

CITY OF MARLBOROUGH
ZONING BOARD OF APPEALS
Application for Variance or Appeal Hearing

FILE COPY

Official Use :

Date Received : 4-2-2021 City Clerk's # _____ ZBA Case # 1478-2021

Request for :

[] Variance [x] Appeal

Kamal Armanious, Resident Agent

Information :

Property Address 175 Lakeside Ave. Zoning District B Map# 80 Parcel# 8

Applicant is: [x] Owner [] Tenant [] Prospective Purchaser [] Other _____

I am the owner of the property and I have knowledge of, and consent to, this application.

Owner's signature Kamal Armanious Date 4/2/21

Owner's name St. Mary Thomas LLC Address 8 Wixtead Ct., Douglas

State MA Zip 01516 Phone# 508-331-2555 E-mail _____

Applicant name _____ Address _____

State _____ Zip _____ Phone# _____ E-mail _____

Representative Name: Mina Makarious Company Anderson & Kreiger LLP

Address 50 Milk St., 21st Floor, Boston

State MA Zip 02109 Phone# 617-621-6525 E-mail mina@andersonkreiger.com

Describe below what is being requested, such as what is the proposed action, relief, or construction on the property.

Request to overturn denial of building permit as described in the attached.

Provide below all sections of the Zoning Ordinance (Chapter 650, Article(s), Section(s), Paragraph(s), Subsection(s)) which are pertinent to the Variance (see denial letter).

Zoning Ordinance Chapter 650.12(B)(1); 650-24B; 650-24(E)(2)(d); 650-56

Variance

1. What is the soil condition, shape or topography of **YOUR** lot or structure which **DISTINCTLY** affects your lot, as distinguished from other lots in the zoning district which it is located.

N/A

2. What is the **HARDSHIP** that is **CAUSED** by the soil condition, shape or topography of your lot or structure stated above. **PERSONAL INCONVIENCE** is **NOT** a hardship. A hardship imposes a substantial financial penalty or directly affects your use of the land or structure as it is zoned.

N/A

3. State how the variance you are requesting, if granted, will not nullify or detract from the intent or purpose of the Zoning Ordinance.

N/A

4. State how the variance you are requesting, if granted, will not diminish the public welfare or well-being.

N/A

Appeal

State the specifics of the Appeal (use additional sheet if necessary).

Please see attached.

Application Packet:

The applicant shall submit ten (8) copies of the application packet which shall contain sufficient information to illustrate and defend the applicant's case and as a minimum shall consist of the following:

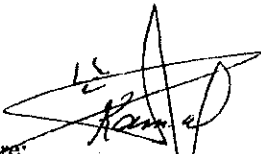
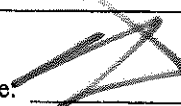
- Completed Zoning Board of Appeals Application Form
- Abutters List certified by the Assessor's Office
- Copy of denial letter from City Official
- Certified Plot Plan prepared and stamped by a Massachusetts Registered Professional Land Surveyor. A mortgage plan is **NOT** a certified plot plan. The certified plot plan shall include:
 - Plan Size 8 1/2" x 11" or 11" x 17"
 - Plans drawn to accurate scale with north arrow
 - Owner names and street addresses of directly abutting lots
 - Name of streets and zoning districts.
 - Bearing and distances of subject property
 - Dimensions and property line setbacks of all structures on subject property
 - Location of driveways, parking areas and other impervious surfaces on subject property
 - Location of walls, curbing, major landscaping, fences on subject property
 - Location of easements, wetlands and floodplains on subject property, if applicable
 - Dimensions and property line setbacks of all proposed work
 - Lot Coverage (area covered by all impervious surfaces) existing and proposed
 - Location and property line setbacks of structures, fences, driveways etc. on abutting lots that are within fifteen (15) feet of subject property lines
- Site plans of subject property showing topography and drainage structures, if regrading of the site or rerouting of runoff is proposed or if property is in Floodplain and Wetland Protection District.
- Architectural plans of new or modified building structure, if applicable.

