

**COMMONWEALTH OF MASSACHUSETTS
MEDFORD CITY COUNCIL**

IN RE: APPEAL OF SIGN PERMIT REFUSAL NO.: S24-00053

**MEMORANDUM IN SUPPORT OF APPEAL OF DENIAL OF
SIGN PERMIT S24-00053**

I. INTRODUCTION:

The Petitioner, Aim Realty Medford, LLC (“Aim Realty”) seeks to Appeal the Denial of Sign Permit S24-00053. The first issue raised on appeal relates to when Aim Realty first received a Notice of Denial as required by Chapter 94 Section 6.4.6 (2) for purposes of Appeal to the City Council pursuant to Chapter 94 Section 6.4.6(4). The second issue raised on Appeal relates to whether the use of the existing pylon sign has lapsed due to its abandonment or nonuse in accordance with Chapter 94 Section 5.6 of the Medford Zoning Ordinance, (the “Ordinance”).

II. FACTUAL BACKGROUND:

Aim Realty, is the current owner of the property situated at 42 Fulbright Street, Medford, MA 02155 (the “Property”).¹ The Property was acquired by deed of Winafred B. Silk, Trustee of the Silk Realty Trust (“Silk Realty”) dated September 7, 2022 and filed with the Middlesex South District Registry of Deeds Registered Land Section, Document No. 1922609, Book 01593, Page 171. The Property is a 12,716 square foot parcel of land situated within the C-2 District. The car wash use is a permitted use within the C-2 zoning district upon the issuance of a special permit by the special permit granting authority which is presently the Community Development Board. Aim Realty purchased the Property in 2022, with the purpose of renovating the existing

¹ The owner of the property is Aim Realty; however, the car wash will be operated by ScrubaDub Auto Wash Centers, Inc. for purposes of simplicity, Aim Realty will be referenced with respect to both parties. The Property is further referred to in various City records as “2 Fulbright Street, Medford, MA;

car wash facility and continuing the operation of a car wash in accordance with the existing special permit granted to Silk Realty.

By way of background, in September of 1966 a special permit was issued by the Medford Zoning Board of Appeals (the "Zoning Board") to Silk Realty relative to the operation of a "car washing facility." The special permit issued to Silk Realty did not contain any limiting language that would serve to limit the operation of the car wash, restrict the special permit's duration, or restrict the transfer of the special permit to a subsequent owner. See, Minutes of the Board of Appeals Meetings attached hereto as Exhibit "A," See also, Medford Building Department Record attached hereto as Exhibit "B." A permit or license was further granted for the installation of the pylon sign which is the subject of dispute on May 17, 1967.² A copy of the permit is attached hereto as Exhibit "C."

According to the City of Medford Assessor's records, construction of the car wash was completed approximately 55 years ago in 1968. Following completion of construction, Silk Realty moved its existing operation, previously situated at 593 Mystic Avenue, Somerville, MA to the Medford location. The July 29, 1966, meeting minutes of the Zoning Board reflect that the move was motivated by the "expansion of Route 93" which abuts the Property to the north. The pylon sign which is the subject of this appeal sits on the southerly side of the Property and is visible from Route 93. According to the Affidavit of Peter W. Silk, a former principal of Minute Man Car Wash, Inc., ("Company") the sign has stood at the site since his early childhood and prior to the completion of Interstate Route 93. See, Paragraph 3 of the Affidavit of Peter W. Silk attached hereto as Exhibit "D".³

For over fifty (50) years, the Company conducted a full-service car wash business at the Property. Until its sale in September of 2022, the Company also maintained its corporate headquarters at the Property. (Affidavit of Peter W. Silk, Paragraph 1). The operation of the

² The permit to construct the pylon sign is new evidence as it was recently discovered and provided by the Affiant, Peter Silk. According to the Building Department and Office of Community Development, there was no record of the permit/license in the Building Department file.

