

with a total of 423 parking spaces. Approximately 47,124 s.f. of retail space approved for construction under the March 5, 1992 decision has not been constructed as of the date of this decision. The property is zoned for commercial use and is surrounded by commercial uses to the north and west. Residential uses are located to the east and south of the site.

PROCEDURAL HISTORY

The Commission granted the original Applicant, Mr. Raymond Chasse, a Hardship Exemption with conditions for a 110,400 s.f. retail plaza on September 5, 1990, which was modified on December 6, 1990. Subsequent to the Commission's approval of the Hardship Exemption, Lansing Realty Trust purchased the 18-acre site for the purpose of constructing a Super Stop & Shop store and additional retail development totaling 109,116 s.f.. The Commission granted modifications to the original Hardship Exemption decision on September 12, 1991 and March 5, 1992 to permit construction of the Super Stop & Shop store.

On November 17, 1995, the Applicant requested a modification to condition #1 of the Hardship Exemption decision dated March 5, 1992 (#TR90002) for the project to extend the timeframe for construction of the remaining 47,124 s.f. of retail space from December 31, 1995 to December 31, 2000 or such other date deemed reasonable by the Commission. The request for modification was received pursuant to Section 9(n) of the Cape Cod Commission's Enabling Regulations. On November 27, 1995 the Regulatory Committee of the Commission determined that the request was a modification requiring Commission approval based on an October 15, 1992 policy which sets out procedures for review of modification requests.

The Commission held a public hearing on January 4, 1996 in the Chamber of the Assembly of Delegates, First District Courthouse, Barnstable, MA to consider the modification request. The public hearing and record were closed on this date. As a result of testimony received at the public hearing, application materials submitted by the Applicant and technical information provided by staff, the Commission voted 10 to 3 to deny the modification request.

Materials submitted for the record

The following materials were received as part of the written record on the Harwich Commons modification request:

From the Applicant:

- letter from Myer Singer, Esq. to Cape Cod Commission, received November 20, 1995
- Existing Conditions Site Plan for Harwich Realty Trust, prepared by Coastal Engineering Co. Inc. dated January 2, 1996, 1 sheet
- Memorandum from Kenneth P. Cram, P.E., Vanasse & Associates, Inc. to Elizabeth M. Frank, Stop & Shop Supermarket Co. received January 4, 1996

Cape Cod Commission staff:

- letter from Sharon Rooney, Commission staff to Myer Singer, Esq. dated December 1, 1995
- Cape Cod Commission staff report dated December 29, 1995

Other materials:

- letter from Joseph Tamsky, Harwich representative to the Assembly of Delegates to Cape Cod

Commission, received on January 4, 1996

• letter from Virginia McCann, representing Pleasant Bay Homeowners Association to Cape Cod Commission, received on January 4, 1996

TESTIMONY

At the January 4, 1996 public hearing, Myer Singer, Esq. and Ms. Elizabeth Frank of Stop & Shop Supermarket Co. represented the Applicant. Mr. Singer submitted reduced copies of an existing conditions plan for Commission review and noted that the modification request was not for a change to the site plan but rather to modify a condition of the Hardship Exemption requiring construction of the remaining 47,124 s.f. by December 31, 1995. He added that the Regulatory Committee had granted a one-month extension of this deadline as a minor modification to allow adequate time for notice of the public hearing. He noted that the cost of the real estate investment for this property continues to be a hardship due to the poor business economy in recent years and his client was requesting additional time to construct the remaining retail space. He stated that a five-year extension would be preferred but that the Regulatory Committee of the Commission had indicated that 2 or 3 years was a more realistic timeframe. Mr. Singer noted that the RPP was not in effect at the time of the original approval. He also noted that the town of Harwich had not expressed any objections to the request. Mr. Singer submitted a memorandum which provided updated traffic information. He also stated that the Applicant was unaware of any non-compliance issues as noted in the staff report and requested that any such concerns be brought to the Applicant's attention.

Ms. Rooney provided a staff report noting modifications granted to the Applicant since the original approval of the hardship exemption to Mr. Raymond Chasse. Ms. Rooney noted that the original traffic study was of a very limited scope due to Mr. Chasse's financial circumstances and stated that the hardship was no longer present. Staff recommended that the remaining retail space be reviewed as a DRI. Sue Pommrehn, Transportation staff, added that the traffic memorandum received from the Applicant was in narrative form and did not contain any methodology used. In addition, she noted that the estimated trip generation figures were determined for the p.m. peak hour for new trips only.

Comments from the public included Joseph Tamsky, speaking as a resident and as a Harwich representative of the Assembly of Delegates, who opposed the modification request. He asked the Commission to deny the request for the following reasons: 1) Lansing Realty Trust is now the Applicant where originally it was Raymond Chasse; 2) there have been a number of developments in the vicinity of the site since granting the original hardship exemption and the effects can be measured directly; 3) granting the extension would allow the Applicant to avoid responsibility for the mitigation of impacts; and 4) the town is contemplating changes to the Route 137/39 intersection.