Filing Fee: Filing fees are based upon the proposed **USE** of the property:

- Residential Non--revenue bearing \$130.00
- Residential Revenue bearing \$250.00
- Business, Commercial or Automotive \$375.00
- Industrial, Limited or Full \$500.00
- Special Permit (Flood Plain and Wetland Protection District..... \$450.00

Hearing Request: I hereby request a hearing before the Zoning Board of Appeals regarding this application packet and I am aware that two (2) legal ads will be placed in the MetroWest Daily News or the Marlborough Enterprise Weekly newspaper which will be billed directly to me or my representative. I am further aware that I am responsible for sending copies of the Notice of Hearing to all the abutters on the certified list at least fourteen (14) days prior to the hearing date and that I will submit the receipts confirming this mailing to the zoning office seven (7) days prior to the hearing. Finally, I am aware that I am required to record the board's certified decision and the certified plot plan with the Registry of Deeds in order for it to take effect.

ZBA Case # _____

Applicant's signature: 
 Print name: Kamal Armanious, St. Mary Thomas, LLC
 and/or
 Representative's signature: 
 Print Name: Mina S. Makarios


Date: 4/1/21

Date: 4/2/21

Official Use Only:

Received from applicant, the sum of \$ 375⁰⁰ Check # _____

Signature of the agent of the Zoning Board of Appeals:


 Susan Brown - Board Secretary
 Department - Zoning Board of Appeals
 140 Main Street
 Marlborough, MA 01752
 Tel# 508-460-3768 E-mail: sbrown@marlborough-ma.gov

Date: 4-2-2021

The date and signature of the agent of the Zoning Board of Appeals will serve as certification as to when the **COMPLETE** application packet accompanied by the proper filing fee was filed with this office.



City of Marlborough
BUILDING DEPARTMENT

140 Main Street
Marlborough, Massachusetts 01752
Tel. (508) 460-3776 Facsimile (508) 460-3736
building_dept@marlborough-ma.gov

JEFFREY COOKE, C.B.O.
BUILDING COMMISSIONER

PATRICK DAHLGREN
ASSISTANT BUILDING
COMMISSIONER

WILLIAM PAYNTON
LOCAL BUILDING INSPECTOR

RICHARD DESIMONE
PLUMBING & GAS INSPECTOR

JOHN CAIN
WIRING INSPECTOR

March 3, 2021

VIA CERTIFIED MAIL 7001 0320 0005 9088 0234 AND 7001 0320 0005 9088 0227

Owner

Kamal Armanious, Resident Agent
St. Mary Thomas, LLC
8 Wixtead Ct
Douglas Ma 01516

Applicant

Paul Cadd
Mr. Handyman
205 Church St
Marlborough, MA 01752

Re: Construction Permit Application
175 Lakeside Ave., Marlborough, MA
BP-2021-000234

Dear Mr. Armanious and Mr. Cadd:

This is to advise that your above-referenced building permit application to rebuild interior finishes for a gas filling station is denied. As you are already aware the structure suffered a fire in January 24, 2019 and the property has not been used since that time. The business has not been opened to serve any fuel or make any automotive repairs in the two years since that time and there has been no attempt to legally make any improvements to restore the site. You were repeatedly made aware by this office of the deteriorating condition of your property and your responsibility to repair the site.

This denial is predicated on the following in accordance with the following sections of the State Building Code 780 CMR and the City of Marlborough Zoning Ordinance Chapter 650.

- 780 CMR § 105.3.1 Zoning. In accordance with the provisions of M.G.L. c. 40A, no permit for the construction, alteration, change of use or moving of any building or structure shall be issued if such building or structure would be in violation of any zoning ordinance.
- Chapter 650.12(B)(1): Any nonconforming use or structure which has been abandoned or not used for a period of two years or more shall lose its protected status and be subject to this chapter. The use of the property as a gas station/motor vehicle service station, or automotive repair garage, is not allowed at this location as it is within the City of Marlborough's Water Supply Protection District. Chapter 650-24 B: Applicable activities or uses which fall within the Water Supply Protection District must comply with the requirements of this district as well as with the underlying zoning. Uses that are prohibited in the underlying zoning district shall not be permitted in the Water Supply Protection District.
- Chapter 650-24(E)(2)(d): Motor vehicle service stations; automotive repair garages are prohibited in Zone A of the Water Supply Protection District.