³ The Affidavit of Peter Silk and the information contained therein was not available to the Applicant prior to the email of the Building Commissioner dated January 8, 2025. However, as indicated within the Memorandum, the Applicant did provide the Building Commissioner with other evidence that was probative on the business's continued operation and until its listing for sale.

business spanned three (3) generations of the Silk family members, beginning with the founding principal John P. Silk.

As indicated in the Affidavit of Peter W. Silk, during the last few years of its operation, the Company experienced many challenges beginning with a fire that occurred on September 14, 2018, originating from an explosion of the then-existing electrical panel. As a result of the fire, the car wash facility was temporarily shut down for repairs from September 14, 2018, to the second week of December 2018. (Affidavit of Peter W. Silk, Paragraph 5). Following the completion of the casualty repairs, the car wash re-opened and resumed normal operations servicing customers seven (7) days a week, Monday through Saturday from 8:00 a.m. to 5:00 p.m., and Sunday from 8:00 a.m. to 12:30 p.m. Normal business operations continued until mid-March of 2020 when the car wash was again required to close in accordance with the restrictions imposed by both the Commonwealth of Massachusetts and the City of Medford due to COVID-19. (Affidavit of Peter W. Silk, Paragraph 6).

The Company made best efforts to cooperate fully with the City of Medford in honoring the restrictions imposed and did not re-open in any capacity until the late summer/early fall of 2020 when the regulations permitted car wash facilities to provide exterior wash services only to its customers. Eventually in the winter of 2020, the regulations were relaxed to allow for interior detailing of vehicles, but the requirements relating to masking and the use of gloves had an impact on the level of business and also the ability to retain temporary employees during busy periods. Nonetheless, the Company continued to operate a full-service car wash with a staff of five full-time employees. Following the pandemic, the Company did reduce the hours of operation to 9:00 a.m. to 5:00 p.m., Monday through Saturday and closed the business on Sundays. (Affidavit of Peter W. Silk, Paragraph 7).

Following the death of William Silk in October of 2021, the Company faced a crossroads as to whether to invest the necessary funds in the business to compete with those companies that had developed a more modern business model, or alternatively to investigate the sale of the Property and business. (Affidavit of Peter W. Silk, Paragraph 8).

The car wash continued its operation and was open to the public until December 31, 2021. In March of 2022, the Company and Silk Realty listed the Property for sale. (Affidavit of Peter W. Silk, Paragraph 9). A copy of the listing is attached hereto as Exhibit "E." It is significant to note,

that the pylon sign was specifically listed in the advertisement of the Property for sale. The Property continued to be utilized as the corporate headquarters, and to wash vehicles of family and friends until the sale of the business to Aim Realty was completed in September of 2022. (Affidavit of Peter W. Silk, Paragraph 9).

Following acquisition of the Property in September of 2022, Aim Realty commenced the process necessary to modernize the existing car wash facility which included, but was not limited to, the reconstruction of the existing car wash. Actions taken by Aim Realty to advance the project included the following: (1) submission of a Memorandum dated March 7, 2023, in response to issues raised by the former Building Commissioner, William Forte, with respect to the scope of the existing special permit, as well as to address the reconstruction or voluntary demolition of the existing structure. (2) submission of an application on July 3, 2023, for a special permit to the Zoning Board; and (3) following the grant of a special permit by the Zoning Board in December of 2023, the submission of building plans necessary to obtain a building permit from the City of Medford. A copy of the Memorandum is attached hereto as Exhibit "F." A copy of the recorded zoning decision is attached hereto as Exhibit "G."

III. PROCEDURAL HISTORY PERTAINING TO SIGN PERMIT:

1. On Tuesday, November 12, 2024, Corrin Kosinski of Poyant Signs, Inc., of New Bedford, MA 02745 ("Poyant") submitted an application, on behalf of Aim Realty, to obtain the approval necessary from the City of Medford to reface the existing panels on the pylon sign to reflect the change in operation of the car wash to ScrubaDub. Copies of the documents submitted in connection with the application for refacing the pylon sign are attached hereto as Exhibit "H."

