

MEMORANDUM

To: East Hampton Zoning Board of Appeals

From: Kenneth R. Slater, Jr.

Date: June 13, 2022

Re: Atlantis Marketing, Application ZBA-22-002
Our File No. 27904.0001

I. Introduction.

The revised site plan suffers from the same legal failings as the version subject to the hearing before your board on April 11, 2022.

The plan does not qualify for the variances for each of the following reasons:

- **Impermissible use variance:** The applicant must show that the property could not be converted to a legally conforming residential use to qualify for the use variance to authorize the newly proposed expanded gas station and pump field.
- **The application fails for the lack of hardship:** The property contains viable residential and nonconforming commercial uses on the residentially-zoned parcels. The only reason for the variances is to increase the financial gains from the existing nonconforming commercial business which is never a valid ground for a variance.
- **Expansion of a nonconforming use is not authorized under the Adolphson doctrine:** Authorizing a variance without showing of hardship applies only when a nonconforming use is not expanded.

II. A Gas Station, whether proposed or preexisting the zoning regulations, is not a permitted use in the R-2 Zone

The May 3, 2022 memo from the Town Attorney, Richard Carella, cites section 8.2 H of the Regulations to correctly conclude that the drive-through contained in the prior plan was not permitted because it did not previously exist on the site. However, his opinion, without citing supporting case law or detailed analysis of the specific applicable zoning regulations, suggests the the Board could treat the proposed gas station and pump field as a “permitted use.” In that respect, he is mistaken.

A. A nonconforming use is by definition and under bedrock zoning law not a permitted use

Uses can be broken down into three types: permitted uses (those expressly permitted in the zone), prohibited uses (those not expressly permitted in the zone), and prohibited uses that are nonetheless authorized to continue to exist if they lawfully existed prior to the adoption of the existing zoning regulation prohibiting the use (nonconforming uses).

A nonconforming use does not conform with the zoning regulations and is necessarily not a permitted use. Nonconforming uses are authorized to continue to exist in violation of zoning regulations because Conn. Gen. Stat. §8-2 states that zoning regulations cannot “[p]rohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations.”

Consistent with that distinction, permitted uses and non-conforming uses are separately defined in the East Hampton Regulations. Permitted Use is defined as “[a]ny use allowed in the zoning district and subject to the restrictions applicable to that zoning district.” Non-conforming use is defined as “[a] use or activity which was lawful prior to the adoption, revision or amendment of a zoning regulation but which fails, by reason of such adoption, revision or amendment to conform to the present requirement of the zoning district.”

The Supreme Court has expressly and unambiguously held that a nonconforming use is not a permitted use. *Pfister v. Madison Beach Hotel, LLC*, 341 Conn. 702, 722 (2022) (“the court is persuaded by the reasoning in *Thomas v. Plan. & Zoning Comm'n of Town of Thompson*, 98 Conn. App. 742 (2006)], which accords with several bedrock principles of land use law, including that ‘**[a] permitted use is not a nonconforming use**’”); *Melody v. Zoning Board of Appeals*, 158 Conn. 516, 519 (1969) (“**a permitted use is not a nonconforming use**”) (emphasis added).

“[T]he accepted policy of zoning ... is to prevent the extension of nonconforming uses ... and that it is the indisputable goal of zoning to reduce nonconforming to conforming uses with all the speed justice will tolerate. ... Nevertheless, the rule concerning the continuance of a nonconforming use protects the right of a user to continue the same use of the property as it existed before the date of the adoption of the zoning regulations.” *Pfister v. Madison Beach Hotel, LLC*, 341 Conn. 702, 724 (2022) citing *Helbig v. Zoning Commission*, 185 Conn. 294, 306 (1981) (citations omitted; internal quotation marks omitted.)

B. The R-2 regulations do not authorize preexisting gas stations as a permitted use

As stated above, the Regulations define “permitted uses” as uses authorized by the regulations in the zone. Turning to the specific regulations, it is indisputable that a gas station is not a permitted use in the R-2 zone.

Section 1.4, *Permitted Uses and Activities*, states:

1. *These Regulations shall be construed as being permissive in nature.*
2. *All permitted uses shall be described within these Regulations.*
3. *All uses not expressly permitted are prohibited.*
4. *For a principal use permitted by these Regulations, accessory uses which are customarily incidental and are actually subordinate thereto are permitted.*
5. *In the event of uncertainty as to whether a use or activity is permitted, the Commission shall be responsible for interpreting these Regulations.*

Section 4.2 states the permitted uses in the R-2 zone. Specifically, it provides:

Section 4.2. R-2 Zone – Single Family Residential

A. Purpose

The purpose of this zone is to provide primarily for single family residential uses in those areas of the Town which have been predominately developed with single family dwellings and to provide a transition of density between those areas which shall remain rural in nature, due to environmental and topographical concerns (R-3 and R-4) and those areas more densely settled (R-1 Zone).

