Town of Scituate

ZONING BOARD OF APPEALS

600 CHIEF JUSTICE CUSHING WAY
SCITUATE, MASSACHUSETTS 02066
(781) 545-8716

DECISION ON REMAND ON APPLICATION FOR SPECIAL PERMIT/FINDING
G.L. c. 40A, §§6, 9; SCITUATE ZONING BY-LAWS § 820/1020.2(D)

APPLICANT: DICHRISDA, LLC
PROPERTY: 44 JERICHO ROAD
DATE: MARCH 20, 2008

I. PROCEDURAL HISTORY

This matter concerns the application of Dichrisda, LLC (the "Applicant") for a Special Permit/Finding under M.G.L. Ch. 40A, §§ 6, 9 and § 820/1020.2(D) of the Scituate Zoning Bylaws to allow a change of an alleged pre-existing nonconforming use/structure located on the premises located at 44 Jericho Road (hereinafter, the "Property" or "Pier 44") to a more restricted use and structure.

The original application was received, advertised, and an initial public hearing was opened on April 26, 2006, and continued at the Applicant's request to May 24, 2006. The hearing was closed on May 24, 2006, at which point the Board voted to deny the Application. The Board's denial was based upon the fact that the alleged *pre-existing* nonconformities were in fact, not *pre-existing*. Rather, the alleged non-conformities were permitted under a series of variances. Accordingly, relief under G.L. c. 40A, §6 and the above-cited provisions of the Scituate Zoning By-law was found to be unavailable. As such the Applicant did not have the requisite standing and the Application was denied for lack of subject matter jurisdiction. The Board's original denial, which was filed with the Town Clerk on August 18, 2006, is attached hereto as Exhibit A.

The Applicant appealed the Board's denial to the Plymouth County Superior Court, raising a number of claims, including a claim for a constructive grant. The Board, as well as the Scituate Planning Board, filed a separate appeal in the Land Court, challenging the Applicant's claim for a constructive grant.

The litigation between the parties was consolidated and featured a variety of procedural maneuvers until the Board finally moved to remand the matter so as to address the perceived procedural defects that the Applicant had alleged. Although the Applicant opposed the remand, the Court granted the Board's Motion, requiring that a new hearing be held.

The Board scheduled a duly noticed and published public hearing for the remanded application. The hearing was scheduled to commence on October 25, 2007. Additionally, pursuant to the Court's directive, the Board's Special Counsel, Jason Talerman, reviewed the

possibility of conflicts of interest for each of the Board's members and associate members. It was determined that no conflicts of interest existed. Although, outside of the hearing process, the Applicant's counsel levied veiled accusations of potential conflicts of Board member Sara Trezise, the Massachusetts Ethics Commission informed Ms. Trezise that no conflict existed.

The hearing commenced on October 25, 2007. The presiding Board members were Albert Bangert (Chair), Sara Trezise and Brian Sullivan. Associate members Peter Morin and Edward Tibbets were also in attendance. The Applicant, however, did not attend, and, instead, requested, by letter dated October 25, 2007, that the hearing be continued to some time after January 1, 2008 due to "the large number of professionals involved with Dichrisda's development team and the impending holiday season." A copy of this letter is attached hereto as Exhibit B. The Board, therefore, continued the public hearing to January 10, 2008. On January 8th, the Applicant wrote to the Board and stated that it did not wish to proceed with the remand hearing "at this time." At the January 10th hearing session, the Applicant and his counsel were in the hearing room for a hearing on a related application, submitted under c. 40B, for a similar building on the same site. The Applicant exited the room immediately prior to the c. 40A hearing being called to order. Upon opening the hearing session, the Board requested that the Applicant provide the Board with its intentions for the ongoing hearing. However, neither the Applicant nor his counsel responded to the request. Accordingly, the Board granted one more continuance, until January 31, 2008. The grant of this continuance was based upon the confusing nature of the Applicant's correspondence and the Board's uncertainty as to whether the Applicant intended to proceed at all. On January 11, 2008, the Board wrote to the Applicant outlining the status of the proceedings. The Board's letter is attached hereto as Exhibit C. On January 31st, the Board duly reopened the public hearing but, again, the Applicant, who was present for the related proceeding, failed to respond and, again, left the room. Accordingly, the Board closed the public hearing.

Before closing the public hearing, the Board incorporated all of the Application materials and other evidence collected in association with the original proceedings.

II. PROJECT AND PROPERTY DESCRIPTION

Based upon the Applicant's submissions and public record, the Property which is the subject of this application is located at the intersection of Jericho and Hatherly Roads. It also borders Scituate Harbor on the easterly side.

The restaurant that occupied the property at the time of the original application, known as ***"Pier 44"***, had been a well known local institution in the Town, in various incarnations, for well over forty years.[1] The restaurant, and prior uses on the Property, came into existence by virtue of a series of variances that are more particularly described in Exhibit A hereto.

The Application proposes to raze the existing restaurant and replace it with a 22-unit condominium complex. The plans submitted by the Applicant indicate that the proposed building will have a much larger footprint than the existing restaurant. The plans also indicate

[1] A restaurant under a different name is presently doing business on the Property.

that the height of the building will exceed the height limitations contained within the Scituate Zoning By-laws. However, the Applicant did not request a variance from height limitations.