2. From November 15, 2024, to November 22, 2024, numerous emails were exchanged between representatives of Poyant and Senior Planner, Danielle Evans of the Medford Office of Community Development as to the pre-existing nonconforming status of the pylon sign. Copies of the emails are attached hereto as Exhibit "I."

4. On November 22, 2024, Senior Planner, Danielle Evans indicated via email that the Office of Community Development had denied the application following its review. The email further indicated that the applicant will "need to contact the building dept. to see about documentation of the official permit denial." (Exhibit I, at page 3). The Plan Review Report

received by Poyant from the Office of Community Development ("Plan Report") stated in pertinent part that the "sign exceeds size (sign face max is 60 sf.) and height (max height is 20'), and any pre-existing nonconforming protections have lapsed." The Plan Report sent on November 26, 2024 and did not provide specific reference to the cited sections of the Ordinance. More importantly, the Plan Report stated that the application remained under Building Department review. A copy of the Plan Report is attached hereto as Exhibit "J."

5. On November 25, 2024, The Building Commissioner, Scott Vandewalle, forwarded an email to Poyant indicating that further evidence was required to show that the former car wash was a functioning business within the past two (2) years. The email further indicated "that may shed some light on this [so] we can better understand what is going on here." In closing, the email stated that "No formal denial has been issued yet..." See, Exhibit "I, page 5."

6. On December 5, 2024, Attorney Kathleen A. Desmond, counsel to Aim Realty, submitted an email to the Building Commissioner providing a history of the discussions with the prior Building Commissioner, William Forte, as to the fact that the car wash use was pursuant to a special permit and was not a nonconforming pre-existing use. The email included two attachments, the first being the Memorandum dated March 7, 2024, submitted to the former Commissioner in support of the continued use of the car wash without modification of the special permit, and in furtherance of renovations to the existing structure; the second attachment included a Massachusetts case, Barron Chevrolet v. Town of Danvers, 419 Mass. 404 (1995) that pertained to the refacing of pre-existing nonconforming signs being permitted by right and not constituting a change in use pursuant to M.G.L.c 40A Section 6. A copy of the email is attached as Exhibit "K."

7. A response was received from the Building Commissioner on December 11, 2024, raising issues with respect to the prior special permit, scope of the prior review of plans to reconstruct the car wash facility; and a request for further documentation as to continued activity of the business. A copy of the email is attached as Exhibit "L." There was no indication in the email of the Building Commissioner that a notice of denial had been issued with respect to the pending application.

8. On January 6, 2025, Attorney Kathleen A. Desmond submitted a response email that included information received from the City of Medford Assessor's Office indicating business personal property tax payments through the first quarter of FY2022, Yelp reviews evidencing that

the car wash was operating into 2022, and the link to the Board of Appeals meeting on September 28, 2023 which evidenced the discussion as to the existing special permit and proposed renovations to the existing car wash. A copy of the email is attached as Exhibit "M."

9. On January 8, 2025, an email was received from the Building Commissioner indicating for the first time that the application had been denied on November 26, 2024. The email did not provide a copy of the denial letter referenced. In addition to raising the denial, the email also referenced additional violations that had not been raised in prior emails including Section 94-6.2.5(4) pertaining to "Any other information deemed necessary... by the office of community development," and Section 94-6.2.3, "No sign shall be altered except for painting and colors and format as depicted in the original..."⁴ A copy of the email is attached as Exhibit "N."

10. A review of the Citizenserve website on January 8, 2025, showed the review by the Building Department "pending," and no denial appeared to be on file. A copy of the screenshot is attached hereto as Exhibit "O."

IV. STATEMENT OF ISSUES

Based on the foregoing factual circumstances, Aim Realty contends as follows:

(1) The purported denial of the sign permit does not meet the requirements of Chapter 94 Section 6.2.6(2) of the Ordinance and may be appealed to the City Council.

