



CAPE COD COMMISSION

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DATE: May 16, 2002

TO: Robert H. Ament
Ament & Ament
39 Town Hall Square / P.O. Box 919
Falmouth, MA 02540-0919

FROM: Cape Cod Commission

RE: Hardship Exemption
Cape Cod Commission Act, Section 23

APPLICANT: Peter Dobyns, Trustee of Wild Silver Trust

PROJECT #: HDEX 20087

PROJECT: Silver Square Expansion
Route 28A & County Road
North Falmouth, MA

BOOK/PAGE: 13027 / 307

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby approves with conditions the Hardship Exemption application of Peter Dobyns, Trustee of Wild Silver Trust, for the Silver Square Expansion, pursuant to Section 23 of the Act, c. 716 of the Acts of 1989, as amended. The decision is rendered pursuant to a vote of the Commission on May 16, 2002.

PROJECT DESCRIPTION

The project was initially constructed and occupied in 2000 as two buildings for retail business use identified as Building A and Building B, of 4,255 square feet and 5,520 square feet, respectively. The project is located in North Falmouth on a parcel of 2.37 acres, at the northwest corner of Route 28A and Rt. 151/County Road, in a commercially zoned district adjacent to other commercial uses. In May 2001, the applicant secured a building permit to renovate the second floor of Building B that created 4,444 sq.ft. of



space for office use. The renovation work was completed in late autumn of 2001. A real estate company has already signed a lease to use 2,500 square feet, while the remaining 1,920 square feet will be leased in the future as general office space.

REVIEW CRITERIA

Under the Act, the Commission has two overall areas of review in a hardship exemption request. The first pertains to a finding of hardship. The Commission may grant a hardship exemption where it specifically finds that a literal enforcement of the provisions of the Act would involve substantial hardship, financial or otherwise, to the applicant. The second finding is that 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 Act.

PROCEDURAL HISTORY

The applicant submitted a hardship exemption application to the Commission on February 7, 2002. Additional necessary information was provided March 7, 2002. The application was deemed to be complete on March 14, 2002. Duly noticed public hearings were conducted by the Commission pursuant to Section 5 of the Act by an authorized subcommittee of the Commission on April 10, and April 29, 2002 at the Commission office. After the April 29 hearing, the subcommittee voted unanimously to recommend granting a hardship exemption with conditions. The full Commission voted unanimously to approve the hardship exemption with conditions on May 16, 2002.

Materials submitted for the record

From the applicant:

- Application and supporting materials for hardship exemption, received February 7, 2002
- Letter notifying of DRI application withdrawal from Commission and from town review, received March 5, 2002
- Reduced size (11"x17") copies of site plans and building elevations, received March 7, 2002
- Copy of affidavits from architect Mark Hutker and from Millennium Design Group, Inc. on the applicants design plan for the project, received March 21, 2002
- List of expenditures made for the second floor expansion by applicant and real estate tenant, received April 10, 2002
- Copy of letter from Falmouth Design Review Committee to Ament & Ament, received by fax, April 17, 2002
- Water consumption data and nitrogen loading calculations prepared by Holmes & McGrath, Inc., received by fax April 18, 2002
- Letter in response to draft findings and conditions, received by fax April 29, 2002
- Additional nitrogen-loading calculations prepared by Holmes & McGrath, Inc., received by fax April 29, 2002

From Commission staff:

1. Letter to applicant notifying that the project has been referred as a DRI, December 28, 2002
2. Letter to the applicant stating that application deemed complete, March 14, 2002
3. Staff Report, April 4, 2002
4. Nitrogen loading analysis and spreadsheet, E-mailed to Michael McGrath and Laura Moynihan, April 25, 2002
5. Draft findings and conditions, April 26, 2002

From Town or State officials:

- DRI referral from Falmouth Planning Board, received December 27, 2002
- Copy of letter from Town Planner to Town Clerk, notifying of withdrawal, received March 5, 2002
- Determination from Massachusetts Historical Commission, received March 12, 2002

From the general public:

- E-mail message from Patricia Johnson, received January 28, 2002
- E-mail message from Patricia Johnson, received March 5, 2002
- Letter from Patricia Johnson, received by fax March 7, 2002
- Letter from Patricia Johnson, received by fax April 5, 2002

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

TESTIMONY

A public hearing was held April 10, 2002, at the Commission office. Presentations were made by the applicant's attorneys, Bob Ament and Laura Moynihan, and by staff. Mr. Ament noted that there was hardship both to the applicant and the pending tenant of the office space. There was no general public in attendance.

A second hearing was held April 29, 2002 at the Commission office. Staff described the conditions that could be required of the project in the issue areas of Water Resources and Transportation. The applicant's attorney described which options were feasible and affordable for nitrogen-loading reduction. There was no general public present.

