOR	18720 SF
TOTAL SF - SECOND FLOOR	11220 SF

TOTAL -
 LOTS (4-4, 4-5, 4-6, 4-7, 4-8)
 MAP 26
 SEE L-1

REVISION SITE PLAN (PARTIAL)
 SCALE: 1" = 20'