Virginia McCann, Secretary of Pleasant Bay Homeowners Association, noted that she was representing a residential community directly behind the project property, 57 single family homes built in 1985. Ms. McCann noted that their concerns were: traffic, buffers to the residential area, and community safety issues. She noted that the Homeowners Association was opposed to the request for an extension of time for the Applicant.

William Riley, Chatham representative, asked staff for clarification on the issue of noncompliance

with conditions attached to the project. Ms. Rooney replied that abutters had noted that the Applicant may be mowing buffer areas revegetated with tree seedlings. Alix Ritchie stated that she was uncomfortable granting an extension of time for this project beyond what would have been granted for a DRI approval. Ken Mason noted that there was no information on traffic accidents and that improvement and study is needed in the area surrounding the project site because it has one of the highest accidents rates in town. Mr. Mason further stated that water protection issues also need to be addressed. John Doane believed that the intersection of Routes 137 and 39 is one of the busiest intersections in town with the least amount of congestion. William Riley asked if traffic issues could be handled at the local level. Margo Fenn, Deputy Director/Chief Planner, noted that site specific traffic issues can be addressed at the local level but that offsite issues would require Commission review.

Mr. Silverman wondered if a DRI review would be an involved process for this project. Ms. Rooney stated that a DRI review would ensure compliance with the Regional Policy Plan which was not in effect when the project was originally approved. Ken Brock stated that he could find no rational reason to grant an extension. Mr. Riley believed that the extension request was reasonable and that if not granted, the Applicant could start over without any of the use restrictions which are currently attached to the decision. Patricia Daley, Staff Counsel, noted that conditions only exist as a part of the Hardship Exemption decision. Ken Mason noted that there is a contractual agreement between abutting residents and the Applicant outside of the Commission's review which would remain in effect even if the decision lapsed.

Ms. Ritchie stated that it would not be good precedent to extend a hardship exemption beyond the timeframe of a DRI (7 years) and that if an extension was to be granted that it should only be granted to 9/5/97 which would have been the deadline for a DRI. Greg Silverman noted that Mr. Tamsky had made a compelling case to deny the request for an extension of time and felt that because the Hardship Exemption was requested before the drafting of the RPP that it could now be considered under the RPP guidelines. Mr. Kaufman believed that the financial hardship no longer exists.

Mr. LeBlanc moved to close the hearing and the record. Ms. Ritchie seconded the motion. The vote was unanimous. Mr. Riley moved to approve a three year extension of the hardship exemption. Mr. Doane seconded the motion. Ms. Ritchie amended the motion to grant the extension of the hardship exemption to 9/5/97, a two year extension, keeping it within the timeframe of a DRI. Mr. Lambros seconded the motion. A vote was called on the amendment and it failed. The vote was then called on Mr. Riley's motion and it failed.

Ken Brock moved to accept the staff recommendation for rejection of the extension request and to not extend the timeframe. Ms. Bebout seconded the motion. The motion passed by a vote of 10-3.

JURISDICTION

The Harwich Commons shopping center qualifies as a DRI under Section 3(e) of the DRI Enabling Regulations as "any proposed commercial, service, retail or wholesale business.. with a gross floor area greater than 10,000 square feet."

FINDINGS

The Commission has considered the modification request of Lansing Realty Trust and based on consideration of such request, the information presented at the public hearing and submitted for the record, the Commission makes the following findings:

- 1). Condition #1 of the modified Hardship Exemption decision dated March 5, 1992 required in part that construction of the remaining 47,124 s.f. of retail space commence by December 31, 1995. This condition further required that if the Applicant failed to meet this condition the Hardship Exemption would lapse and the proposed development would be automatically deemed to be a Development of Regional Impact requiring review under the Cape Cod Commission Act. Construction of the 47,124 s.f. of retail space has not commenced as of the date of this decision.
- 2). The circumstances which led to the granting of a Hardship Exemption by the Commission in 1990 to Mr. Raymond Chasse no longer exist. In addition, due to the financial circumstances of the original Applicant, the scope of the original traffic study was limited. In particular, no mitigation was considered for intersections north and east of the site, and a limited number west and south. These areas should be examined for project impacts and necessary mitigation.

CONCLUSION

The Cape Cod Commission hereby denies Lansing Realty Trust a modification to the Hardship Exemption decision of September 9, 1990 as last modified on March 5, 1992 pursuant to Section 23 of the Cape Cod Commission Act (Act), c. 716 of the Acts of 1989, as amended, and Section 9(n) of the DRI Enabling Regulations, Barnstable County Ordinance 90-12 for an extension of the timeframe for construction of the remaining 47,124 s.f. of retail space located at the Harwich Commons shopping center in East Harwich, MA.

Summer Kaufman
Summer Kaufman, Chairman

1/18/96
Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn to before me this 18th day of January 1996

Katharine J. Peters
Name, Notary Public

My commission expires: _____