JURISDICTION

The Silver Square commercial development qualifies as a Development of Regional Impact (DRI) under Section 3(i) of the Enabling Regulations governing Developments of Regional Impact which requires review of "...any of the following proposed commercial, service, retail, or wholesale business, office or industrial development, as well as any private health, recreational or educational development: new construction with a gross floor area greater than 10,000 sq.ft."

A jurisdictional determination was made by a duly authorized subcommittee of the Commission on April 4, 2002, finding that the project required DRI review as a segmented project over 10,000 sq.ft. of floor area, under Section 3(l) of the DRI Enabling Regulations.

FINDINGS

The Commission has considered the application of Peter Dobyms, Trustee of Wild Silver Trust, for a Hardship Exemption on the Silver Square retail development project and based on consideration of such application and upon the information presented in the public hearing and submitted for the record, makes the following findings pursuant to Section 23 of the Act:

General

G1. The project was initially constructed and occupied in 2000 as 2 buildings for retail business use, identified as Building A and Building B, of 4,255 square feet and 5,520 square feet, respectively. In May 2001, the applicant secured a building permit to renovate the second floor of Building B to add 4,444 sq.ft. of space for office use. A real estate company has leased 2,500 square feet, while the remaining 1,920 square feet will be leased in the future as general office space. This work was completed by late autumn of 2001. A Certificate of Occupancy has not been issued yet.

G2. A building permit was issued for renovation of Building B into office space because the Falmouth Building Inspector was not aware that the renovation for additional space would put the project over the Commission's threshold for review of commercial projects. The full amount of DRI mitigation poses a financial hardship for the applicant because he has already spent over \$100,000 on the renovations, including the installation of an elevator.

G3. Desirable relief can be granted to this applicant without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of the Act.

Transportation

T1. The project is located in North Falmouth, on the northwest corner of Route 28A and Rt. 151/County Road. Both Route 28A and Route 151 are Regional Roadways as defined by MPS 4.1.1.2. Additional regional roadways in the study area include: Route 28, County Road, Chester Street, Quaker Road, Garnet Avenue, Wild Harbor Road, Pine Street, Scraggy Neck Road (Bourne), and County Road (Bourne).

T2. The Falmouth Planning Board, in its July 7, 1999 conditions of approval of the existing development notes:

- 1. Construction shall be limited to 2,500 square feet of "Convenience Store" (ITE Land Use Code 852) and 7,450 square feet of "Specialty Retail" (ITE*

Land Use Code 814) as presented in the applicant's traffic study. Any change in use resulting in increased trip generation, as per the Institute of Transportation Engineers "Trip Generation Manual", must be reviewed by the Planning Board to determine whether additional traffic mitigation measures are necessary, or the applicant may make an in-lieu contribution to the Regional Transit Authority or private transportation company as per §240-113.1.C of the Zoning Bylaw. The amount of such contribution shall be calculated using the Cape Cod Commission Technical Memoranda for Fair Share Contributions, payment of which shall increase the total number of trips accordingly.

The current occupancy of the building includes a BlockBuster video rental store, which occupies part of the specialty retail use approved by the Falmouth Planning Board. Video rental stores on average generate more traffic than specialty retail by a factor of more than five times during the weekday afternoon peak hour of adjacent street traffic. The project as currently constructed and occupied exceeds the trip generation approved by the Falmouth Planning Board. It appears that further review by the Planning Board and/or consequential mitigation may be needed.

T3. MPS 4.1.1.5 requires developments to have sufficient sight distance at the site driveway. Preliminary staff review of the existing sightlines shows the sightlines may not be sufficient for safe operations:

Silver Square Retail - Sight Distance Table				
	Sight Distance From North (ft)	Required	Sight Distance From South (ft)	Required
Northern Drive	< 100 (420 without boulder)	360	470	360
Southern Drive	< 300 (over 420 without boulder)	360	275 from intersection (more for southern approach to Rt. 28 / 151 intersection)	250 (360 for southern approach to Rt. 28 / 151 intersection)

Source: Preliminary CCC staff measurements

The applicant has agreed to either move the boulder at the north driveway back 20' to create sufficient sight distances or to provide a detailed analysis performed by an independent engineer showing sight distances will meet this standard.

T4. The site as built currently has 59 parking spaces (according to testimony at the March 21, 2002 JD hearing.) The original site plans include 53 parking spaces. The Falmouth Planning Board approval included a walk-up ATM on the parking lot which currently has not been built. Two of the existing spaces may be lost when/if the proposed ATM is developed for the site, leaving 57 spaces. With a reduction allowed by Falmouth bylaws, the minimum number of spaces required is 54 as estimated by staff. MPS 4.1.1.15 requires parking to be limited to the requirements of the local community.

T5. MPS 4.1.2.1. requires DRIs to reduce estimated average weekday trips. The applicant has committed to a trip reduction program as well as a trip reduction payment/offset.