III. FINDINGS

1. Under G.L. c. 40A, §6, it is an applicant's burden to establish that a proposed alteration of a pre-existing non-conforming structure or use is "not substantially more detrimental than the existing nonconforming use to the neighborhood" than the present structure or use. Similarly, under Section 820 of the Scituate Zoning By-laws, it is an applicant's burden to establish that such an alteration is "not substantially different in character, or more detrimental or injurious to persons, property or improvements in the vicinity." The Board finds that it provided the Applicant with no less than three opportunities to appear before it and attempt to satisfy these burdens of proof. However, the Applicant failed to appear before it and make any presentation in support of the Application. Accordingly, the Board finds that the Applicant failed to satisfy its burden of proof.

2. Under 1020.2(D) of the Zoning By-laws, approvals under Section 820 require a Special Permit. Under G.L. c. 40A, §9, it is the burden of applicant for a special permit to demonstrate that the proposal is "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." The specific provisions of the Scituate Zoning By-laws are contained in Section 1030.2, which require that an applicant for a special permit establish that:

   A. The specific site is an appropriate location for the use or structure.
   B. The use as developed will not adversely affect the neighborhood.
   C. There will not be an undue nuisance or serious hazard to vehicles or pedestrians as a result of the proposed use or structure.
   D. Adequate and appropriate facilities will be provided to assure the proper operation of the proposed use or structure.
   E. There will not be any significant impact on any public or private water supply.

   The Board finds that it provided the Applicant with no less than three opportunities to appear before it and attempt to satisfy these burdens of proof. However, the Applicant failed to appear before it and make any presentation in support of the Application. Accordingly, the Board finds that the Applicant failed to satisfy its burden of proof.

3. The Board finds that its August 18, 2006 denial of the Application was based upon an accurate assessment of the facts and the law. Accordingly, the Board finds that the uses and structures on the property do not enjoy the classification as being "pre-existing nonconforming." Accordingly, the Board adopts the reasoning set forth in its prior decision and finds: (a) that the Applicant lacked standing to seek relief under

Sections 820 and 1020.2(D) of the Zoning Bylaws; and (b) that the Application is *dismissable* for lack of subject matter jurisdiction.

4. The Board finds that it provided the Applicant with no less than three opportunities to appear before it and provide evidence, testimony or other proof as to why the Board's August 18, 2006 decision did not set forth a correct statement of fact or law. However, the Applicant failed to appear before it and make any presentation in support of a contention that the Board's prior decision was erroneous.

5. The Board finds that, based upon its non-appearance and written statements, the Applicant has abandoned its Application.

6. The Board finds that the project proposed by the Applicant would not be possible without an application for a variance from height limitations contained within the Zoning By-laws. The Applicant has not applied for such a variance. As such, even if the Application was not dismissable on other grounds, a permit under Sections 820 and 1020.2(D) of the Zoning By-laws would be insufficient to allow construction of the condominium complex proposed by the Applicant. The Application is therefore moot.

7. The Board finds that the Applicant has not complied with the letter or spirit of the Court ordered remand of this matter.

IV. DECISION

Accordingly, for the foregoing reasons, by Motion of Albert Bangert, seconded by Sara Tezise, the Board unanimously voted to deny the Application.

ZONING BOARD OF APPEALS

Albert Bangert, Chairman

Sara Trezise

Brian Sullivan

Concurring:

Edward Tibbetts, Associate Member

Peter Morin, Associate Member

Filed with the Town Clerk on 4/1/08

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 Registry of Deeds after the appeal period of twenty (20) days.

Any appeal of any decision of the Zoning Board of Appeals may be made pursuant to M.G.L. Chapter 40A, § 17, and shall be filed within twenty (20) days of the date of the filing of the decision with the Town Clerk.

Town of Scituate

ZONING BOARD OF APPEALS

600 CHIEF JUSTICE CUSHING WAY
SCITUATE, MASSACHUSETTS 02066
(781) 545-8716

Decision of the Scituate Zoning Board of Appeals on the application of Dichrisda, LLC of 44 Jericho Road, Scituate, Massachusetts for a Special Permit/Finding under M.G.L. Ch. 40A, § 6 and § 820/1020.2(D) of the Scituate Zoning Bylaws to allow a change on an alleged existing nonconforming use(s) of the premises located at 44 Jericho Road (known as "***Pier 44***") to a more restricted use(s) or to uses not substantially more detrimental or injurious to persons, property or improvements in the vicinity.

The application was received, advertised, and an initial public hearing was opened on April 26, 2006, and continued at the Applicant's request to May 24, 2006. The following members of the Zoning Board of Appeals heard the application and voted at the special hearing on May 24, 2006:

John F. Danehey, Chairman
Edward C. Tibbetts
Richard Dennis

David A. Pallotta (manager) appeared at the hearings on behalf of Dichrisda, LLC (hereinafter referred to as "the Applicant"), along with the following representatives: (i) William H. Ohrenberger, III, Esq., and Jeffrey A. De Lisi, Esq., of Ohrenberger Associates; (ii) Paul Mirabito, L.S., of Ross Engineering Company, Inc.; (iii) J. Peterman; (iv) Steven G. Cecil of The Cecil Group, Inc.; and (v) John W. Diaz of GPI Greenman – Pedersen, Inc.

