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Memorandum in Opposition to Application for Special Permit filed by Round Cove Resort Owner LLC and 4 Cove Landing Road Owner LLC

To: Harwich Zoning Board of Appeals
From: Michael D. Ford, Esq. and William F. Riley, Esq.
Re: Board of Appeals Case No. 2023-05
Date: August 24, 2023

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1. Introduction

This office and the office of Riley and Norcross, represent Dorothy and Stanley Shelton, Trustees of Shelton Realty Trust ("Sheltons"), the owners of residential property located at 2 Cove Landing Road ("Shelton Property") an immediate abutter of the project proposed at 2173 Rt. 28 - Head of the Bay Road, listed as Resort/Inn on the Harwich Assessor's Card ("Hotel Site") and 4 Cove Landing Road, listed as two family residential on the Harwich Assessor' Card ("Two-Family Dwelling Site"). All three properties are located in the RH-2 Zone where hotel/motel use is only allowed by special permit and a single-family dwelling is permitted as of right and a two-family dwelling is allowed by special permit.

2. Proposed Project

The Applicants, Round Cove Resort Owner, LLC & 4 Cove Landing Road, LLC are seeking a Special Permit pursuant to the Town of Harwich Zoning Bylaw ("Bylaw') to alter pre-existing nonconforming motel/hotel use and amenities coverage pursuant to the Harwich Zoning By-laws §325-54 and M.G.L. Chapter 40A §6.

The proposed project includes a raze and replacement of three single story resort buildings built around 1967. The buildings appear to have been authorized by the Board as an extension of a non-conforming use in 1967. All three buildings are located entirely on the Hotel Site. One proposed building (Building A) is proposed to be located, in part, on the existing Two-Family Dwelling Site.

The Two-Family Dwelling Site has never been used for Hotel purposes and accordingly is not pre-existing non-conforming.

Town Counsel Amy Kwesell's Memo dated June 21, 2023 to the Planning Board opines:

> "In my opinion, provided the lots are merged either by the merger doctrine or preferably by the recording of a G.L. c. 41, § 81X plan, the relief required is a special permit from the Zoning Board of Appeals to alter and expand a nonconforming use and structures on the Property. See, §325-54(B)(1)." [1]

Bylaw §325-54 limits the expansion of structures used for nonconforming purposes, including a raze and replacement, to the **same site**. Specifically, §325-54 B.(1) states in pertinent part:

> "Except for single- and two-family dwellings provided for in Subsection A (5) of this section, a lawfully preexisting structure, whether conforming or not, used for a lawfully nonconforming use may, by special permit, be changed, altered, or razed and replaced with a new structure **on the same site**, provided that it is determined by the Board of Appeals that …").

The Bylaw specifically requires that a new structure must be located **on the same site.** "Terms used in a zoning by-law should be interpreted in the context of the by-law as a whole and, to the extent consistent with common sense and practicality, they should be given their ordinary meaning." *Hall v. Zoning Bd. of Appeals of Edgartown*, 28 Mass.App.Ct.249, 254 (1990). Where there is no express definition, "the meaning of a word or phrase used in a local zoning enactment … is to be determined by the ordinary principles of statutory construction." *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981). The Bylaw's phrase "same site" clearly means the site on which the lawfully preexisting structure was located. The three buildings to be razed are located entirely on the Hotel Site and thus the new structures must likewise be located on the Hotel Site.

The Applicant's recent recording of an "81X Plan" showing the Hotel Site and the Two-Family Dwelling Site as one lot does not cure the fact that the hotel use, by the Applicant's own admission, has <u>never</u> existed on the Two-Family Dwelling Site.

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[1] The merger doctrine provides that adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities. *Sorenti v. Board of Appeals of Wellesley*, 345 Mass. 348, 353 (1963). "The statutory grandfather provision contained in G.L. c. 40A, § 6, incorporates this doctrine by providing protection from increases in lot area and frontage requirements only to nonconforming lots that are not held in common ownership with any adjoining land. The common ownership requirement in G.L. c. 40A §6 represents a "statutory codification of a principle of longstanding application in the zoning context: a landowner will not be permitted to create a dimensional nonconformity if he could have used his adjoining land to avoid or diminish the nonconformity." *Planning Bd of Norwell v. Serena*, 406 Mass. 1008 (1990). This merger doctrine embodies the zoning policy of minimizing nonconforming property: "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases." Here the fact that the Hotel Site and the "Residential Site" are now owned in common by Round Cove does not mean that the lots have merged for zoning purposes. Further, the fact that the applicant has shown the lots on an 81X plan does not merge the lots for zoning purposes.

If an owner can simply acquire other property and join them to be the "same site" then the terms and requirements of the Bylaw regarding the "same site" are meaningless. The same site requirement must mean the same site that the nonconforming use was on.

Town Counsel's opinion did not address the Bylaw's "same site" requirement; and therefore, we would request that the Board seek a follow-up opinion from Town Counsel on this issue.

Town Counsel further notes that if the lots have merged "there will be two primary uses on the entire Property (a hotel/motel and a two-family dwelling) for which I do not find a prohibition of in the Bylaw." However, the Bylaw §325-8 Applicability of use regulations, states that:

> Except as provided by the Zoning Act or this bylaw, in each district no building, structure, water body or lot shall be used or occupied except for a purpose which is authorized by the Table of Use Regulations in the zoning district wherein the land is located … Any use not listed shall be construed to be prohibited. …

Bylaw §325-2 "Word Usage and Definitions" contains the following relevant defintions:

The Bylaw defines "principal use" as the "main or primary purpose for which a structure or lot is designed, arranged, or intended, or for which it may be used, occupied, or maintained under this by-law." (§325-2) This definition reflects the singular nature of "principal use."

The Bylaw defines "accessory use" as a "use incidental and subordinate to the principal use of a structure or lot." (§325-2) This definition further reflects that there is only one principal use of a lot.

The Bylaw's Table of Use Regulations <u>does not</u> list two primary uses as permitted uses and accordingly, we would respectively suggest that, contrary to Town Counsel's opinion, an owner of property in the Town of Harwich is allowed to engage in only one principal use. See *Town of Southhampton v. Youmell*, 2015 WL 461527 (Mass Land Court No. 13 MISC 480731 (RBF) (Feb. 3 2015)

3. Conclusion

The special permit application should be denied because as proposed the project does not comply with the applicable provisions of the Harwich Zoning Bylaw.