T6. The Commission has found there is a hardship related to this project, as noted in finding G2. Due to the hardship, the Commission finds that the following allows the project to comply to the maximum extent feasible with Minimum Performance Standards and is the minimum relief necessary for transportation to address the hardship: a \$23,000 trip reduction payment, a condition relating to safety, a trip reduction program, a condition on parking, and requirements for pedestrian, bicycle, and transit access.

Water Resources

WR1. The Silver Square parcel is located within the watershed to Rands Harbor, which is a portion of Megansett Harbor. Megansett Harbor is a regional embayment shared by both Bourne and Falmouth. Nitrogen loading within Megansett Harbor and its subwatersheds is a portion of a current nitrogen loading project being completed by the Commission using funds from the state Department of Environmental Protection (DEP). Final analyses for Rands Harbor have not been completed for the grant, so the regional nitrogen loading minimum performance standard (5 ppm, MPS 2.1.1.1.) applies to the parcel. This standard was approved in the RPP to provide a minimum level of protection for all water resources on Cape Cod (*i.e.*, embayments, drinking water, and ponds).

WR2. Based on water use records from the site, current water use during the off-season billing period (October to April) is 290 gallons per day (gpd). This average flow is reduced by 11 gpd for the tight tank that is used by the hair salon in the plaza. With 279 gpd of wastewater, 40,580 ft² of parking, 9,775 ft² of roof, and 27,793 ft² of lawn area, the existing nitrogen loading on the 2.37 acre lot is 3.8 ppm.

WR3. The applicant has built 4,444 ft² of additional office space on the site. Title 5 wastewater flow associated with this area of office space is 333 gpd. Addition of this flow to the existing nitrogen loading raises the proposed project nitrogen loading to 5.5 ppm.

WR4. There are four proven options to meet the regional 5 ppm standard for this project: 1) install a denitrifying septic system, 2) remove 13,000 ft² of lawn, 3) limit the use of the available office space to 3,020 ft² or 4) some combination of lawn removal and office space restriction.

WR5. The applicant has proposed that another option to reduce the nitrogen load to the regional 5 ppm standard is to install an irrigation well and use this irrigation water as a nitrogen source for the lawn areas. Staff evaluation of this option indicates that a relatively high average of total nitrogen concentration (25 ppm) would be necessary to meet the 5 ppm minimum performance standard. Water quality monitoring, as shown in condition WR2, is necessary to confirm that this concentration is met.

Natural Resources

NR1. The project is located in a Significant Natural Resource Area due to the presence of unfragmented forest. The parcel is not mapped for estimated rare species habitat, and according to the proponents, there are no wetlands on or in the vicinity of the project site. The project site is presently developed. In addition, the site is surrounded by development, with a commercial building, transformer station, and train tracks to the west, and retail and office development to the north. Given the developed nature of the site, and the site's location on a busy road and its isolation from other wooded upland areas due to existing development, the significance of the mapped unfragmented forest is likely minor for wildlife.

Community Character

CC1. Exterior lighting was the only community character issue considered for the Hardship Exemption review. The project's lighting consists of decorative pole mounts, recessed lights under the eaves along the front of each building, a light for a flagpole, and for the project's signage.

Hazardous Materials

HM1. The project site is not located within any existing or proposed Wellhead Protection Area (Zone II). As such, Minimum Performance Standard (MPS) 4.2.2.3 of the Regional Policy Plan, pertaining to hazardous materials in Zone II's, does not apply to this project.

HM2. Tenants in the two buildings are Blockbuster Video, Hot Locks Beauty Salon, Dean's Convenience Store and Capeway Cleaners. Capeway Cleaners is a pickup/drop off business only. A tight tank has been installed by the beauty salon to capture rinse water.

CONCLUSION

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

- A financial hardship exists for the applicant, as noted in Finding G1.
- Desirable relief can be granted to the applicant without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Act.

The Commission hereby approves the application of Peter Dobyms, Trustee of Wild Silver Trust, for a hardship exemption on the Silver Square Expansion project, provided the following conditions are met:

CONDITIONS

General:

G1. The hardship exemption approved herein is for the Silver Square Expansion project, which consists of two existing retail buildings on a parcel of 2.37 acres. The original buildings are 4,255 sq.ft. and 5,520 sq.ft. in area, with an expansion of 4,444 square feet of office space on the second floor of Building "B", as shown on the site plans labeled as "2nd Floor Construction Plan and Notes" prepared by Millennium Design Group, Inc., dated 3/9/01, and "Site Plan Prepared for Coastal Construction Corp. in Falmouth", prepared by Holmes and McGrath, Inc., dated 3/14/00. The additional office space has been divided into two sections – a real estate business office of 2,500 square feet and 1,944 square feet of general office space that can be leased in the future. Any change of use of the retail space, office space, or creation of additional leasable space shall be reviewed by the Commission.