Mission Statement
To promote the safe and compatible development of the community through the fair and consistent enforcement of the building codes and zoning regulations.

Permit Application 175 Lakeside Avenue

If you are aggrieved by this order, you have the right to appeal within thirty (30) days pursuant to the provisions of M.G.L. c. 40A §§ 8 and 15 and Marlborough Zoning Ordinance Chapter 650 § 56.

The City of Marlborough's General Code, including the above referenced cites, can be found at www.ecode.360.com/MA1056.

Sincerely,



Patrick Dahlgren
Assistant Building Commissioner

Cc: Councilor Tunnera
City of Marlborough Legal Office
File

[Type here]

ANDERSON KREIGER

MINA S. MAKARIOUS
mmakariou@andersonkreiger.com
T: 617.621.6525
F: 617.621.6625

April 2, 2021

BY HAND DELIVERY AND EMAIL

City of Marlborough
Zoning Board of Appeals
140 Main Street
Marlborough, MA 01752

Re: 175 Lakeside Avenue Appeal

To the Zoning Board of Appeals:

I write on behalf of my client, St. Mary Thomas, LLC, to appeal the denial of a commercial building permit at 175 Lakeside Avenue, Marlborough (the "Property"). St. Mary Thomas has owned a gas station at the property since 2015. The station was destroyed in a fire on January 24, 2019. The City's Buildings Department denied a commercial building permit to rebuild a gas station on March 3, 2021, on the grounds that the gas station use had been abandoned, notwithstanding my clients' continuous efforts since 2019 to rebuild it. The permit was wrongfully denied under local and state law, and that denial should be overturned.

I. BACKGROUND

The Property is an irregularly shaped lot. Between 1969 and 2019, the Property was used as a gas station. St. Mary Thomas bought the Property and gas station in 2015. The managers of St. Mary Thomas, Kamal Armanious, Emmanuel Armanious and Bitar Armanious (collectively, the "Managers"), responsibly ran the gas station for over three years without any problems.

The Property is in a Business District. Gasoline filling stations and auto service facilities for minor repairs are permitted in the District by special permit. Marlborough Ordinances § 650, att. 1. The City of Marlborough (the "City") amended its zoning ordinance sometime between the construction of the gas station and 1996 to create a Water Supply Protection District. Zone A of the Water Supply Protection District encompasses any area within 400 feet of certain waterbodies, including Lake Williams. *Id.* § 650-24(D)(3)(a). This includes the Property. Motor vehicle service stations are prohibited in Zone A. *Id.* § 650-24(E)(2)(d). The amendment rendered the gas station a lawfully continued prior nonconforming use.

On January 24, 2019, a fire destroyed the station and badly damaged the Property. The station became unusable. The Managers, who have limited income outside of the gas station, immediately began working to rebuild. Because of the nature of the business, the COVID-19 pandemic and because of delay by third parties, rebuilding has been a complex, lengthy process.

On January 26, 2019, just two days after the fire, St. Mary Thomas engaged ARS Restoration to complete the mitigation and cleanup of the property and to prepare a quote for the repair of the gas station. In February and March 2019, the Managers reached out to their contact at ARS Restoration multiple times. Most of these efforts at communication were met with no response. ARS Restoration finally sent a brief summary of the scope of work, without details or a price quote, on March 22, 2019. ARS Restoration continued to stonewall the Managers into April. On April 7, the ARS Restoration representative requested a meeting to sign a contract for the work—for which ARS Restoration had not yet quoted a price. However, when the representative met with the Managers on April 8 he concluded that final approval for the work could not be granted until their insurance claim had been approved. Making matters worse, St. Mary Thomas's insurance representative was unavailable for much of April. The ARS Representative proceeded to fail to respond to another at least four attempts at communication in May.

