
TO: Paul Halkiotis, AICP, Director of Planning and Community Development
Town of Harwich Planning Board
(By Electronic Mail Only)

FROM: Amy Kwesell, Esq.

RE: Round Cove Resort/Wequassett Resort, Planning Board
2173 Rt. 28 – Head of the Bay Road
4 Cove Landing Road

DATE: June 21, 2023

The Applicants, Round Cove Resort Owner, LLC and 4 Cove Landing Road Owner, LLC (a/k/a Wequassett Resort & Golf Club) (the “Applicants”), are seeking Site Plan Review and a Special Permit pursuant to the Town of Harwich Zoning Bylaw (the “Bylaw”), §325-51, to allow redevelopment by razing three existing one-story buildings (units 1, 2 & 11 or Buildings A, B & K) and replacing with three two-story buildings (the “Project”).¹ The Project will increase the total floor area for the buildings 6,749 s.f. to 16,416 s.f. with a net increase of 9,667 s.f. and will result in an increase of 12 hotel units. The Applicants have applied to the Town of Harwich Planning Board (the “Board”) for a special permit pursuant to the Bylaw, §325-9 which provides in part:

“Any use presently listed as a permitted use in the Table of Use Regulations shall be designated as a special permit if the use proposes a structure or structures having a gross floor area of more than 7,500 square feet...”

The Applicants have also applied to the Town of Harwich Zoning Board of Appeals for a Special Permit for a change in pre-existing nonconforming amenities coverage.

The Project is located at 2173 Rt. 28 - Head of the Bay Road (owned by Round Cove Resort Owner LLC) and 4 Cove Landing Road (owned by a related LLC, 4 Cove Landing Road Owner LLC) in the Residential High (RH-2) zoning district.² The Property is currently developed with 35 buildings (sheds included), 2 pools, 4 tennis courts, building decks, parking lots, dry-laid brick walkways, playground, gravel storage areas, revetment, and utilities. There are currently 121 hotel units with 304 parking spaces.

¹ The Project also includes hardscape, landscape and amenity improvements.

² The Application and Project narratives submitted by the Applicants state in some documents that the Property is located in the RH-2 zoning district and in other documents that it is in the CH-2 zoning district. I do not have access to an updated zoning map, so I am relying on the Town Planner’s memo indicating the Property is in the RH-2 zoning district.

Further, the Applicants are proposing to transfer 4 Cove Landing Road and 2 Swan Drive (which is already owned in common with 2173 Rt. 28 – Head of the Bay Road) to Round Cove Resort Owner LLC and merge all of the lots through a G.L. c. 41, § 81X plan.

With regard to dimensional requirements, the applications note the following³:

- Lot area: 282,000 s.f.⁴ is required (40,000 s.f plus 2,000 s.f. per rental unit (121 units)). At the proposed 133 units (121 unit plus 12 units) the required area would be 306,000 s.f. The Property contains 966,100 s.f. and is therefore compliant.
- Frontage: 150 feet; 734 feet existing, 1318 when merged and therefore compliant.
- Front setback: 50 feet; 72 existing, 30.4 feet when lots merge (new nonconformity due to the planned merging of lots).⁵
- Side setback: 50 feet; 30.4 feet (existing nonconformity and will not be altered).
- Rear setback: 50 feet; 15.9 feet (existing nonconformity and will not be altered).
- Lot coverage: 30% allowed; 8.1% exists and 8.4% is proposed.
- Site coverage: 35% allowed; 32.1% exists and 32.4 is proposed.
- Amenities coverage: 15% allowed; 23.9% (existing nonconformity and will not be altered).

Both hotel and motel uses are allowed by special permit in the RH-2 zoning district. The existing buildings were authorized by a decision of the Harwich Zoning Board of Appeals dated November 24, 1967, allowing an extension of a nonconforming use. Further, I have been informed by submittals from counsel for the abutter (Dorothy and Stanley Shelton, as Trustees of Shelton Realty Trust at 2 Cove Landing Road) that 4 Cove Landing Road contains an existing two-family dwelling which is intended to remain after the lots are merged. Additionally, a portion of the rebuilt Building A is proposed to be on the existing lot at 4 Cove Landing Road.