G2. Before the issuance of a Certificate of Occupancy from the Town of Falmouth for the 2,500 square feet leased to the Century 21 real estate office, the applicant must receive a first Certificate of Compliance from the Commission, stating that all of the conditions pertaining to that Certificate have been met. Before the issuance of a Certificate of Occupancy from the Town of Falmouth for the remaining 1,920 square feet of office space, the applicant must receive a second Certificate of Compliance, stating that all of the conditions pertaining to that Certificate have been met.

G3. The Hardship Exemption is valid for a period of 7 (seven) years from the date of this decision.

Transportation

T1. Before the issuance of the first Certificate of Compliance, the applicant shall correct sight distance problems for the driveways. The applicant shall move the rock at the northern driveway back 20 feet; or, the applicant may submit to the commission for approval a letter from a Massachusetts Licensed Professional Civil Engineer (P.E.) certifying acceptable sight distances. The letter must be an original, be signed, and include the P.E. seal. The letter must include measured safe stopping sight distances for a vehicle stopped at the stop bar of the northern driveway (not in the crosswalk.) The letter must also include the required safe stopping sight distance under American Association of State Highway Transportation Official's (AASHTO) *A Policy on Geometric Design of Highways and Streets, 2001*. The letter must show that the existing sight distances meet these AASHTO requirements.

T2. An on-site discounted lunch program shall be provided to employees of the complex to help reduce automotive trips to and from the facility. Before the issuance of the first Certificate of Compliance, verification of this program's operation shall be provided.

T3. The applicant shall allow access to the site for use as a transit shuttle stop.

T4. The applicant shall make a monetary contribution of \$23,000 to Barnstable County / Cape Cod Commission. These funds shall be expended upon the recommendation of the Commission Executive Director to support projects or strategies that encourage alternatives to automobile travel in the Town of Falmouth. These include but are not limited to the following strategies and types of projects: planning, design, or construction of alternatives to automobile travel such as bicycle paths and sidewalks; supporting, marketing or promoting bus or shuttle services; the purchase of land for the creation of bicycle or pedestrian ways; or the monitoring of traffic volumes, speeds, and vehicle classification. In addition, up to 1/15 of these funds, or \$1,533 plus proportionally accrued interest, may be used to fund promotional and/or informational materials regarding alternatives to travel or to provide alternatives to automobile travel on Cape Cod. Any funds remaining after 10 years shall be turned over to the Cape Cod Regional Transit Authority or similar transportation agency for public transportation.

T5. The trip reduction funds are to be paid in two payments, proportionate to the trip generation of the two sections of office space. The first payment shall be \$16,400 and shall be paid before the First Certificate of Compliance is issued and before the real estate office portion of the addition is occupied. The remaining \$6,600 shall be paid before the Second Certificate of Compliance is issued and before the remaining office portion of the addition is occupied.

T6. The applicant shall limit paved parking spaces to the 59 existing spaces. Pursuant to MPS 4.1.1.15, no additional paved parking spaces shall be permitted. If the town requires additional parking spaces, they shall be on pervious surface such as grass, vegetative grids, gravel, etc. Total parking spaces will be limited to the total required by the town.

T7. If a recreational trail is established behind the applicant's development, the applicant shall pave an appropriate connecting path across the applicant's land and allow users of the trail full access from the trail directly into the development.

Water Resources

WR1. In order to meet the 5 ppm nitrogen loading standard, the applicant shall occupy no more than 3,020 ft² of the available 4,444 ft² office space. The Commission shall approve use of additional office space only if the Commission also approves an appropriate nitrogen loading offset strategy to ensure that the site nitrogen loading remains below 5 ppm.

WR2. If the applicant chooses to install an irrigation well on the site to offset nitrogen loading associated with the occupancy of the remaining 1,424 ft² of office space, the nitrogen concentration in the irrigation water must average 25 ppm total nitrogen or more. Monitoring of the irrigation well will be done monthly during the four months between May and August, inclusive, and shall occur for two years prior to the occupancy of the remaining office space. If the average total nitrogen concentration for the eight sampling dates is less than 25 ppm, the applicant shall utilize one of the options in

Finding #4 to ensure that the project nitrogen loading is 5 ppm or less. Use of such an irrigation well shall be reviewed by the Falmouth Board of Health.

The Cape Cod Commission hereby approves with conditions the Hardship Exemption application of Peter Dobyns, Trustee of Wild Silver Trust, for the Silver Square Expansion.

Elizabeth Taylor
Elizabeth Taylor, Chair

May 16, 2002
Date

Commonwealth of Massachusetts

Barnstable, ss.

On this 16th day of May, 2002, before me personally appeared Elizabeth Taylor, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

Katharine L. Peters
Notary Public
Commonwealth of Massachusetts

My Commission expires