The Applicant provided the Board with the following application materials: (1) application seeking a Special Permit/Finding; (2) Color plans of floor, elevations, parking, and roof/site of Pier 44 Redevelopment designed by The Cecil Group; (3) plan prepared by Ross Engineering Company Inc. entitled "Proposed Site Plan Pier 44 Redevelopment – 44 Jericho Road, in Scituate, Massachusetts", dated March 6, 2006, containing the following five sheets: (i) Title Sheet, (ii) Existing Conditions Plan, (iii) Layout and Grading Plan, (iv) Parking & Utility Plan, and (v) Construction Details; (4) Technical Memorandum (Traffic Analysis) dated March 2006, prepared by GPI Greenman-Pedersen, Inc.; (5) current photographs of the site; (6) a Quitclaim Deed from James F. Mulvee and Debra A. Mulvee, Trustees of Harborview Realty Trust for $3,000.000.00 to Dichrisda, LLC (dated August 8, 2003); (7) Plan of Land 44 Jericho Road, in Scituate, Massachusetts (dated August 4, 2003 and recorded at the Plymouth County Registry of Deeds in Plan Book 2003, page 571); (8) Town of Scituate Assessors Card; (9) and "Exhibit 'A'" explaining the metes and bounds of the property; (10) a Subdivision Plan of Land in Scituate, Mass., owned by Allan R. Wheeler and Anne M. Wheeler (dated March 28, 1960 by Stenbeck & Taylor, Inc. Surveyors, Marshfield, Massachusetts (Revised January 1961); (11) Annotated Laws of Massachusetts (Recompiled 1952 by Gabriel V. Mottla and Fernald Hutchins) Chapter 40 Sections 24 through 38; (12) Town of Scituate – Building By-Laws (1949); (13) Plan of Land in Scituate, Mass. Surveyed for Thomas L. Dwyer (dated September 23, 1957) and recorded at the Plymouth County Registry of Deeds (on or about October 14,

1957) in Book 25, Page 461; (14) Letter addressed to the Chairman (dated May 24, 2006); (15) Affidavits from Charles Short Sr., Robert Harris, Tom Steverman, and Thomas Bell; and (16) assessors information from 1954.

In addition to the information provided by the Applicant, the Board also received the following public information: (A) May 29, 1951 Zoning Board of Appeals Variance (approval) (with attached minutes of the meeting); (B) November 2, 1960 Zoning Board of Appeals Variance (approval) (with attached minutes of the meeting and verbatim reference of the May 29, 1951 Variance); (C) Planning Board Comments (dated April 19, 2006); (D) June 16, 1951 Planning Board Letter addressed to the former Building Inspector Lester Hobson; (E) June 22, 1951 Letter from Planning Board Attorney to Inspector of Buildings; (F) February 2, 1956 Zoning Board of Appeals of Liquor Variance (denial); (G) March 2, 1961 Letter from former Building Inspector/Zoning Enforcement Officer, Edward G. Sexton referencing the May 29, 1951 Variance; and (H) April 30, 2006 Letter from Stephanie G. Bono of 20 Porter Road.

The Applicant's attorney was afforded an opportunity to address the Board with an opening statement concerning the Applicant's petition and proposed development project. Specifically, the Applicant proposed to tear down the existing restaurant business and build twenty-two (22) condominium units on the site which has 45,000 square feet (37,500' which is above the high water mark and 7,500' below). Based upon the representations of Applicant's attorney opening statement, there are no affordable units included in the development project. The restaurant use is the sole business at the premises.

The Applicant filed the application under Scituate Zoning By-Law, Section 820 presuming that the restaurant "use" was nonconforming. The use is not nonconforming because it came about by grant of a variance. Section 820, entitled "Change of Nonconforming Use", states: [t]he board of appeals may authorize a nonconforming use to be changed to a more restricted use or to a specified use not substantially different in character, or more detrimental or injurious to persons, property or improvements in the vicinity. . ." The Applicant is under the mistaken belief that if the restaurant "use" is nonconforming it can petition the Board requesting it to authorize a change of the "nonconforming use" of the premises to a more restricted use or uses not substantially more detrimental to persons, property, or improvements in and around the area.

In order to understand what would be classified a nonconforming use, review of Scituate Zoning By-Law, Section 810 is necessary. Section 810 defines nonconforming structures and uses already in existence as:

> "Any lawful structure or any lawful use of land or structure, existing at the effective date of this bylaw or any amendment thereto, subject to the limitation established in Massachusetts General Laws, Chapter 40A, Section 6, as amended, or any construction or operation for which a building permit has been issued prior to the effective date of this bylaw or any amendment thereto may be continued, although not in conformity with the provision thereof, unless or until abandoned or not used for a period of two years or more."

The only issue the Board addressed concerning this application was whether the present restaurant "use" qualifies as a pre-existing nonconforming use, as described in M.G.L. Ch. 40A § 6 and the Zoning By-Laws. The legal issue presented by the application, in light of the public information pertaining to the subject property, is whether the Applicant has legal standing to file for a special permit/finding, under Sections 820/1020.2(D) of the Scituate Zoning By-Law and M.G.L. chapter 40A, §6, in light of the fact that the business "use", i.e., the restaurant, came about, not through preexisting right as identified in the statute and by-laws, but through the after-the-fact dispensation of a variance granted by the Board on May 29, 1951. The Board determined that the Applicant did not have legal standing to apply for a change of the "nonconforming use" because it was granted a variance, i.e., a prohibited use, to operate the restaurant, and for that reason, **DENIED** the application.

