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MEMORANDUM

To Jeremy DeCarli, AICP – Planning & Zoning Official

From Richard Carella, Town Attorney

Re: ZBA Variance – ZBA-22-002 - Atlantis Marketing ("Applicant")

QUESTION PRESENTED:

You asked me to review whether Section 8.2H of the East Hampton Zoning Regulations ("Regulations") supports the applicant's proposed variances at 1 and 5 Colchester Avenue and 157 Main Street.

The Applicant is relying on this section in support of its development plans and requested variances, as being an enlargement of a prior-existing non-conforming building and use. It argues that the current use of a gasoline station and convenience store is allowed to continue under Section 8.2, and thus such use is a "permitted use" as required in the zoning code section 8.2.H.

East Hampton Zoning Code Section 8.2.

H. Enlargement of a Permitted use on Non-Conforming Lots

Buildings containing a permitted use, but which does not conform to the requirements of the Regulations regarding height, floor area, percentage of lot coverage, setbacks or parking facilities, may be enlarged or altered provided:

1. Such enlargement contains no more dwelling units than now exist.
2. Additions are constructed in accordance with the applicable yard and height requirements, or with the approval of the Zoning Board of Appeals, are not closer to the lot lines than the existing building or structure (revision effective July 8, 2006).

ANSWER:

The short answer is that Section 8.2H can provide legal grounds for the applicant's requested variances to allow the reconstruction and enlargement of its nonconforming use and parking areas; provided, however, not as currently being proposed as to the drive-through component of the plans, nor expansion of the building upon the 157 Main parcel. As currently owned, only the parcels at 1 and 5 Colchester Avenue appear to have merged and thus, the Applicant must limit the expansion of the convenience store and gas station to those parcels only. However, given Section 7.1 of the Zoning Regulations related to parking areas, the current proposed parking layout is permissible.

DISCUSSION:

Does Section 8.2 support the Applicant's proposed plans?

Section 8.2 regulates "Non-Conforming Conditions" and, considered as a whole, is concerned with the changes to non-conforming uses, as well as non-conforming buildings and structures. It is this section which provides for the continuation of the convenience store and gas station as a non-conforming use and non-conforming building.

Of note, Section 8.2 states that "[a]ny non-conforming use or building, lawfully existing at the time of adoption of these Regulations or of any amendments thereto, may be continued, and any building so existing, housing such non-conforming use, may be reconstructed in accordance with this Section."

There is no drive-through use currently in existence at this location, nor has there been any evidence of such a historic use. As such, the Applicant's proposal to construct a *new* drive through facility to the reconstruction of the convenience store is not a protected non-conforming use, and not permissible.

The opponents argue that, because the building does not contain a "permitted use" (i.e., this is a gas station use in a residential zone), it cannot be enlarged or altered. However, when read as a whole Section 8.2 does support the concept of allowing the enlargement of a building, which contains an allowed continuation of a non-conforming use, as a reasonable interpretation of the term 'permitted use' as used in this regulation, and in this context. Provided that the conditions in Section 8.2H are met, the continuation and reconstruction of the convenience store and gasoline station may be approved.

Can the Applicant reconstruct the building, in part, on the adjoining lots?

The Applicant's proposal is for the merger of three parcels. Where the landowner combines or merges several parcels or lots into one larger parcel, the lot lines remain in place for title purposes until a deed of conveyance or a new subdivision is created, but by operation of law, a single parcel merges for zoning purposes." 9B Conn. Prac., Land Use Law & Prac. § 53:6 (4th ed.)

Section 8.2F(2) provides that "Subject to the provisions of Section 8-26a(b) of the Connecticut General Statutes, contiguous, nonconforming lots created prior to adoption of Subdivision Regulations (5/1/49), or existing as the result of divisions not requiring subdivision, shall be considered one non-conforming lot when such lots are of the same ownership and have contiguous frontage." This suggests that, once the three lots come under common ownership, they would be considered one nonconforming lot.

However, only parcels located at 1 and 5 Colchester Avenue appear to be under common ownership. According to the Assessor records, 157 Main Street is owned by AMG REAL ESTATE LLC; and 1 and 5 Colchester Avenue are owned by AMG PUB II LLC. Therefore, Section 8.2F(2) would merge the two Colchester Avenue properties and they are considered as one nonconforming lot for zoning purposes. This means that, as the parcels currently exist, the proposed building could be reconstructed upon only the 1 and 5 Colchester Avenue properties. The ZBA could impose a condition of approval to have all three lots under common ownership, or a change to the boundary line resulting in a larger area for the convenience store, and thus mitigate the variety and number of variances sought. Applicant could also seek variances to the front yard setback rather than propose encroaching on 157 Main parcel to achieve reconstruction of the building entirely upon the 1 and 5 Colchester parcels.