While they waited for insurance so that repair could proceed, the Managers continued to diligently work to rebuild the property. They engaged contractors for tree removal, general contractor work, and electrical wiring. By August 2019, all contractors had been secured except for a roofing contractor.

The search for a roofing contractor, unfortunately, delayed the work for several more months. The Managers met with a roofing contractor on September 9, who agreed to send an official quote, but by October 18—after several text messages back and forth and another site visit—had not done so. After the other contractors performed initial work in January 2020, the Managers made an appointment with a second contractor in February, but the contractor never showed up to the appointment. A third roofing contractor sent a quote and agreed on a contract with the Managers in March. However, when it came time to sign the contract, the third contractor presented an unprofessional document that contained none of the agreed upon terms. A fourth roofing contractor never sent a promised quote after an appointment. A fifth roofing contractor sent a quote but then declined to commit to the work, citing other projects. Finally, nine months after beginning its search, St. Mary Thomas signed a contract with the sixth potential roofing contractor on June 2, 2020.

With all contractors finally engaged nearly a year and a half after the fire, St. Mary Thomas and its contractors turned their focus to securing necessary building permits. The roofing contractor worked to secure its permit from the City, and indicated on June 22 that it was delaying the start of the project because of a backlog in permit processing in Marlborough at the time. This backlog is unsurprising, given that the COVID-19 pandemic had struck Massachusetts three months prior. The roofing work finally began on August 25. The electrician applied for an electrical permit on June 17, 2020. The electrician finished its work by September, but the City

did not inspect and approve the restoration work until November 4, and did not notify National Grid of the approval until December. Accordingly, National Grid did not complete its power restoration until January 5, 2021, four months after electrical work had been completed. Roofing construction work was completed the same day.

The Managers spent the rest of January 2021 engaging a construction contractor and a plumbing to complete the remaining work. Their contractor in turn applied for a construction permit on February 10. However, the Assistant Building Commissioner denied the permit on March 3 asserting that the nonconforming use had not been used for two years.

The Property is currently idle. Because of the Property's irregular shape, future owners will struggle to establish a new use in compliance with the zoning law. The property could remain vacant for a substantial period of time if the Managers are unable to complete the reconstruction of the gas station. The Managers will also be placed in a very difficult financial situation if they are forced to maintain tanks, equipment, and leak detection monitoring to prevent soil contamination without the anticipated income from operating the station. In addition, if the station is not operational, it will likely be more difficult to insure.

II. ST. MARY THOMAS HAS BEEN DILIGENTLY WORKING TO RECONSTRUCT THE GAS STATION, AND IS THUS USING THE PROPERTY

State and local law protect nonconforming uses that existed prior to the enactment of a zoning bylaw. Zoning ordinances "shall not apply to structures or uses lawfully in existence . . . before the first publication of notice of the public hearing on such ordinance." G.L. c. 40A, § 6. However, a "nonconforming use or structure which has been abandoned or not used for a period of two years or more shall lose its protected status." Marlborough Zoning Code § 650-12(B)(1). Abandonment requires intent to abandon and voluntary conduct carry the implication of abandonment. *Ka-Hur Enterprises, Inc. v. Zoning Bd. of Appeals of Provincetown*, 424 Mass. 404, 406 (1997); *Dial Away Co. v. Zoning Bd. of Appeals of Auburn*, 41 Mass. App. Ct. 165, 172 (1996). "The 'not-used' test contemplates 'a simple cessation of a nonconforming use for a period of at least two years,' with no regard to whether the cessation was intentional or unintentional." *120 Front St., LLC v. Leblanc*, No. 18 MISC 000191 (MDV), 2019 WL 858767, at *5 (Mass. Land Ct. Feb. 21, 2019) (quoting *Town of Orange v. Shay*, 68 Mass. App. Ct. 358, 363 (2007)). Use is defined broadly and renovations or reconstruction can still constitute "use." *Lussier v. Rhodes*, No. 17 MISC 000283 (HPS), 2018 WL 6787046, at *5 (Mass. Land Ct. Dec. 24, 2018) (finding that "nonuse" of a residential building is "the simple cessation of the occupancy for residential purposes, provided that the failure to occupy was not for the purpose of making repairs or renovations" (emphasis added)). Because St. Mary Thomas diligently sought to rebuild the gas station, there was no abandonment, and only nonuse is at issue here.