(2) Aim Realty is entitled to retain the existing freestanding pylon sign as the use has not been subject to abandonment or nonuse for a period of two (2) years in violation of Chapter 94, Section 5.6 of the Ordinance.

V. ARGUMENT

A. THE PETITIONER WAS NOT PROVIDED WITH NOTICE OF A DENIAL OF ITS SIGN APPLICATION IN ACCORDANCE WITH CHAPTER 94 SECTION 6.2.6(2) OF THE ORDINANCE FROM WHICH AN APPEAL COULD BE TAKEN TO CITY COUNCIL IN ACCORDANCE WITH CHAPTER 94 SECTION 6.2.6(4) OF THE ORDINANCE.

⁴ The Building Commissioner correctly pointed out a variance in the depiction of the sign in the signage permit application and the architectural elevation set submitted. Aim Realty understands that, but for the panels the sign cannot be varied. Aim Realty is further open to adapting the color and formatting of the panels.

Pursuant to Chapter 94 Section 6.2.6 (2), “[A]n application disapproved shall contain written reasons for disapproval, including specific references to the cited sections of the Ordinance. Appeal of such disapproval may be made to the City Council according to the provisions of Section 6.2.6(4).” Chapter 94, Section 6.2.6(4) further provides, in pertinent part, that “[A]ny appeal to the City Council shall be taken within 14-days of the date of the decision being appealed.”

As indicated above on November 12, 2024, an application was submitted on behalf of Aim Realty to reface the existing panels of the sign by replacing the existing panels with new panels for purposes of reflecting the change in ownership of the car wash. See Exhibit “H.” Following an exchange of emails between Poyant and the Office Community Development, a Plan Report was provided to Poyant reflecting disapproval of the pylon sign on the basis that the “[S]ign exceeds size... and height... and any pre-existing nonconforming protections have lapsed.” The Plan Report further indicated that the Building Department was still in the process of reviewing the application.

Aim Realty contends that the denial contained in the Plan Report could not be construed as a notice of denial for two reasons. First, the Plan Review did not constitute a disapproval in accordance with Chapter 94 Section 6.4.6(2) of the Ordinance as it did not provide written reasons for disapproval with specific reference to the cited sections of the Ordinance. Second, the Plan Report indicated that the application review by the Building Department was still pending.

Aim Realty’s position is further supported by the email of the Building Commissioner dated November 25, 2024, which requested additional evidence that the car wash was a functioning business within the past two years. The email further indicated that “no formal denial has been issued yet.” In response to the email of November 25, 2024, additional information was provided by Aim Realty by way of email dated December 5, 2024. The information included evidence that the car wash use was authorized by special permit, and was not a pre-existing nonconforming use, and set forth the timeline and actions taken by Aim Realty to obtain the necessary permits to approve the project and intended renovations.

Following submission of the additional materials, a subsequent email dated December 11, 2024, was received from the Building Commissioner requesting additional documentation as to the last active date of the business. Again, the email of the Building Commissioner did not

indicate that the application had been formally denied or provide a denial letter in conformity with Chapter 94 Section 6.2.6(2). See Exhibit “L.”

On January 8, 2025, following the submission of additional information pertaining to the last date that the car wash was an “active business,” an email was received by the Aim Realty’s counsel from the Building Commissioner that the application had been previously denied on November 26, 2024, and the right to appeal the decision had effectively expired. See, Exhibit “N.” The email referred to a denial that was issued on the basis of a failure to provide requested documents in violation of Section 94-6.2.5(4) and failure of the sign to conform “with the size requirements of the current signage language.” A copy of the denial letter itself was not included with the email. In addition to referencing the above denial, the email made further reference as to additional possible violations of Section 94-6.2.3 pertaining to the alteration of signs with the exception of painting and colors and format as depicted in the original. The reference to this particular violation had not been raised in previous communication.