Can the Applicant expand the convenience store parking lots to the adjoining lots?

An instructive case is *Crabtree Realty Co. v. PZC*, 82 Conn. App. 559 (2004) (discussed by *Pfister v. Madison Beach Hotel LLC*, 197 Conn. App. 326 (2020), which was affirmed by 341 Conn. 702 (2022), which also discussed *Crabtree*). In *Crabtree*:

> a defendant landowner sought to construct a parking lot on a vacant parcel of land adjacent to his own property, which he was leasing for that purpose. Id., 563, 845 A.2d 447. The defendant's own property, an auto dealership, was a preexisting nonconforming use within the zoning district in which it was located. Id. The defendant landowner filed a site plan application with the local planning and zoning commission, seeking approval to construct the parking lot on the leased parcel of land. Id., 561–62, 845 A.2d 447. The commission denied the request on the ground that his proposal would enlarge his property's preexisting nonconforming use in violation of the local zoning regulations. Id., 562. On appeal, the Superior Court affirmed the decision of the commission, and the landowner thereafter appealed to this court. Id., 561, 845 A.2d 447. In turn, this court affirmed the Superior Court's decision, holding that the landowner's proposed use of the leased parcel to add parking spots for the nonconforming business it operated on its own parcel would constitute an illegal expansion of the preexisting nonconforming use. Id., 565–66, 845 A.2d 447. *Pfister*, 197 Conn. App. at 337.

More specifically, unlike the provisions which would allow for the merger of the parcels and allow an expansion of the building, the *Crabtree* court reasoned that "[b]ecause the proposed use of [the adjacent leased parcel] would result in a physical change of the property under the [dealership's] control, the commission reasonably could decide that granting the [dealership's] proposed use of [the adjacent leased parcel] would result in the illegal expansion of its preexisting nonconforming use." (Emphasis added). *Crabtree,* 82 Conn. App. at 565-66.

Crabtree is distinguishable, however, because the court reviewed the PZC's decision as a question of fact and, critically, it addressed an appeal from a PZC decision rather than the ZBA addressing a variance application for the same issue. *Crabtree* can be distinguished for legal reasons as well. The Supreme Court noted that "the Appellate Court was not required to—nor

did it—consider whether the planning and zoning commission had the legal authority to deny a site plan application for a permitted use (parking) merely because it would be used in connection with a nonconforming use. Two years later, however, in *Thomas v. Planning & Zoning Commission*, supra, 98 Conn. App. at 748–51, 911 A.2d 1129, the Appellate Court squarely addressed that question and concluded that a planning and zoning commission could not deny a permit for a permitted use on the ground that the permit was sought in connection with a nonconforming use." *Pfister*, 341 Conn. at 720-21.

The facts of *Thomas* are nearly identical to those of *Crabtree*. In *Thomas*, a manufacturing company operating as a nonconforming business in a residential zoning district applied for permission to construct twenty parking spaces behind its manufacturing plant. An abutting landowner opposed the application on the ground that the proposed additional parking on the manufacturer's property would constitute an illegal expansion of the company's nonconforming use of that property, even though off-street parking was a permitted use in the district. Specifically, the landowner argued that, "because the parking lot is used in connection with a nonconforming manufacturing use on the property, the use of the parking lot itself is nonconforming." Id., at 748. After the defendant planning and zoning commission approved the application, the landowner appealed to the trial court, which dismissed the appeal. The Appellate Court subsequently affirmed the trial court's judgment, concluding that the planning and zoning commission properly had approved the application because the proposed parking lot was a permitted use within the district. Id., at 751. *Pfister*, 341 Conn. at 721.

Such is the case here, where "Parking in accordance with Section 7.1" is a use permitted as-of-right in the R-2 zone. Section 7.1 of the Zoning Code bases the number of parking spaces on the type of use, not on zoning location. Section 7.1G encourages shared parking "for different structures or uses, or for mixed uses," in any zoning district. Moreover, Section 7.1G(d) indicates the uses sharing the parking do not need to be contained on the same lot. Thus, as the parcels currently exist, the 157 Main parcel could be used for part of a shared parking area, whether or not it has merged with the 1 and 5 Colchester Avenue parcels.