The Managers have worked constantly since the fire to rebuild the gas station. They instructed their contractors to diligently apply for all necessary permits, wasting no time. Even though the gas station did not reopen within two years, the Managers were constantly engaged with the

Property and working to begin renovations and repairs. These efforts constitute “use.” Further, even accounting for the delays the Managers’ experience in securing contractors, the City’s own delays in processing permits and approvals accounted for several months of the delays, whereas the building permit application was filed just 17 days after the two year anniversary of the fire that destroyed the Property. The Property’s use as a gas station has thus not lost its protected status as a prior nonconforming use because it has not been abandoned or not used for two years, and to the extent it was not in commercial operation at the end of the two year period, that was not due to any inaction or failure to diligently prosecute construction by the Managers.

III. THE TWO-YEAR DEADLINE TO FINISH RECONSTRUCTION IS TOLLED

The Marlborough Zoning Code provides that, when a nonconforming use “is destroyed or damaged by fire . . . to not greater than 75% of the fair market value of the building or structure . . . the structure or use may be restored or rebuilt at the same location and used as previously, provided that . . . [t]he restoration or rebuilding . . . shall be completed within two years of the catastrophe, unless approved by the City Council in writing in accordance with Article VIII.” However, the two-year limit was tolled by the state legislature.

At the outset of the pandemic, the Legislature tolled any “permit in effect or existence as of March 10, 2020 . . . during the state of emergency.” An Act to Address Challenges Faced by Municipalities and State Authorities Resulting from COVID-19, Acts 2020, c. 53, § 17(b)(iii) 19 [hereinafter the “Permit Tolling Act”]. This tolling period is still ongoing—a subsequent statute ended other tolled time limitations, but not this provision. *See* Acts 2020, c. 201, §§ 33–38. “Permit” under the Permit Tolling Act means “a permit, variance, special permit, license, amendment, extension, or other approval issued by a permit granting authority pursuant to a statute, ordinance, bylaw, rule or regulation, whether ministerial or discretionary,” where a permit granting authority is a local official or body authorized to issue a permit. Permit Tolling Act § 17(a).

The definition of “permit” should be read to encompass the two-year limit in the Marlborough Zoning Code. The use of the phrase “other approvals” indicates that the Legislature intended the Act to be broadly construed to apply to as many municipal permissions as possible. When a fire destroyed its gas station, St. Mary Thomas automatically had permission to rebuild the station. Although St. Mary Thomas had not formalized this permission in a building permit, the permission still existed. The granting of the building permit was a ministerial formality that merely codified the existing pre-existing nonconforming use approval. Thus, the permission is an “other approval” targeted by the permit tolling act.

The context surrounding the Permit Tolling Act also suggest the Act applies to Marlborough’s two-year time limit. Like everyone else, the Managers have been deeply affected by the COVID-19 pandemic. The pandemic made it difficult and time-consuming for St. Mary Thomas to secure municipal permits. Hiring contractors was an extraordinarily lengthy process, which the pandemic made only more difficult. These problems were widespread throughout the

Commonwealth, so the Legislature addressed them by tolling permits. It was the Legislature's intent to prevent the unfairness that would result if landowners were unable to complete their planned construction because of the pandemic. That intent is especially applicable to this situation, where the Managers repeatedly sought to hire responsible contractors to perform the work, and to push City staff to complete inspections, but faced delays throughout 2020. Further, the Permit Tolling Act also extended numerous deadlines for municipal action. Permit Tolling Act § 17. Given that municipal delay was partially responsible for the lapse of two years, it would be inequitable to not extend the same extension to St. Mary Thomas.