While Aim Realty contends that the disapproval received on January 8, 2025 is still not in compliance with the requirements of a disapproval pursuant to Chapter 94 Section 6.2.6(2), it is Aim Realty’s position that the email from the Building Commissioner dated January 8, 2025, provided the first and only notice to Aim Realty that the Building Department’s review had been completed, and the application had been for all intent and purpose officially denied.

Based on the foregoing the Applicant contends that its appeal of the denial of the sign permit is timely as it was filed within fourteen (14) days of the aforesaid notice.

B. AIM REALTY IS ENTITLED TO RETAIN THE EXISTING FREESTANDING PYLON SIGN AS THE USE HAS NOT BEEN SUBJECT TO ABANDONMENT OR NONUSE FOR A PERIOD OF TWO (2) YEARS.

First, it is important to distinguish the issuance of a special permit authorized pursuant to M.G.L.c 40A Section 9 from that of a pre-existing nonconforming use. The first paragraph of M.G.L.c 40A Section 9 provides in pertinent part that, “[Z]oning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit...” (emphasis added). Chapter 40A Section 9 further provides that “[S]pecial permits may be issued **only for uses which are in *harmony with the general purpose and intent of the ordinance or by-law*** and shall be subject to general or specific provisions set

forth therein; and such permits may also impose conditions, safeguards and limitations on time or use." *Id.* In contrast, pre-existing nonconforming uses are lawful uses that had been allowed as of right prior to the enactment of a zoning ordinance which expressly prohibits the prior use. See, M.G.L.ch 40A§6.

In a recent Land Court case involving the denial by a local board of the proposed expansion of an existing structure for purposes of housing both an existing Cumberland Farm's convenience store, previously authorized by special permit, and an accompanying liquor store separately housed on the property and grandfathered as a pre-existing nonconforming use, the Court separately reviewed the validity of the special permit issued in 1978 and held by Cumberland Farms, as a successor-in-interest to the special permit, and the liquor store's status as a pre-existing nonconforming use. See, Cumberland Farms, Inc. v. Jacob, 23 LCR 620; 2015Mass. LCR LEXIS 150; affirmed by Cumberland Farms, Inc v.Bd. of Appeals of Wellfleet, 2016 Mass.App. Unpub. LEXIS 1149 (Mass. App. Ct., Dec. 2, 2016). In deciding that Cumberland Farms did not require relief by way of a "modification of the existing special permit or a new special permit to continue its operation in a larger space" the Court pointed to the fact that the language of Cumberland Farm's existing special permit did not impose conditions or restrictions that would limit the expansion of the existing structure. *Id.* at 627.

The instant matter is analogous to the Cumberland Farms case as it too involves the grant of a special permit. The available records with respect to the substance of the special permit issued to Silk Realty do not evidence any conditions or restrictions with respect to its use, duration or transfer. As demonstrated by Cumberland Farms, supra, in the case of a specifically authorized special permit, the analysis focuses on the terms and conditions contained within the four corners of the original special permit as granted. With specific reference to duration of a special permit, the Supreme Judicial Court in Lobisser Building Corp. & Another v. Planning Board of Bellingham, 454 Mass. 123 (2009), has further held that where the special permit itself did not contain a specific time limit, and construction of the first phase of a construction project was initiated within the initial two-year lapse period permitted in M.G.L.c 40A Section 9,⁵ the

⁵ M.G.L.ch.40A Section 9 provides " that a special permit granted under this section shall lapse within a specified period of time, not more than 3 years, from the grant thereof, which shall not include such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced..."

delay in the construction of further phases of the project could not be construed as a lapse of the special permit, and construction was permitted to resume years after the original grant. In so deciding, the Court reaffirmed that, “[O]nce a special permit for a project...has been approved all that the statute requires is that substantial use commence within the applicable lapse period...” Id. at 130.

