

Village of Skaneateles
Zoning Board of Appeals Public Hearing
August 25, 2009

In the matter of the application submitted by Doug Clark, to vary/waive the strict application of Section 225-58, Off-street Parking and Loading requirements and the interpretation and/or application of the Parking Trust Fund, for the change of use from office to retail for the structure located at the rear of 10 Jordan Street in the Village of Skaneateles.

Present: Lisa Banuski, Chairman
 Craig Phinney, Member
 John Cromp, Member
 Larry Pardee, Member
 Lee Buttolph, Member

Jorge Batlle, Clerk to the Zoning Board of Appeals
Ricardo Galbato, Attorney for the Zoning Board of Appeals

Doug Clark, Applicant
Robert Eggleston, Architect for the applicant

Clifford Abrams, State Street

Chairman Banuski opened the hearing at 7:46pm announcing the application from Doug Clark for the building addressed as rear of 10 Jordan Street.

Robert Eggleston, Architect for Doug Clark made the presentation. He said, “Doug Clark owns the 2 story brick building, commonly known as Doug’s Dining Room until 2006, when the dining room was moved into the building fronting Jordan Street. At that time a Critical Impact Permit was granted for the use of the property. In doing it we did 2 Critical Impacts. We changed the retail in this building to restaurant and at the same time the Board insisted that we change this to retail or office. Doug Clark did not have a tenant at the time so he didn’t know who it was. The key element in 2006 was this not be another restaurant or added restaurant because at the time we did a parking shift and the parking from here basically came over here and the parking from here went here and everything stayed the same. So we got our approvals in 2006 for both Mark Edwards who owns Doug’s Fish Fry and Doug who owns the brick building.

In April of 2006, Sundance, a health food store, occupied the building in compliance with the 2005 Critical Impact Permit. The retail use remained until February of 2007 and the building was then vacant until November of 2007. ReMax Real Estate which had already occupied 16 Jordan Street, occupied the additional space, just walking across the street. They needed more space, so they occupied the space from November 2007 to March of 2009. This was a change of use that was never applied for, nor received separate zoning approval. In that the 2005 approval was for either retail or office, Doug Clark did not realize that once the retail use which was Sundance was established in 2006, that a new approval would be required for a change of use for office. He

thought when they said it could be retail or office, he thought it was interchangeable and didn't have to come back. I say that in defense of Doug – didn't intend to avoid the law, he thought he was working within the law.

In April of 2009, *Echoes of the Lake* a clothing retail shop occupied the building which is the subject of this Critical Impact review. In that the ReMax office was never granted zoning approval, would that make the current approval for this building retail, based on the March 2005 action and April 2006 occupancy of Sundance health food store? And the removal of the ReMax office is just correcting an occupancy that did not go through the permit process? So, the first question of interpretation – we know it was applied to be office/retail. You could say, OK, he's good for office or retail and he can interchange and that's what was granted – which is Doug's interpretation of what he thought he received. Or – because it was then finally established as retail, and we never came back for a change of use, it's always been retail. And actually ReMax was a non-compliant occupant for a period of time unknown and not brought to anyone's attention. So, if that's the case, the use is still retail. There's no Critical Impact. There's no change of use and there's no parking requirement. That is one question that I put before you for interpretation.

The rest of the information here gets into the information we would provide relative to a Critical Impact. Again, the office space and the retail space are permitted and do not need site plan review and do not need special use permits. They are permitted by right, but they do require Critical Impact use which is a change of use within the Downtown D District. Then of course, in reviewing it one has to look at the parking law.

Echoes of the Lake is a retail, high end consignment shop. Selling both men and women's clothing. The store hours are typically ten to five and occasionally in the evenings. Deliveries are usually made by UPS with minimal trash and recyclables that are generated by the store. The sign conforms with the Village Ordinance and will be placed on the east in at the front door. In that there is only one employee on-site, water and sewage usage is only 15 gallons per day, where the office had more based on 15 gallons per employee.

The parking requirements are no different than what was approved in the 2005 Critical Impact. The building has 1480 square feet of gross area, which represents 4.9 or 5 cars. I'm going to avoid the next sentence in that was to address the proposed parking which didn't go into effect. I don't want to confuse the issue. When the office occupied the building, which never received zoning approval, the parking requirements would have been 200 square feet per car or 7 cars gross. As far as what parking is available on-site, obviously there is only a few feet around the building. In 1968, an agreement was signed with the eleven property owners in this general area and filed with the County Clerk's Office. I have attached a copy for the file. Number 4 says *it is mutually understood that the entire parking area is for the use of all. But each party hereto agrees that the use of parking area in such a manner as to be a detriment to the other parties hereto.* So basically, these people in this area – I believe it started just past the Masonic Temple up to this alley, came into an agreement in 2008 formalizing access in and out because you've got a lot of weird properties, and that this parking generally is available for everyone. But it wasn't really assigned. So, this building has parking available but it doesn't have defined parking

available. I couldn't tell you how many spots. I don't think I'm in a position to do an inventory of the entire eleven buildings.

