



Decision of the Scituate Zoning Board of Appeals on the application of Maturalago, LLC c/o The Hamilton Company, 39 Brighton Avenue, Boston, Massachusetts 02134 (collectively, the “Applicant”) for a determination/finding that the proposed retail/office and restaurant use of the premises at 146-164 Front Street are permitted by right at the subject property or in the alternative a special permit/finding under M.G.L. c. 40A, Section 6 and Sections 820/1020.2(D) of the Scituate Zoning Bylaws as a change in a nonconforming use. The decision is also for a determination/finding that the parking requirements of Section 760 of said Bylaws are not applicable to the proposed uses/project pursuant to Section 760.2 of said Bylaws since it does not involve an intensification of the parking use, or in the alternative if they are applicable, then for a determination/finding that the proposed uses/project requires a Site Plan Special Permit from the Planning Board pursuant to Section 770 of said Bylaws, or such other relief as the Planning Board deems appropriate.

The application was timely received, advertised, and a public meeting was held on September 17, 2009 with the following members of the Zoning Board of Appeals hearing the application:

Mr. Peter Morin
Mr. Brian Sullivan
Ms. Sara Trezise

The Applicant was represented at the public meeting by the following representatives (i) Bernard F. Shadrawy, Jr., attorney of Shadrawy & Rabinovitz; and (ii) Stephen Weinig of Hamilton Construction Management Corp.;

The subject property identified in the application is known as Unit 1 of the Welch Company Condominium located at 146-164 Front Street, Scituate, Massachusetts and is owned by the Applicant by a certain deed recorded at the Plymouth County Registry of Deeds at Book 36286, Page 158. Unit 1 of the said Welch Company Condominium consists of (i) a building located at 146 Front Street, Scituate, Massachusetts, (ii) a building located at 162 Front Street, Scituate, Massachusetts, (iii) a building located at 164 Front Street, Scituate, Massachusetts, and (iv) a building known as the “Cable Building”, together with appurtenant rights as set forth in the Condominium Master Deed and the Master Plans (hereinafter the “Premises” or “Unit 1 Premises”). The application concerns the proposed retail, office and restaurant uses of the Unit 1 Premises and the applicability of the parking requirements to such uses.

The Applicant provided the Board with the following application materials: (1) Condominium Site Plan prepared by Ross Engineering dated 2/8/07; (2) Site Plan, A1.1, prepared by The Hamilton Company dated 8/20/09; (3) 1st Floor Plan, A1.4, prepared by The Hamilton Company dated 8/20/09; (4) 2nd & 3rd Floor Plans, A1.5, prepared by The Hamilton Company dated 8/20/09; (5) Condominium Floor Plans – 164 Front Street and The Cable Building prepared by Ross Engineering dated 2/8/07; (6) Front and Rear Elevations, A2.1, prepared by The Hamilton Company dated 8/20/09; (7) a set of photos

of the subject property; (8) a current unit deed; and (9) information from the Town Assessor. The Applicant, by its attorney also provided the Board with a Memorandum in Support of the Application with the following five (5) exhibits: (i) Condominium Site Plan prepared by Ross Engineering dated 2/8/07 as recorded in Plan Book 52, Page 1044 at the Plymouth County Registry of Deeds; (ii) Decision of the Scituate Zoning Board of Appeals for the subject property as voted January 19, 2006; (iii) Common Victualler License dated December 7, 2004 and portion of Application for Lotus Restaurant; (iv) Land Court Case Docket for Zoning Appeal for the subject premises in Case No. 06MISC327751; and (v) Site Plan Mill Wharf Restaurant prepared by Loring H. Jacobs, Co. dated December 30, 1983, as revised and Scituate Planning Board approval of said Site Plan dated January 25, 1984 and related meeting minutes.

The Proposed Uses/Project of the Unit 1 Welch Company Condominium Premises consists of the following:

- a) Removed Use – the residential apartment occupying the 2nd and 3rd floor of 162 Front Street has been removed and replaced with accessory mechanical space on the 3rd floor and no use on the 2nd floor.
- b) Proposed Uses –
 - (i) A 65 seat restaurant to occupy the 1st floor space (Restaurant #1) at 162 Front Street formerly occupied by the 65 seat Lotus Restaurant in addition to 400 square feet of 1st floor former retail space at 146 Front Street for accessory restrooms and manager's office (total area of 2100 square feet);
 - (ii) A children's retail store at Retail Tenant #2 space at 146 Front Street containing 1900 square feet;
 - (iii) A 200 SF office on 2nd floor at 146 Front Street (Office Tenant C3);
 - (iv) Pre-existing Uses (Unit 1) – In addition to the above Proposed Uses the remainder of 146 Front Street will continue retail uses on the first floor and office uses on the second floor as indicated on the accompanying plans. The use of 164 Front Street will remain 1673 square feet of retail space and the use of the Cable Building will remain office use on the 1st and 2nd floors totaling approximately 2200 square feet.