There is no question in this case that Silk Realty exercised its rights under the special permit within the first two years of its grant, and therefore, even if, for argument’s sake, a lapse in use had occurred in this instance, such lapse would not serve to invalidate the special permit to operate a car wash, or its continued use as there is no condition as to duration or transfer contained within the confines of the special permit. It is also of significance to note that this is not an instance where, by virtue of a zoning amendment, the car wash use is no longer a permitted use by special permit within the C-2 District where the business is located. Pursuant to Table A: Table of Use and Parking Regulations, Item H (7) of the Ordinance, the “car wash use” remains permissible by special permit; therefore, it is impossible for the car wash use to also be construed as a nonconforming use subject to the lapse provisions of Section 5 of the Ordinance pertaining to nonconforming uses and structures.⁶

Based on the foregoing, Aim Realty maintains that the freestanding pylon sign has not been abandoned as it continues to provide for the identification of the location of a car washing facility permitted by the grant of a special permit.

While Aim Realty contends that the analysis should end upon a review of the terms of the existing special permit, a review of the materials provided in connection with the application submitted to reface the sign, and the established facts set forth above, results in the same conclusion; namely, that the use of the pylon sign has not lapsed even if considered as a pre-existing nonconforming structure. Chapter 94 Section 5.6 of the Ordinance entitled, Abandonment or Non-Use provides that, “[A] nonconforming use or structure which has been abandoned, or not used for a period of two years, shall lose its protected status and be subject to all of the provisions of this Ordinance.” In defining the term “nonuse” Massachusetts courts

⁶ The Planning Department Plan Review and the Building Commissioner’s emails do not specifically reference Section 5 of the Ordinance; however, the request for documentation as to a 2-year gap in use suggest that the provisions of Section 5 formed the basis of the objection.

have stated that “[G]enerally, nonuse of a nonconforming [structure] requires both vacancy and the lack of any attempt to rent, sell, or maintain the structure.” Stona J. Fitch v. Board of Appeals of Concord, Appeals Court Docket No. 18-P-591(2019) (Memorandum and Order Pursuant to Appeals Court Rule 1:28).

In this particular instance, Aim Realty submitted to the Building Department the following evidence and information in support of its position that the use of the pylon sign had not lapsed: (1) information obtained from the City of Medford Assessor’s Office that business personal property taxes had been paid by Silk Realty through the first quarter of FY 2022; (2) a website reference to Yelp reviews indicating that the business was operating through 2021; (3) following Silk Realty’s listing of the Property in March of 2022, and Aim Realty’s purchase of the Property in September of 2022, the documentation submitted relating to Aim Realty’s efforts to refurbish the existing car wash for purposes of continuing its operation.

It is also significant to note that during the initial permitting process for the project, the issue of abandonment or lapse of use was never raised as a potential issue. Instead, the questions raised by both the Building Commissioner and the Zoning Board of Appeals related to an increase in business associated with the modernization of the car wash facility.

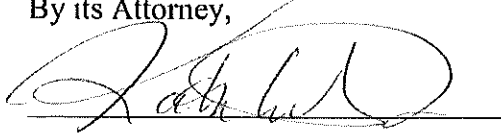
From a review of the above stated facts, it is clear that the claim of nonuse has no merit. Following the close of business in December of 2021, the Property was placed on the market for sale. Once purchased by Aim Realty, continual efforts have been made to renovate the existing car wash in furtherance of its continued operation.

CONCLUSION

For the above stated reasons Aim Realty respectfully requests that the Medford City Council grant its Appeal and permit the issuance of the sign permit necessary to reface the existing pylon sign located at 42 Fulbright Street, Medford, MA 02155.

Respectfully Submitted by,

The Applicant, Aim Realty Medford, LLC,
By its Attorney,

A handwritten signature in black ink, appearing to read 'Kathleen A. Desmond', is written over a horizontal line.

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Dated: January 22, 2025