Background:

Based upon the Applicant's submissions and public record, the parcel of land, which is the subject of this application, is located at the intersection of Jericho and Hatherly Roads. It also borders Scituate Harbor on the easterly side. The parcel was originally purchased on or about October 16, 1941 by Thomas L. Dwyer from Annie P. Foster, and contained at that time approximately nine acres.

After purchasing it, Mr. Dwyer filed a petition with the Zoning Board of Appeals for a variance. Specifically, in 1945, Mr. Dwyer filed for relief from the then existing zoning laws to permit the operation of a business on the land for "bleaching beaches", i.e., bleaching of Irish moss. On July 31, 1945, a hearing was held at the former high school cafeteria (now Gates Middle School) wherein Mr. Dwyer sought a variance to operate a business on the site because he had developed a new process to bleach the moss in level floor basins constructed of cement using pumps to pump salt water from the harbor into the basins to bleach the moss. According to the information provided, the process would take between 2 to 48 hours as compared to the more traditional bleaching period of time of approximately 15 days. From the minutes of the meeting, Mr. Dwyer understood that harvesting of Irish moss had been employed at or around the site "for many years prior to the time the zoning by laws, became effective in 1936." Mr. Dwyer, by and through his attorney, understood then that the land he owned was located in the "A" district which is a residential area, and that the business he sought to operate at the site, could not operate without a variance. The Board unanimously voted to grant Mr. Dwyer a variance to operate the mossing business at the site.

The restaurant that presently occupies the property, known as "***Pier 44***", has been a well known local institution in the Town, in various incarnations, for well over forty years. Interestingly, the restaurant first came into existence by virtue of another variance that was subsequently granted by the Board in 1951 (hereinafter referred to as "1951 Variance"). The 1951 Variance is sufficiently clear. The Board granted the 1951 Variance to the petitioner, Thomas L. Dwyer, who sought permission to conduct a restaurant business in the residential district. (Minutes of the decision were attached to the decision and provided the Board intriguing anecdotal

commentary and observations.) The 1951 Variance specifically permitted Mr. Dwyer to conduct a restaurant in the residential district upon four conditions: (1) denial would result in a substantial hardship to Mr. Dwyer; (2) the Variance would "meet the altered needs" of the area and will not adversely affect the "character in the district"; (3) the Variance would be "in the interest of the public good and [would] not substantially derogate from the purpose of the Zoning By-laws" as there were and/or are four other businesses being conducted in the same area; and (4) the Variance is being conditioned that no alcoholic beverages be sold upon the premises. As a direct result of the issuance of the 1951 Variance, a restaurant was subsequently built and operated to this present day.[1]

Thereafter, in 1955, another application to amend the existing variance was made by a lessee of the property to the Board to serve alcohol. In particular, on January 5, 1956, a hearing was held where the Applicant, Frank J. Kenney (lessee), sought a variance to dispense alcoholic beverages, i.e., table service only, at the restaurant owned by Mr. Dwyer. A decision was rendered by the Board on February 2, 1956, wherein it *"denied"* the application for sale of alcohol. (Unfortunately, there were not minutes of the decision).

Not to be deterred, on May 22, 1958 another application was made by Edwin A. Dobson, d/b/a Eddie Dobson's Restaurant, for a variance for "the service of all alcoholic beverages to persons seated at tables only". (The minutes of the meeting were attached and reference the 1951 "conditional" Variance.). At the close of the hearing, the Board voted unanimously to *"deny"* the request.

On or about February 6, 1960, Mr. Dwyer sold the property to Allan R. and Anne M. Wheeler. Shortly after this purchase, Mr. & Mrs. Wheeler subdivided the lots, thereby creating five (5) lots, 1, 2, 3, 4, and 5. The two lots that continued to remain as part and parcel of the restaurant were lots 1 and 2.

Undaunted, another applicant filed an application to amend the variance to permit the sale of alcohol at the restaurant was made by Arthur J. MacDonald who leased the restaurant from the then owner, Allan Wheeler. Unlike the prior decisions, this time the Board approved the application for a liquor variance on November 2, 1960. In its decision, the Board noted that it was "not enlarging the zoning use but recognize[d] that table service of liquor is a part of modern restaurant operation." The variance (hereinafter referred to as "1960 Variance"), was permitted under the following conditions: (1) service of liquor was to be limited to table service only (no public bar and the service is to be with and part of meal service); (2) restaurants of this type catering to full course dinners, that liquor is an incidental and necessary part of operation if it is to be competitive; (3) the decision of granting a liquor license is the province of the Board of Selectman; and (4) "[i]t is also the understanding of the Zoning Board that development of the

[1] In spite of this decision, the Scituate Planning Board initiated an action appealing the variance to the Plymouth County Superior Court on or about June 14, 1951. The case is identified as Kenneth Mansfield, et al. v. W. Cleveland Cogswell, et al. (Docket No. 33396). The case survived until a Final Decree of Dismissal was duly docketed on April 7, 1952. Despite the appeal by the Planning Board, the building permit was issued and the restaurant built.