The Removed Use and Proposed Uses are hereinafter collectively referred to as Proposed Uses/Project.

The Board discussed the issue of whether uses permitted by right in a nonconforming structure are nonconforming uses. The Applicant though their attorney presented

nonconforming use for the Proposed Uses/Project under these circumstances. Testimony was provided by former Scituate Zoning Board of Appeals Chairman John F. Danehey that any prior Board decision for the subject property that determined that permitted uses in nonconforming structures were per se nonconforming uses was incorrect and the equivalent of a scrivener's error. The Board concurred with former Chairman Danehey and found that the Scituate Zoning Bylaws did not support such a determination of a nonconforming use for the Proposed Uses/Project under these circumstances. The Board found and determined that the proposed retail, restaurant and office uses of the structures situated on the Unit 1 Premises are not nonconforming uses because they are situated in a nonconforming structure or structures but are not only long term continuing pre-existing uses but are uses permitted by right in a Business District under Section 430 of the Scituate Zoning Bylaws.

The Board next addressed the issue of the applicability of the parking requirements under Section 760 of the Zoning Bylaws to the Proposed Uses/Project and if it the proposed and current uses amounted to an intensification of use. Section 760.2 of the Zoning Bylaws governs the applicability of the Parking Requirements of Section 760 to the Proposed Uses/Project and states as follows:

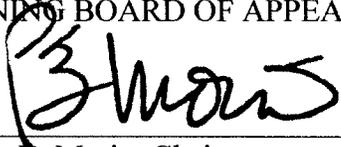
“Off-street parking shall be provided to service the net increase in demand created by new construction, additions, or change of use. Structures and land uses in existence on January 1, 1988, are not subject to these requirements so long as they are not enlarged or changed in a manner that increases their parking needs.”

Analysis of the provisions of Section 760.2 turns on an examination of net increase in demand or increases in parking needs. These concepts are generally referred to as intensification of use. The Board examined the applicability of the parking requirements to the long-standing existing 90 space parking area referred to on the Condominium Site Plan as Aggregate Common Area and Facilities and the Proposed Uses/Project.

The Board reviewed the parking numbers on the Mill Wharf Restaurant Site Plan as approved on January 25, 1984 by the Planning Board and the other evidence submitted by the Applicant. The Board examined the impact of the Proposed Uses/Project on parking demand and intensification of use and indicated that the removal of the residential apartment and four hundred square feet of retail space resulted in a net decrease in parking demand relative to the uses in existence on January 1, 1988. The Board found that the structures and uses of the Unit 1 Premises existed prior to January 1, 1988. The Board next found and determined that the Proposed Uses/Project of the Unit 1 Premises do not result in a net increase in parking demand created by new construction addition or change of use and therefore did not amount to an intensification of use. The Board further found that the parking requirements of Section 760 of the Zoning Bylaws are inapplicable to the Proposed Uses/Project subject to the condition that the proposed restaurant use on the first floor of 146-162 Front Street shall not exceed a maximum of 65 seats.

Based upon the evidence and information presented at the public hearing, the Board unanimously voted to approve the findings/determinations as set forth above and to allow the Applicant to proceed with the Proposed Uses/Project subject only to a condition that seating for the proposed restaurant use not exceed a maximum of 65 seats.

ZONING BOARD OF APPEALS



Peter B. Morin, Chairman



Brian B. Sullivan



Sara J. Trezise

Filed with the Town Clerk on: October 1, 2009

This Special Permit/Finding will not become effective until such time as an attested copy of this decision has been filed with the Plymouth County of Deeds after the appeal period of twenty (20) days.

Appeal of any decision of the Zoning Board of Appeals may be made pursuant to M.G.L. Chapter 40A, Section 17, and shall be filed in a court of competent jurisdiction. Proof of that filing shall be provided to the Town Clerk within twenty (20) days of the date of the filing of the decision with the Town Clerk.