B. Uses Permitted As-Of-Right

The following uses are permitted in the R-2 Zone as of right:

1. Detached Single family dwellings
2. Accessory uses and buildings incidental and subordinate to a permitted residential buildings shall comply with Section 8.3.I
3. Keeping of domestic livestock in accordance with Section 8.4.C
4. Parking in accordance with Section 7.1
5. Signs in accordance with Section 7.2
6. Agricultural uses as defined in Section 8.4.C
7. Temporary Health Care Structure in accordance with Section 4.6.D and Public Act 17-155.
8. Home Occupations in accordance with Section 8.4.O
9. Home Based Businesses in accordance with Section 8.4.P

C. Uses Permitted With Site Plan Review

The following uses are permitted in the R-2 Zone following site plan review as described in Section 9.1:

1. Buildings used for the storing, processing and manufacture of site grown agricultural products and livestock as an accessory use of a farm.
2. Buildings used for the storage of farm equipment and motor vehicles, when such equipment and vehicles are used in connection with the operation of such a farm.

D. Uses Permitted With Special Permit

The following are Special Permit uses, permitted in the R-2 Zone only when specifically approved by the Planning and Zoning Commission in accordance with the provisions of Section 9.2:

1. Uses providing essential community services including, but not limited to the following:
 - a. Fire or Police stations or other Municipal buildings
 - b. Public Utility buildings, structures or utility substations
 - c. Public and Parochial schools
 - d. Parks, playgrounds or public recreations areas
 - e. Libraries, churches, museums or auditoriums
 - f. Cemeteries and their extensions
 - g. Hospitals.
2. Roadside stands for the seasonal sale of farm produce and products grown or produced on the parcel on which they stand. Such stands shall be located no closer than fifty (50') feet from any street or lot line.
3. Commercial recreation as defined and described in Section 8.4.F
4. Veterinary Clinics in accordance with Section 8.4.N.

Neither gas stations nor preexisting gas stations are a permitted use in the zone. Instead, it is a prohibited use in the zone. However, preexisting gas stations, while a prohibited use in the zone, are allowed to exist as a nonconforming use as required by Conn. Gen. Stat. § 8-2.

C. The Gas Station is Authorized on the Site as a non-conforming, not a permitted, use

Consistent with the mandate of Conn. Gen. Stat. § 8-2, Section 8.2 of the Regulations provides 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 nonconforming use, may be reconstructed in accordance with this Section.” That paragraph allows the reconstruction of a building containing a nonconforming use but does not allow any expansion.

The only section of the Regulations that allows an expansion of a nonconformity, Section 8.2 H, applies only to expansion of nonconforming buildings containing permitted uses. Specifically that Regulation, entitled “Enlargement of a **Permitted use** on Non-Conforming Lots” states “*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...*” (Emphasis added).

The gas station is not a permitted use in a residential zone. As a result, a building containing that nonconforming use cannot be expanded.

D. The applicant for the proposed expansion of the non-conforming use cannot establish reasonable hardship to justify a use variance

Wishing to have a larger gas station on the property does not satisfy the requirement for hardship. *Mayer-Wittmann v. Zoning Bd. of Appeals of City of Stamford*, 333 Conn. 624, 640–41 (2019) (“Financial considerations [to justify a variance] are relevant only in those exceptional situations where a board could reasonably find that the application of the regulations to the property greatly decreases or practically destroys its value for any of the uses to which it could reasonably be put When a property would have economic value even if the zoning regulations were strictly enforced, the fact that a peculiar characteristic of the property would make compliance with the zoning regulations exceptionally difficult if the property were put to a more valuable or desirable use does not constitute either an ‘exceptional difficulty’ or an unusual hardship” (internal citations omitted)).

To qualify for a use variance, the applicant must demonstrate that the property cannot reasonably be used for a permitted use. *Caruso v. Zoning Bd. of Appeals of City of Meriden*, 320 Conn. 315, 325 (2016). The property containing the commercial convenience store could undoubtedly be converted to contain a single residence and already contains a residential use.

For those reasons, it cannot qualify for a use variance to allow a new and larger convenience store building, pump station and canopy.

E. Adolphson does not authorize a use variance

The doctrine of *Adolphson* allows the grant of variance without showing hardship when the plan results in elimination or reduction of a nonconforming use. *Adolphson v. Zoning Board of Appeals*, 205 Conn. 703 (1988). In that case, the applicant proposed to operate an auto repair business in a building containing a nonconforming aluminum casting foundry. The court upheld the commission's decision that the use as an auto repair business is less offensive in the zone than a foundry, authorizing a variance to enable that improvement in the use of the site.

In a subsequent case, the Appellate Court found that a commission could grant a variance from setback requirements when the proposal would eliminate the existing nonconforming residential use and establish a commercial use in a commercial zone. *Stancuna v. Zoning Bd. of Appeals of Town of Wallingford*, 66 Conn. App. 565, 567 (2001).

It has also been applied to authorize a ZBA to grant a variance allowing the reduction of a building nonconformity when the building houses a permitted use. *Hesock v. Zoning Board of Appeals of the Town of Stonington*, 112 Conn.App. 39 (2009) There the Appellate Court upheld a variance from a regulation requiring a 100 foot buffer from the mean high tide line when it authorized construction of a new house 47 feet from the mean tide line in place of an existing one nonconforming building located 45 feet from that line. In that case, no nonconforming use was expanded and the existing building nonconformity was reduced.

No court has held that the *Adolphson* case authorizes expansion of a nonconforming use. Regardless of the number of nonconformities as to building location that are eliminated, a variance cannot be lawfully granted to increase the nonconforming use of the property.

III. Conclusion

The proposed plan to increase the size of the nonconforming gas station and tank field in the residential zone plainly fails to qualify for variance under Connecticut law and should be denied.