

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 Zervas Realty Trust, Peter Booras and Harry Booras for a finding under Massachusetts General Laws Chapter 40A Section 6 and special permit and/or a modification of a variance dated March 8, 1948 from the Scituate Zoning Board of Appeals for property located at 78 Border Street.

The application was received, advertised and a public hearing was duly held on November 19, 2009 and continued to December 17, 2009 with the following members of the Zoning Board of Appeals hearing the application:

Peter Morin, Chairman
Brian B. Sullivan
Sara J. Trezise

The property that is the subject matter of this application is located in the A-2 Residential District. As shown on the plan that accompanied the application, the premises consists of a lot containing 174,305 square feet of land with 361.26 feet of frontage along Border Street, a public way in the Town of Scituate. A single-family dwelling and a large restaurant and function facility are located on the lot. The records of the Assessors Office state that the structures were constructed in 1926. It is also clear from the plan that the restaurant and function facility does not meet the current side setback requirements of the Scituate Zoning Bylaw.

The restaurant and function facility have a long and interesting history. It has been operated continuously since 1948, after its predecessor across the street was destroyed by fire in 1945. It has operated as a popular restaurant and lounge with names such as Hugo's Winter Cabin, Scituate Cabins, Golden Rooster, Cock and Kettle, and most recently The River Club. The building contains a kitchen, a small dining area, a bar, and a large dining and function area. The current capacity for the facility is 280 patrons.

At the November 19, 2009 public hearing, the Board reviewed the submitted application with the Applicants and their attorney, Michael C. Hayes. It was agreed at the outset that the restaurant's existence was permitted by variance granted on March 8, 1948 from the Zoning Board of Appeal. The 1948 variance, filed with the Town Clerk on March 8, 1948 was never recorded and was discovered in the Town archives in 2007.

That variance granted the then Applicants a variance to conduct a restaurant with seasonal alcoholic beverages and "such entertainment as the proper authorities might grant permission for." The variance also contained a condition with a restriction numbered 2.a., that stated, "Dancing shall not be allowed upon the premises nor shall

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floor shows be allowed.” It is this restriction that is the subject matter of the current applicants’ request for relief.

At the initial public hearing the Applicants requested that the 1948 variance be modified by removing the above stated restriction. The Applicants have proposed that as a supplement to the operation of a restaurant with bar and a function facility for weddings, private meetings and parties, music events be permitted. The initial application also requested that the capacity of the facility be allowed to increase from the current capacity of 280 to 500 patrons. The Applicants explained that the building contained enough square feet, septic sewer capacity and parking to hold 500 patrons and that they would work with the Building Inspector to ensure all that applicable laws would be met.

The Board expressed its concern that an increase in the capacity would result in increased traffic in a residential neighborhood. It requested that the Applicants perform a traffic study to measure the impact of the additional capacity and a site plan showing the number of parking spaces available. It also requested information as to whether there was any information in the town’s archives to shed some light on the intent of the town at the time of the original variance. Two abutting neighbors expressed concern that an increase in the capacity would have an impact on traffic and noise in the neighborhood.

At the December 17, 2009 public hearing, the Applicants submitted a letter withdrawing their request to increase the capacity for the facility and stated their intention to keep the capacity at its current level of 280. In addition, the Applicants produced copies of entertainment licenses from the 1940’s 1950’s, 1960’s, 1970’s and 1980’s from the town’s archives. Each one gave the premises an entertainment license for music and dancing. The Board also reviewed the current license, issued by the Board of Selectmen, which permits “entertainment only in conjunction with dinner theater, and special functions; acting (including vocals; small function bands (4-7 pieces); DJ’s.

It was apparent from the record that music and dancing have existed as part of the operation of the facility for over sixty years. This has been in addition to the weddings, private parties and fundraisers that included music and dancing

The Board reviewed with the Applicants and their attorney the law on variances and the Board agreed that a variance may be modified and specifically a condition contained in a variance may, after a public hearing, be removed, especially when a specific condition can be deemed to be against public policy. In the current application, the Board finds that Condition 2.a of the 1948 variance’s prohibition against dancing may violate freedom of expression and may be void as against public policy. The Board further finds that the 1948 variance allowed music and entertainment “as the proper authorities might grant permission for”, and that said proper authorities are the Board of Selectmen.

The Applicants submitted their argument that, since the original variance was never appealed, this Board is bound to presume the 1948 Board properly found each of the

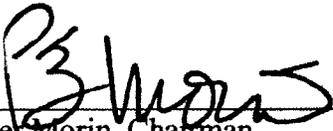
specific criteria contained in Chapter 40A Section 10 for a variance. This Board finds nothing in the 1948 variance to suggest that any of the section 10 required findings were made in 1948. Nonetheless, it here finds that there exist conditions specially affecting the subject property that are unique, and do not generally affect the zoning district. The lot is comprised almost entirely of solid ledge, and is likely to be unsuitable for use as single-family residences due to the impossibility of siting individual septic systems thereon. As a result, a literal enforcement of the zoning bylaw would cause a hardship to the owner. Next, the Board must determine whether the relief sought can be granted without nullifying or substantially derogating from the public good and without nullifying or substantially derogating from the intent or purpose of the bylaw. Finally, the relief granted cannot substantially change the relief originally given.

The Board finds that the removal of condition 2.a of the 1948 variance prohibition against dancing and floorshows, given the historic use of the property and given the fact that the proper authorities have allowed both, meets the above stated requirements. Over the years, there have been musical events many weddings, parties, fundraisers, dinner theaters and other functions that have included music and dancing as a supplement to the operation of the restaurant and lounge. The removal of the condition is consistent with the long-time permitted use of the property.

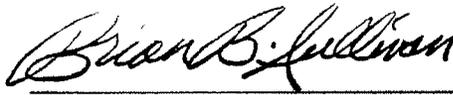
For the foregoing reasons, the Board unanimously voted to GRANT the Applicants' request to remove Condition 2.a of the 1948 variance which prohibited dancing and floor shows with the following condition:

1. The use of the property shall not result in excessive noise as regulated by state or local law.

ZONING BOARD OF APPEALS



Peter Morin, Chairman



Brian B. Sullivan



Sara J. Trezise

Filed with the Town Clerk on: December 30, 2009.

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This Modification of Variance 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. 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.