restaurant operation is preliminary to discontinuance of other business operations at this location." The 1960 Variance was duly recorded at the Plymouth County Registry of Deeds, in Book 2818, Page 355. At the time of the granting of the 1960 Variance, the restaurant was known as "Marina Restaurant". Minutes of the meeting were attached to the decision which indicated the existence of the 1951 Variance.[2]

Discussion:

The only issue the Board addressed was whether the Board could evaluate the application under Section 820 as a nonconforming use knowing that the restaurant use was created by virtue of the 1951 Variance. By its very creation, the 1951 Variance presupposes the existence of Zoning By-Laws and the promulgation and adoption thereof by the Town regulating uses in the residential district. Accordingly, as a direct result of this application re-discovery was made by the Board of the Scituate Zoning By-Laws dating back to 1936 when two zones were designated and created after acceptance under Article 5 at the Annual Town Meeting of March 2, 1936. The two zones created were: (1) the residential zone known as the "A" zone; and (2) the business zone known as the "B" zone.[3] The creation and delineation of these two zones were further depicted on a drawing presented by the Planning Board (dated February 11, 1935, and February 18, 1936) to the Town and on file at the Town Hall.[4] The drawing is also referenced in the Zoning By-Laws. Prior to this application, the Board had erroneously presumed that all zoning was created as of 1953. From review of old zoning by-laws on file at Town Hall, zoning was clearly established in 1936 with respect to business and residential districts. As a result of this application, it was further discovered that dimensional zoning, i.e., requirements for residential zones (A-1, A-2, and A-3), lot frontage, area and width requirements, were created in or about 1953; while height, setback, and yard requirements were created in 1956. Accordingly, Scituate has had three operative dates for purposes of determining grandfather status of nonconforming uses and/or structures. They are 1936 for business and residential use; 1953 for dimensional zoning; and 1956 for height and setback requirements. All other structures and/or uses that do not predate any of the applicable dates cannot be considered nonconforming under Chapter 40A, § 6 and Sections 810/820 of the By-Laws.

From review of the 1948 Town of Scituate By-Laws, the types of structures that were permitted as matter of right in the "A" Zone were fully described under Section 3. Specially, the only types of structures and/or uses permitted were: (1) single/two family dwelling; (2) club house (providing it was not carried on as a business); (3) church, school, library, museum, parish house; (4) farm, greenhouse nursery, truck garden, sale of produce; (5) cemetery, hospital, sanitarium, and philanthropic institution; (6) passenger station; (7) telephone exchange; (8)

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[2] From review of the minutes, Mrs. Olive Kindlund, formerly of 15 Jericho Road, stated at the hearing in 1960 "that when the variance was first given to the restaurant there was a restriction written into the variance that liquor could never be served there; [sic.] and she asked that the original variance be read." The 1951 Variance was then read into the minutes of the meeting.

[3] As of 1951, these zones had been in existence for over fifteen years.

[4] It should be noted that some of the documents were retained and found in the Town Clerk's Office as well as in the basement, directly below the Town Clerk's Office, in the Town Achieves.

accessory home office; (9) private stable; and (10) a private garage. Restaurants were not referenced, and therefore, they were not allowed in the residential zone. Rather, they were permitted in the business zone under Section 5 of the 1948 By-Laws. Under Section 5 of the 1948 By-Laws "there [were] no restrictions as to construction or use of the building, structure, or premises, [located in the business district]."

With that as background, it is clear that as of 1951, when the variance was granted for the restaurant use, nonconformities were also grandfathered under the by-laws. Specifically, Section 4 of the 1948 By-Laws, permitted the grandfathering and continuance of uses not permitted by the By-Laws, i.e., nonconforming uses to remain; while Section 11 (Enforcement) of the 48 By-Laws dealt with an application process for variances. Under Section 11 of the 1948 By-Laws, "[t]he said Zoning Board may [treat an appeal to it by an aggrieved person] as one in which an application for a variance has been sought and may proceed to determine whether there is or has been or may be a violation of the Town's Zoning By-Laws as alleged. . . Zoning Board shall then make a decision upon the facts and may in its sound discretion grant relief in the nature of a variance upon such terms as meet and proper, in accordance with Chapter 40 of the General Laws." Not only was the Board was empowered to grant variance by Section 11 of the By-Laws, but by statute. (The predecessor to the current Zoning Act was The Zoning Enabling Act, i.e., G.L. ch.40.)

The Zoning Enabling Act came into existence by virtue of the 1933 Mass. Act 269 where it explained the special permit process, detailed the variance mechanism, establish and delineated the powers of the Board of Appeal, outlined the appeals process to the Superior Court, and provided protection from zoning changes for permits issued prior to any amendments. Specifically, former G.L. c. 40, § 30, empowered the board of appeals with the following powers: (1) to hear and decide appeals where it is alleged by the Applicant for a permit that there is error in any order or decision made by an administrative official in the enforcement of sections twenty-five to thirty A, inclusive, or of any ordinance or by-law adopted thereunder; (2) to hear and decide requests for special permits upon which such board is required to pass under such ordinance or by-law; (3) **to authorize upon appeal with respect to a particular parcel of land a variance from the terms of such an ordinance or by-law where, owing to conditions especially affecting such parcel but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance of by-law would involve substantial hardship to the appellant, and where desirable relief may be granted without substantially derogating from the intent or purpose of such ordinance or by-law, but not otherwise. . . In exercising the powers under paragraph 3 above, the board may impose limitations both in time and of user, and a continuation of the use permitted may be conditioned upon compliance with regulations to be made and amended from time to time thereafter.**" (Emphasis added).