The 2008 Special Permit and Site Plan Approval:

The Applicants have provided an approved Special Permit and Site Plan for similar structures from September 11, 2008 (the “2008 Special Permit and Site Plan”). However, the 2008 Special Permit and Site Plan was not fully executed as the proposed hotel buildings were

³ Counsel for the abutter have noted that it is not clear if the existing two-family dwelling located at 4 Cove Landing Road is included in the dimensional calculations. In my opinion, as the lots are all merging into one, the two-family dwelling must be included in dimensional calculations.

⁴ Some of the Applicants’ submissions state “262,000 s.f.” which is in error.

⁵ Please see “Site Plan Review Narrative” (undated) submitted by Law Office of Singer & Singer, LLC, p. 2.

not razed and rebuilt.⁶ It is important to note that the proposed buildings are now located in a different location as a result of an attempt to keep them away from the resource area. Therefore, in my opinion, the Board is not bound by the 2008 Special Permit and Site Plan Decision. See, Bernstein v. Chief Building Inspector, 52 Mass.App.Ct. 422, 427 (2001) (Holding that authority to complete a project initially granted a special permit continues only when a developer has begun construction within two years and a “substantial use” has commenced, otherwise a developer’s power has lapsed).

The G.L. c. 41, § 81X Plan/Merger:

As the G.L. c. 41, § 81X Plan has not been recorded, the Board is reviewing a proposal on three separate lots. However, in my opinion, it is likely that 4 Cove Landing Road has merged with 2173 Rt. 28 - Head of the Bay Road as 4 Cove Landing Road is nonconforming as it has a lot area of less than 40,000 s.f. The doctrine of “merger” occurs when a nonconforming lot abuts another nonconforming lot or a conforming lot under the same control, the lot will merge for zoning purposes. Massachusetts Courts have ruled that the legal identity of the owner is not, by itself, determinative. The key inquiry is whether adjoining land is under common control, and not whether the forms of ownership are identical. See DiStefano v. Town of Stoughton, 36 Mass. App. Ct. 642, 644 (1994); see also Savery v. Duane, 22 LCR 284 (2014). “When record title is held by different entities but controlled by the same owner, the merger doctrine requires a finding of common ownership.” Id. Here, the Applicants are asserting that the two lots have merged for zoning purposes as there is common control. While the lots may have merged for zoning purposes, in my further opinion, any special permit should require that a G.L. c. 41, § 81X Plan be recorded prior to any issuance of a building permit.

Two-Family Dwelling on 4 Cove Landing Road:

The Applicants have indicated that the two-family dwelling existed when they purchased the Property in 1997. Therefore, it is likely that the two-family use on 4 Cove Landing Road is a pre-existing nonconforming use as it was in existence when the zoning was changed from residential to RH-2 at the 4 Cove Landing Road lot. Further, if the lots do indeed merge (or have merged) it appears 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.

Relief Required:

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). In my further opinion, the Bylaw, §325-9 does not apply as that

⁶The balance of the proposed work as approved by the Planning Board at that time was substantially completed and consisted of wastewater treatment, tennis courts, pro shop and children's activity center, site, landscaping and infrastructure improvements.

provision only applies to “[a]ny use presently listed as a permitted use in the Table of Use Regulations...” (emphasis added). Hotel/motel is not presently listed as an allowed use, it is a use allowed by special permit. As the use (hotel/motel) was only permitted by special permit it is legally nonconforming and any change, alteration or extension of that use requires a special permit by the Zoning Board of Appeals and not the Planning Board.⁷ I do not agree with the Applicants that simply because the use is allowed by a special permit, it is not “lawfully nonconforming” or a conforming use. I do not find that argument persuasive. The existing use as a hotel/motel was only permitted by special permit, not as of right, and in my opinion, the use continues to carry the status of a legal nonconforming use.

Further, in my opinion, Bylaw §325-51(D)(1) does not apply as that section states in pertinent part:

- “D. Special permit to construct multifamily dwellings, hotels or motels.
(1) The Planning Board, in acting upon an application for special permit to construct hotels or motels,...” (emphasis added).

The above section does not apply as the Applicants are not seeking relief to construct a hotel or motel but are seeking to alter or expand the existing hotel/motel, a legally nonconforming use.

Additionally, as the combination/merger of the Property is creating a new nonconformity (front setback), it is my opinion that a variance for this new nonconformity is necessary.

If you have any further questions, please do not hesitate to contact me.

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⁷ The Bylaw, Section 325-51 states in part: “The Board of Appeals shall have authority to hear and decide applications for all changes, alterations, or extensions of a nonconforming structure or use that require a special permit...”