The underlying statutory regime also favors a broad interpretation of the Permit Tolling Act. "A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more." G.L. c. 40A, § 6. An ordinance may be less strict than § 6 in its treatment of nonconforming uses, but not more. *Bellalta v. Zoning Bd. of Appeals of Brookline*, 481 Mass. 372, 386 (2019). As discussed above, "use" can include reconstruction and repair of the nonconforming use. Thus, the Property has not been "abandoned or not used for a period of two years or more," a prerequisite for local zoning ordinances to apply. Marlborough's requirement that landowners complete reconstruction in two years strains the limits of what state law permits. The Zoning Board of Appeals should take advantage of the Permit Tolling Act to avoid having to confront the legality of the Marlborough ordinance.

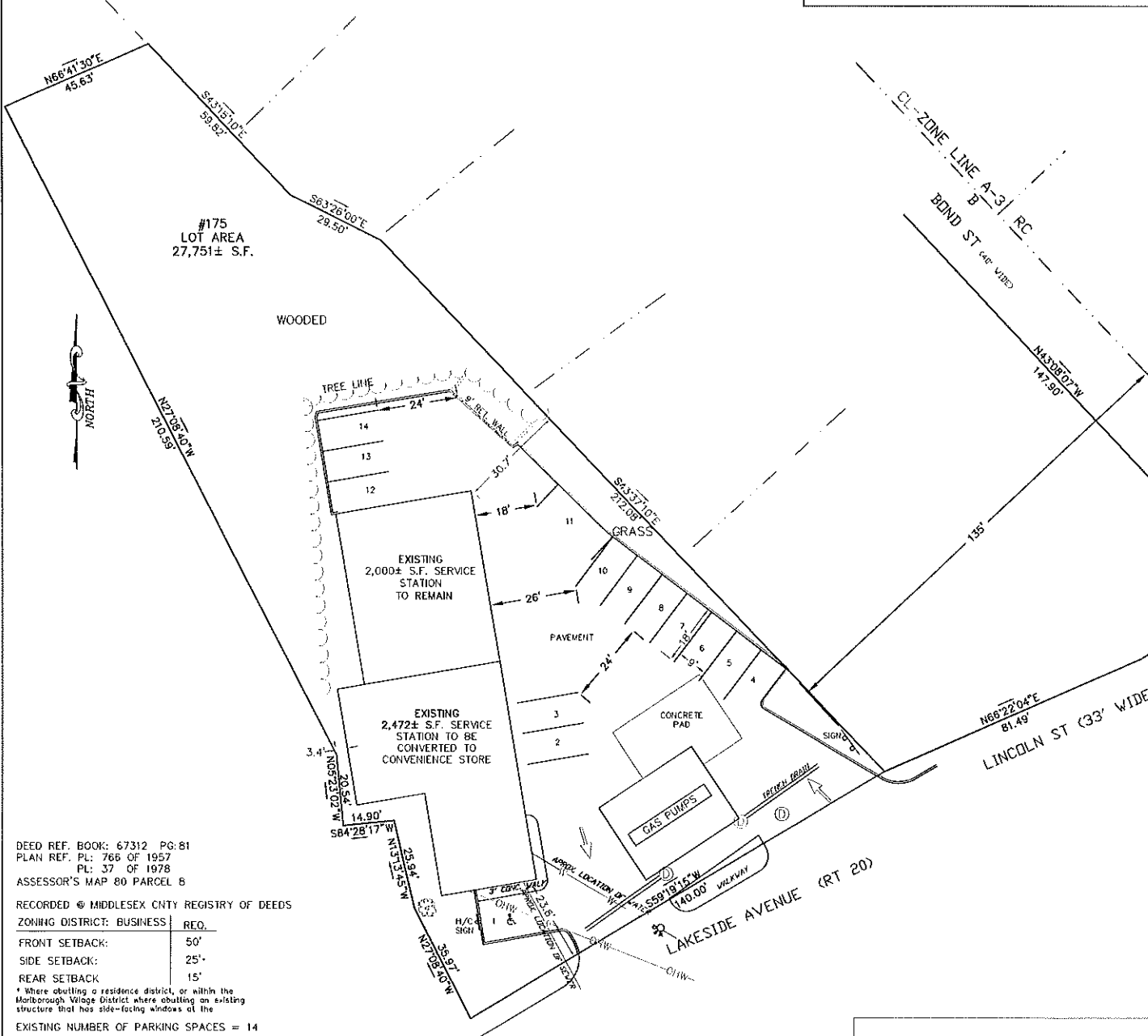
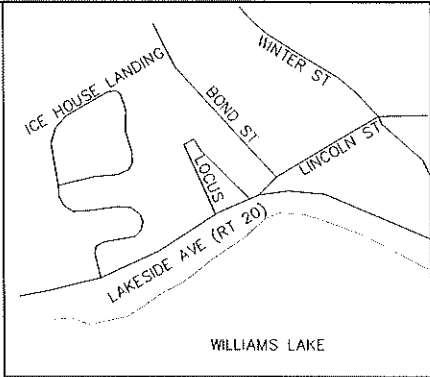
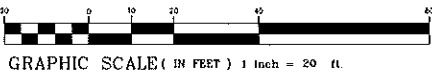
IV. CONCLUSION