Chapter 40 also mandated that the board cause to be made "a detailed record of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and setting forth clearly the reason or reasons for its decisions, and of its other official actions, copies of all of which shall be immediately filed in the office of the city or town clerk and shall be a public record, and notice of the decisions shall be mailed forthwith to parties in interest as hereinafter designated." G.L. c. 40, § 30.

It is evident from review of the local By-Laws and the statute in effect in 1951 that the 1951 Variance was not only properly issued by the Board, but clearly valid. As of the filing of the petition in 1951, the Applicant did not have a preexisting non-conforming use on the subject property concerning a restaurant and a restaurant was a prohibited use in 1951. Since the restaurant use was not grandfathered, the only way it could have been legally authorized was by a petition for a variance, and the very issuance of the 1951 Variance authorized an otherwise **prohibited use** in the residential district.

The Applicant attempted to argue to the Board that the restaurant use was nonconforming for a number of reasons; however, what the Applicant failed to understand is the distinction between a "prohibited use" and a "nonconforming use". "[A] use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it." *Mendes v. Board of appeals of Barnstable*, 28 Mass. 527, 529-30 (1990). "For purposes of deciding whether a use is nonconforming within the meaning of Mass. Gen. L. ch. 40A, § 6, the question is not merely whether the use is lawful but how and when it became lawful." Id. at 531. Therefore, a prior nonconforming use is a use that had been allowed as a matter of right under the prior zoning by-laws, but is not allowed under a new by-law. See G.L. c. 40A, § 6; *Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury*, 409 Mass. 317, 320-21 (1991). This is distinct from a use permitted by a variance because such a use, by virtue of a variance, cannot be a prior nonconforming use, because by definition, a variance was required and it therefore was not allowed as a matter of right. *Barron Chevrolet, Inc. v. Town of Danvers*, 419 Mass. 404, 408 (1995), citing *Mendes*.

The Applicant also argued that because variances, prior to the Zoning Act of 1975, were generally freely granted by local zoning boards, and due to the fact that in 1948 there was no By-Law in effect for an Applicant to apply for a special permit, the 1951 Variance, for all intent and purposes was a granting of special permit. The Board is fully cognizant that the statutory criteria for a variance, set out in G.L. c. 40A, § 10 (as well as its predecessor G.L. c.40, § 30), are demanding, and variances are difficult to obtain.[5] *Gamache v. Acushnet*, 14 Mass.App.Ct. 215, 217 & n. 6, 438 N.E.2d 82 (1982). Conversely, the special permit power under G.L. c. 40A, § 6 presupposes the allowance of certain uses, but only with the sanction of this Board acting in accordance with the fairly flexible criterion of "harmony with the general purpose and intent of the ordinance or by-law." *Mendes*, at 606. In view of the different approaches to the granting of a variance and a special permit, the former grudging and restricted, the latter anticipated and flexible, the Board finds that G.L. c. 40A, § 6, does not authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit. *Mendes*, at 606-607. Additionally, the Applicant would have this Board read into the 1948 By-Laws a special permit when it did not exists. Such reading would be tantamount to usurping the power of voters at Town Meeting and inserting words into the By-Laws that were not approved

5 There is an abundant literature which documents this difficulty. For the proposition that the power to grant variances is sparingly to be exercised, and only under exceptional circumstances. *Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 324 Mass. 433, 439 (1949), and cases cited; *Broderick v. Board of Appeals of Boston*, 361 Mass. 472, 479 (1972).

by the voters of Scituate. If the voters of Scituate, prior to 1951, intended to expand the powers of the board of appeals by enabling it to hear and decide requests for special permits, they would have elected to do so at Town Meeting.

The Applicant also attempted to argue that the prior nonconforming uses, such as mossing, fishing and sale of fish off the boats, somehow migrated and found validity into the restaurant use and/or structure thereby rendering the use nonconforming. In spite of the Applicant's argument, the Board was not persuaded by the transitory argument.[6]

