

# Town of Scituate

## ZONING BOARD OF APPEALS

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



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Decision of the Scituate Zoning Board of Appeals on the application of 14-16 Old Country Way, LLC of 75 Gilson Road, Scituate, Massachusetts (hereinafter, the "**Applicant**") for a finding in accordance with Scituate Zoning Bylaw Sections 820 and 950.2D, 520, and G.L. Ch. 40A, Section 6, and/or such other relief which the Board of Appeals may grant, to change, extend, or alter the pre-existing, nonconforming use of the maximum impervious area at 14-16 Old Country Way, Scituate, MA (hereinafter, the "**Property**"), which presently contains two separate single family dwellings and accessory structures, to a use which will not be substantially more detrimental to the neighborhood and which will contain less impervious area and two buildings containing allowable commercial uses in the business and the water resource protection overlay zoning districts (Map 48, Block 2, Parcels 56 & 57) (hereinafter, collectively, the "**Requested Relief**").

The application was received, advertised, and a public hearing was held on February 15, 2018. Board member Sara J. Trezise recused herself from the hearing on the basis that she is a direct abutter insofar as she has an office and is an owner of property at 5 Old Country Way. The following members were present and voted at the public hearing:

John Hallin, Chairman  
Edward C. Tibbetts  
Anthony J. Bucchere

The Applicant was present at the public hearing and was represented by attorneys William H. Ohrenberger, III and Jeffrey A. De Lisi of Ohrenberger, De Lisi & Harris, LLP of 28 New Driftway, Scituate, MA, and by Paul Mirabito, CE, PLS, and Gregory J. Tansey, P.E. of Ross Engineering Company, Inc., 683 Main Street, Norwell, MA.

Along with the said application, deed, and record plan, the Applicant filed the following materials with Board of Appeals:

1. A copy of an Assessor's Field Cards from the Scituate Assessor from fiscal year 2017 showing that the dwellings on the Property were constructed in 1926;
2. Photographs of the Property;
3. An existing conditions plan entitled "Plan of Land for 14-16 Old Country Way in Scituate, MA," dated April 2, 2016, scale 1" = 20', prepared by Ross Engineering Company Inc. of 683 Main Street, Norwell, MA 02061 (hereinafter, the "**Existing Conditions Plan**"); and
4. A proposed conditions plan entitled "Board of Appeals Plan for 14-16 Old Country Way in Scituate, MA," dated November 11, 2017, scale 1" = 20', prepared by Ross Engineering Company Inc. of 683 Main Street, Norwell, MA 02061 (hereinafter, the "**Proposed Conditions Plan**").

The Property is owned by the Applicant by deed dated March 24, 2016, and recorded with the Plymouth County Registry of Deeds at Book 46723, Page 229. The Property has two single-family dwellings and three detached accessory structures thereon. It is located in the General Business zoning district and Zone A (Surface Water Supply) of the Water Resources Protection overlay district (hereinafter, the "**WRPD**"). According to the Existing Conditions Plan and the Proposed Conditions Plan (hereinafter, collectively, the "**Plot Plans**"), the Property primarily has frontage on Old Country Way, but also has secondary frontage on, and access to and from, Jenkins Place. For purposes of dimensional setback measurements, the front yard is called to be along Old Country Way. According to the Plot Plans and the application, the uses of the Property are nonconforming as follows: (i) to Section 520.6(35) of the Scituate Zoning Bylaw due to the fact that existing uses have rendered impervious approximately 44% of the Property; and (ii) to Section 520.4 of the Scituate Zoning Bylaw, which imposes a non-disturbance buffer zone for certain activities within 150 ft. of the edge of all tributaries in the reservoir watershed (hereinafter, collectively, the "**Nonconforming Uses**"). The nonconforming uses pre-exist the 2014 adoption of the present requirements of the Water Resources Protection zoning district.

The Applicant proposes to raze the existing structures on the Property and to construct two buildings containing eight shops and office space for "carpenter(s), cabinetmaker(s), electrician(s), job printer(s), painter(s), paperhanger(s), plumber(s), sign painter(s) or upholsterer(s)", which are allowed uses as-of-right in the General Business zoning district under Section 420 of the Scituate Zoning Bylaw. The Applicant does not propose to introduce any new nonconformities, and is before the Board of Appeals for authorization to change the Nonconforming Uses by performing the said proposed activities in the buffer zone and reducing the amount of impervious surface from approximately 44% of the Property to approximately 28% of the Property, primarily by the use of pervious material such as permeable pavement.

The Applicant demonstrated pre-existing nonconforming status, and Board of Appeals considered the Requested Relief pursuant to Zoning Bylaw Section 820, that provides as follows:

"The Board of Appeals may by a finding under General Laws Chapter 40A Section 6 authorize a nonconforming use to be changed to a specified use not substantially different in character, or not substantially more detrimental or injurious to the neighborhood than the existing nonconforming use, subject to the following limitations:

1. If the pre-existing, nonconforming use is located within the Water Resources Protection District, such use may not be changed to a use specifically prohibited by the Use Regulations of the Water Resources Protection District enumerated in Section 510.4.
2. If the pre-existing, nonconforming use is located within the Water Resources Protection District, such use may not be changed to another nonconforming use if the changed use would result in a greater average daily sewage discharge, as determined by Title V, the State Environmental Code, than average daily sewage discharge of the pre-existing use or greater storage, usage or disposal of toxic or hazardous material.

Pre-existing nonconforming uses may be extended or altered provided that there is a finding by the Board of Appeals that the extension or alteration shall not be substantially more detrimental to the neighborhood."