The Zoning Board of Appeals should reverse the denial of the commercial building permit and grant a permit to St. Mary Thomas to rebuild the gas station.

Sincerely,



Mina S. Makarious



DEED REF. BOOK: 67312 PG.81
 PLAN REF. PL: 766 OF 1957
 PL: 37 OF 1978
 ASSESSOR'S MAP 80 PARCEL 8

RECORDED @ MIDDLESEX CNTY REGISTRY OF DEEDS

ZONING DISTRICT: BUSINESS	REQ.
FRONT SETBACK:	50'
SIDE SETBACK:	25'
REAR SETBACK:	15'

* Where abutting a residence district, or within the Marlborough Village District where abutting on an existing structure that has side-facing windows at the

EXISTING NUMBER OF PARKING SPACES = 14

THE PURPOSE OF THIS PLAN IS TO CONVERT 2,472± S.F. OF EXISTING SERVICE STATION INTO A CONVENIENCE STORE.

- NOTES:
1. THE PARCEL IS NOT LOCATED IN FLOOD ZONE PER FEMA MAP, COMMUNITY PANEL NO. 25017C 0479E, EFFECTIVE DATE JULY 07, 2014.
 2. BOUNDARY INFORMATION SHOWN HEREON IS THE RESULT OF A GROUND SURVEY CONDUCTED BY ALPHA OMEGA ENGINEERING INC. AND FROM EXISTING DEEDS AND PLANS.
 3. UTILITY INFORMATION SHOWN HEREON WAS TAKEN FROM INFORMATION SUPPLIED BY THE VARIOUS UTILITY COMPANIES. LOCATION AND SIZES OF ALL UTILITIES MUST BE FIELD VERIFIED BY ALL CONTRACTORS PRIOR TO THE START OF ANY CONSTRUCTION. "DIG SAFE" MUST BE NOTIFIED A MINIMUM OF 72 HOURS IN ADVANCE PRIOR TO ANY EXCAVATION.
 5. ASSESSOR'S MAP REFERENCE: TAX MAP 80, PARCEL 8

PLOT PLAN
 LOCATED AT
 175 LAKESIDE AVENUE
 MARLBOROUGH, MA
 PREPARED FOR
 ST. MARY THOMAS, LLC
 06/05/2017

ALPHA OMEGA ENGINEERING INC
 CIVIL ENGINEERS & LAND SURVEYORS
 ENVIRONMENTAL CONSULTANTS
 25 HIGHLAND VIEW DR
 SUTTON, Massachusetts 01590
 (508) 865-9551
 Fax: (508) 865-9551
 info@alphaomegaeng.net
 www.alphaomegaeng.net

Exterior