The Applicant also attempted to argue that the 1951 Variance filing in the clerk's office was not adequate notice and that under the then existing statute (G.L. c. 40, § 30), the 1951 Variance should have been recorded at the Plymouth County Registry of Deeds. Accordingly, as the argument goes, since the 1951 Variance was not recorded, it therefore, was void. The Board was not convinced by this argument either. Specifically, the Applicant argued that the language used under the appeal process suggests that the decision to grant the variance should have been recorded based upon the following: "[a]ny person aggrieved by a decision of the board of appeals, whether or not previously a party to the proceeding, or any municipal officer or board, may appeal to the superior court sitting in equity for the county in which the land concerned is situated; provided, that such appeal is filed in said court fifteen days after such decision is **recorded**." (Emphasis added). This argument fails for the following reasons: (1) and most importantly, the necessity for recording at the Registry of Deeds was not mandatory until 1960;[7] (2) because the 1951 Variance (as well as all other prior variances) was filed with the Town Clerk's Office; (3) an appeal was taken by the Planning Board within 15 days of the decision by virtue of the notice of appeal from the attorney representing the Planning Board indicating that it had filed a complaint on June 13, 1951; (4) another variance to dispense alcoholic beverages on the same property was petitioned and heard on or about January 5, 1956, was denied, however, the written decision was "[f]iled with the Town Clerk on February 9, 1956" as written on the decision; and (5) another application for variance (dated July 28, 1960) petition for the same reason, i.e., to dispense alcoholic beverages on the same property, which was allowed on November 2, 1960.[8] The requirement for recording as in effect under Old Chapter 40A, § 18 from 1960 until the effective date of the Zoning Act in 1975, applied only to limited or conditional zoning variances and special permits and was intended to protect innocent third

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[6] Moreover, while the 1945 Variance was not discovered until after the close of the hearing and prior to the writing of the decision, it further erodes the Applicant's tenuous argument.

[7] Pursuant to Acts, 1960 – Chapter 326, Section 18 of chapter 40A of the General Laws was amended by adding at the end the following: "A limited or conditional zoning variance and special permit shall not take effect until the town clerk records in the registry of deeds for the county in which the land is located, a notice certified by the chairman or clerk of the board of appeals, containing the name and address of the land owner, identifying the land affected, and stating that a limited or conditional variance or special permit has been granted which is set forth in the decision of the board on file in the office of the clerk of the city or town in which the land is located. The fee for recording such notice of a limited or conditional zoning variance or special permit shall be paid by the owner, or on his behalf, and the notice shall be indexed in the grantor index under the name of the owner or record."

[8] This variance was duly recorded within 20 days of the filing with the Town Clerk.

parties relying thereon. The promulgation of this section of the came into being nine (9) years after the approval of the 1951 Variance. Accordingly, as of 1951, there were no requirements, other than filing with town clerk's office of recording with the registry of deeds.

The Applicant also attempted to argue that the Town of Scituate Building By-Laws of July 1949, Article X (Permits), Section 2, indicates that "[a]ll permits shall be void if operations thereunder are not commenced within ninety days after the date of the permit, or if the operations thereunder are discontinued for a period of more than six months." The Applicant argued that based upon an assessors card from 1954, the building permit issued on June 1951, was void because of the gap in time between 1951 and 1954 when the property, i.e., the structure, apparently was not assessed for tax purposes. This argument, although creative, misses the mark because the issue is the "use" and not necessarily the "structure".[9] As referenced above, the building permit was issued shortly after the decision on May 29, 1951; however, litigation ensued between the Zoning and Planning Boards. Certainly, during this period of time the time to commence the building of the structure would have been tolled. *Belfer v Building Com'r of Boston*, 363 Mass 439 (1973) ("Period during which variance must be exercised tolled during appeal from decision of board granting variance"). Said litigation was pending for approximately one year. Whether the building of the structure commenced within 90 days of the issuance of the variance is irrelevant because the variance pertained to the permission of placing a business in the residential district, not to the structure.[10] Nevertheless, it is evident that between April 1951 and 1954, the restaurant was built and began to operate pursuant to the issuance of the 1951 Variance.[11] The creation of the restaurant and the number of years that the restaurant was operating as such establishes that the restaurant was built based upon the 1951 Variance. More importantly, each and every owner of the property has relied upon the creation of the 1951 Variance to run the restaurant.[12]

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9 Keep in mind, the dimensional requirements as well as the setback requirements were not in existence until 1953 and 1956. Accordingly, the structure could have been placed anywhere on the lot.

10 The Applicant failed to proffer any evidence to establish that the building was not commenced within 90 days of the issuance of the building permit. Moreover, even assuming, arguendo, that it was not commenced within said time, Mr. Dwyer had the ability to reapply for the re-issuance of the building permit. Additionally, the Applicant fails to recognize that had the building permit expired, the Town would have waived their right to enforce the Section once it was built and the restaurant began operating. In any event, the Town's relinquishment of voiding the building permit is harmless error and the Applicant's argument may be subject to the equitable doctrines of laches and estoppel in pais.

11 Moreover, it is the obligation of the Applicant to definitely demonstrate to this Board that work was not commenced within 90 days of the issuance of the permit. Although this argument deals with structural issues, supposition that the building permit was not acted upon over 52 years ago is not enough for the Board to invalidate the validity of the 1951 Variance granting Mr. Dwyer the ability to operate a business in the residential district.