G.L. Ch. 40A, Section 6 provides, in relevant part, that zoning ordinances or bylaws shall not apply to lawful pre-existing nonconforming structures or uses, but shall apply to any reconstruction, extension or structural change to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent". Said Section 6 further provides that "pre-existing nonconforming structures and uses may be extended or altered, provided, that no such extension or alteration be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood."<sup>1</sup>

In Zone A of the WRPD the Scituate Zoning Bylaws encourage infiltration of surface water into the ground so as to filter the water and to minimize the possibility that surface water

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<sup>1</sup> The words "structure or" appearing in the brackets in the quoted sentence were supplied by Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21, 514 N.E.2d 369 (1987), and later noted and applied in Rockwood v. Snow Inn Corp., 409 Mass. 361, 363 n.4, 364, 566 N.E.2d 608 (1991).

finds its way into the town's drinking water supply. According to the Existing Conditions Plan, and the testimony of the Applicant's representatives, an approximately 24" subsurface reinforced concrete pipe enters the Property from the northeast property line, then exits the Property at the southwest property line. The said subsurface pipe then runs underneath Old Country Way, and discharges onto an abutting parcel on the opposite side of Old Country Way from the Property. The water which flowed inside the pipe then travels a very short distance on the abutting parcel and enters another culverted pipe, whereby it is diverted underneath Country Way, and ultimately empties into Old Oaken Bucket Pond. On the Property there exists a substantial impervious concrete driveway, which is a structure, a good portion of which is directly above the said pipe for almost the entire 200 ft. in length of the Property. As stated above, approximately 44% of the Property is presently covered with impervious structures, whether it be a concrete driveway or buildings. The Applicant is proposing to continue the Nonconforming Uses of impervious surface and permanent structures on the Property, but to improve the nonconformity by reducing the impervious surface areas of the Property by roughly 36%, which is a significant reduction.<sup>2</sup>

(As stated above, Section 520.4 of the Scituate Zoning Bylaw imposes a non-disturbance buffer zone for the activities within 150 ft. of the edge of all tributaries in the reservoir watershed. The board discussed and reviewed the 150 ft. buffer issues and specifically considered these issues in its decision, The Requested relief and nonconforming uses include pre-existing and proposed activities within this 150' buffer zone)

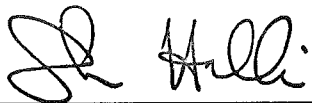
Other activities are already occurring on the site within the 150 ft. non-disturbance buffer, such as the driving of vehicles, and the uses of structures such as the single-family dwellings, detached accessory structures, and impervious driveways. With respect to existing buildings used in the said non-disturbance buffer, the closest portion of the nearest single-family dwelling is about 5 ft. from the said concrete pipe. In contrast, the Applicant proposes that the closest portion of any new building to be used on the Property will be further from the said pipe, about a distance of 18 ft. according to the Proposed Conditions Plan. Under Zoning Bylaw Section 810.3, the pre-existing, nonconforming dwellings and impervious driveway surfaces may be altered or reconstructed upon a finding that the alteration or reconstruction will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

The Applicant's proposal will trigger the requirement of Site Plan Review by the Planning Board, and the filing of a Notice of Intent and Stormwater Permit Application with the Conservation Commission. Scituate's rigorous stormwater permit standards will prevent the applicant from increasing the rate and volume of surface water runoff from the Property. It is not reasonably likely that any surface water that is infiltrated into the ground on the Property itself will permeate the said concrete pipe. However, the Board of Appeals discussed that the Conservation Commission may desire that the site continue to maintain an amount of impervious area greater than 28% of the Property, but less than 40% of the Property, which would still be an improvement of the Nonconforming Uses of impervious

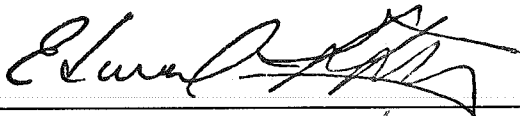
materials. The Applicant indicated that it would be receptive to any change of such impervious surfaces and materials in that range, and Board of Appeals will specifically defer to the stormwater permit granting authority, in conjunction with its consulting engineer, on that specific issue as to whether the total impervious surfaces and materials on the Property should be a maximum of 40% of the Property and a minimum of 28% of the Property.

Based upon the application materials, including the Plot Plan, the information provided at the public hearing, and the foregoing, the Board of Appeals finds that the Applicant has demonstrated that it may use the Property and alter and reconstruct the structures as proposed; that it is entitled to the Requested Relief. A motion was made, and duly seconded, as follows: that the Proposed Conditions Plan represents a change in permeable material which is not more detrimental than the existing conditions, and further to find that the impermeable area of the Property shall not be more than 40% post-development, and that any permeable material be maintained in a way that the permeability thereof is not compromised.

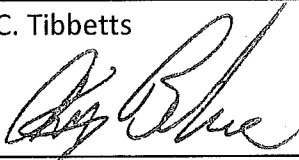
For the foregoing reasons, the Board unanimously voted to pass the said motion and GRANT the necessary findings, and the Requested Relief,( which includes the extension, alteration, reconstruction and continuing of the Nonconforming Uses within the said Zoning Bylaw Section 520 150 ft., non-disturbance buffer zone,) upon the condition that the amount of impermeable area on the Property shall not exceed forty percent post-development, and that any permeable material on the Property be maintained in a way that the permeability is not compromised.



John Hallin, Chairman



Edward C. Tibbetts



Anthony J. Bucchere

Filed with the Town Clerk and Planning Board: April 9, 2018

This 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.

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