12 In their argument to vitiate the 1951 Variance, the Applicant made reference to another decision of this Board, 672 Country Way. In that decision which was an appeal of the Zoning Enforcement Officer's ("ZEO") decision, the Board was asked to invalidate the ZEO's finding that another business on Country Way was a nonconforming use, and that it was not grandfathered because it allegedly did not pre-exist the advent of zoning. Unlike the present decision, 672 Country Way, did not pertain the granting of a valid variance. Further, it was determined by this Board that the business located on the property on Country Way was indeed grandfathered

Accordingly, for the foregoing reasons, the Board voted 2 to 1[13] to **DENY** the Applicant a Special Permit under Scituate Zoning Bylaws § 820 and § 1020.2(D) and found the Applicant had no standing to apply for a special permit/finding under MGL c. 40A, § 6 due to the fact that the Applicant has a valid variance permitting the use of a business in the residential district. The Applicant is left with an avenue of redress if it so elects. Specifically, the Applicant can properly petition the Board, as Applicants did in 1955 and 1960, to amend the variance, pursuant to Section 1020.3 of the Scituate Zoning By-Laws. Since this was not elected, the Board makes no decision nor renders any opinion as to amending the variance.

ZONING BOARD OF APPEALS

John F. Danehey, Chairman

Edward C. Tibbetts

Richard Dennis

Filed with the Town Clerk on 8-18-06

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 Registry of Deeds after the appeal period of twenty (20) days.

Any appeal of any decision of the Zoning Board of Appeals may be made pursuant to M.G.L. Chapter 40A, § 17, and shall be filed within twenty (20) days of the date of the filing of the decision with the Town Clerk.

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because it had been in existence since 1904 and operated for over fifty-two years. In the 672 Country Way appeal process, the applicant was charged with the burden of proof that the ZEO's decision was erroneous. The applicant failed. Likewise, in this application, since the Applicant has raised the issue of the validity of the 1951 Variance, the Applicant is therefore charged with the burden of proof that construction was not commenced within 90 days of issuance of the building permit, and therefore, void. The Board considered all of the information submitted to it and gave it its due weight and found this argument without merit.

13 Richard Dennis dissented in the decision.

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WILLIAM H. OHRENBERGER, III
JEFFREY A. DE LISI
GREG B. HARRIS

WILLIAM H. OHRENBERGER, JR. (1959-1991)

October 24, 2007

-BY HAND DELIVERY-

Albert G. Bangert, Chairman
Scituate Zoning Board of Appeals
Town Hall
600 Chief Justice Cushing Highway
Scituate, Massachusetts 02066

RE: Dichrisda, LLC
44 Jericho Road, Scituate, MA

Dear Mr. Bangert:

This office represents Dichrisda, LLC ("Dichrisda") with respect to its application for a special permit which was remanded to the Board of Appeals by Order of the Plymouth County Superior Court on August 28, 2007. I am informed that the Board's counsel, attorney Jason Talerman of Blatman Bobrowski & Mead LLC, and Dichrisda's litigation counsel, attorney Barry Pollack of Sullivan & Worcester, LLP, have agreed to continue to a future date the October 25, 2007 public hearing which your Board has scheduled on the remanded special permit application concerning the above property (please see enclosed correspondence from Attorney Pollack.) As a result of the agreement amongst counsel to continue the public hearing, neither myself nor Dichrisda's development professionals will be in attendance at the said hearing.

Given the large number of professionals involved with Dichrisda's development team and the impending holiday season, I hereby request on behalf of my client that the continued hearing occur following January 1, 2008. This advance notice would be sufficient for the development team to adequately plan and prepare for such a hearing. If your Board cannot accommodate this requested continued timeframe please inform me otherwise.

Thank you for attention to this matter.

Very truly yours,

William H. Ohrenberger, III

cc: David A. Pallotta, Manager
Barry S. Pollack, Esq.
Jason R. Talerman, Esq.
Joseph L. Tehan, Jr., Esq.

Town of Scituate

ZONING BOARD OF APPEALS

600 CHIEF JUSTICE CUSHING WAY
SCITUATE, MASSACHUSETTS 02066
(781) 545-8716

January 11, 2008

William H. Ohrenberger, III
Ohrenberger Associates
28 New Driftway
Scituate, MA 02066

RE: Dichrisda, LLC
44 Jericho Road, Scituate, MA

Dear Attorney Ohrenberger,

Yesterday the Zoning Board of Appeals reconvened the ongoing hearing on the remanded special permit proceedings. Last night's hearing session followed a hearing session on October 25th at which the Board reluctantly granted your request for a continuance. As you also know, the Court has ordered that the parties participate in the remand. The Board was ready and eager to hear your clients' presentation last night.

On January 9, 2008, you delivered a letter to the Board wherein you stated that your client did not wish to proceed with the hearing at this time. Based on the vague language of your letter, it was impossible to determine whether your client was seeking a continuance or withdrawing his application. You did not attend the hearing last night and, although your client was in the hearing room at the time that the hearing was scheduled to commence, he hurriedly exited the room as the Board opened the hearing session. Nobody from your client's development team was available to clarify the intent of your letter. While the letter may be reasonably interpreted to be a request for withdrawal of the application, the Board, in good faith, voted to continue the hearing to January 31, 2008. If your client has any interest in presenting its special permit application, it is expected that he (or his representatives) will appear at the January 31st hearing to make such presentation, as contemplated by the Court. If your client chooses not to attend this third scheduled session, the Board may reasonably conclude that he has no interest in pursuing a special permit.

Sincerely,

Albert G. Bangert
Chairman, Scituate Zoning Board of Appeals

cc: Scituate Zoning Board of Appeals
Neil Duggan
Jason R. Talerman
Joseph L. Tehan, Jr.
Board of Selectmen