Where we are going with this is #1, if a Critical Impact is not required, because there is no change of use, and/or we are within the guidelines of the 2005 change of use, a more liberal interpretation, that is could be office or retail. Then there is not change of use. And therefore we don't need to continue with Critical Impact and/or there is no parking issue, because no change of use does not trigger parking requirements.

The second question is – relative to the parking, and the fact that this property requires 5 parking spaces. It reduces from the seven, that were required for the office. It is a reduction but yet the current zoning law strict interpretation says we have to pay for 5 cars which are now required. We would ask for a variance for the 20% which you are allowed and a recommendation that the fee not apply as we go to a waiver to the Trustees and the Critical Impact Permit.”

Chairman Banuski said, “I have a comment going back through all of this. The paragraph that says *ReMax Real Estate occupied and that was a change of use that was never applied for nor received zoning approval*. In the Critical Impact minutes from 2005, it actually says, and I'm quoting you Bob, *basically what it does as soon as this moves here and this moves here, Doug can find a tenant and they move in. If they want anything else they would have to come back for that specific proposal*. So, it sounded like, I agree with you, that the Planning Board for that said yes. It can be retail or office. But after that, any changes would be subject. It is literally quoting you from that meeting, as they made the motion for that. So, I thought it was clear that any change of occupancy. At that time the current parking law did not apply. So, all of this took place...” “...and we complied with the parking law at that time,” Eggleston added. The Chairman said, “correct. The in December of 2005 or the Fall, that was when the parking got done. So, anything that happened after that was subject to the new parking. I'm kind of a stickler on this because we had local residents doing projects and developers doing projects. I think we have to be very, very careful about treating everyone the same. That we can't subject someone re-doing the Seitz Building to overcome hurdles that we are not expecting our own local residents to do. So, my first impression of this is, that this is subject - this change of use – is subject to the 2005 parking rules that are now in place- what ever they are with the Trustees. But it is a law in effect. There's no moratorium on it. I think we have to proceed under this law. Anyone else?”

Member Buttolph said, “I have a couple of questions that are more sort of thought experiments. They've got this *Echoes off the Lake* in there now and they've switched back that and if we are saying that's not approved, does Jorge do a Cease and Desist on what they have in there now? And if so, what would he be able to put back in there? Would it have to go back to office, what it was before? Or retail or would it just have to stay vacant?” Chairman Banuski said, “I don't think it comes to a Cease and Desist. I think depending on what we do and pass along to the Trustees for enforcement. It's up to them to decide what to do.” Member Buttolph said, “say he says I don't want to pay the parking fee. I'm not paying 5 times \$7,500 – the big bucks there. Then he say, well I'm keeping them in there. What does Jorge do and what could go back in there? My question then would go backwards one to when ReMax was in there and the new place, Cease and Desist, does it go back to retail?” Member Crompt said, “which it is now.”

Member Buttolph continued, “which it is now. So, say this is February of ’09, when ReMax was in there. They haven’t decided to move out yet. Jorge realizes , oops, change of use – Cease and Desist - you can’t do this. Does it revert back to retail? Or does it just say no you can’t put anything in here because you have changed use and now you have to come and apply.”

The Chairman said, “there is definitely an irony there of what we are dealing with. But I think the reality is that since the law was passed there has been 2 changes of use of the building. Two changes of use. The law specifically says *any change of use* subjects you to this.” Member Buttolph asked, “but say he doesn’t want to change – pay the fee. What is the use? It is now office and he has to now pay the office fee from the retail? (multiple conversations) The Chairman said, “it actually is that he has to reapply. It doesn’t matter what it was the one step before or 2 steps before. It’s reapplying under the law that’s in effect. Because if you don’t follow something like this equally with everyone, you can have anyone changing an approved use in a building and never reviewing that parking issue.”

Member Buttolph said, “I’m not disputing the trying to be exact. But say he does not want to pay the fee. I don’t want to pay it. Then he obviously can’t keep *Echoes off the Lake* in there.” The Chairman said, “right. He also can’t do the office. So, it’s vacant . It is vacant because he had a use in there that was approved. That use changed to something that was not approved. It changed to that after the Parking Law went into effect.” Member Buttolph said, “so basically, per strict application of this, either way he’s paying a parking fee.” The Chairman said, “I think under the law that the Trustees passed that that is absolutely correct.” Member Buttolph said, “under no circumstances is he not paying the fee.” Member Crompt said, “which is unfortunate because like Lisa said, anybody else can do that. Anybody else in the Village can do that. They can go from retail to office and back again...” “.it does change the impact of the parking. To go back to the nut and bolts of this, the reason that there was a Parking Law is because parking is a huge issue,” said the Chairman. She continued, “it is something that this was with all good intentions passed and it was thought that those who were benefiting most by change of use or expansion, would bear the cost of the parking, instead of the taxpayers.”

Member Buttolph said, “the second follow-up question that I had, and this may be more for Rick (Galbato) or Jorge is – say he went from *Sundance* in there and he just didn’t understand the law. ReMax goes in and it’s only a month in, and we realize. Is there a time frame of this use where we say, wait a minute, you’ve got this ReMax in here. That’s not right. It’s only a month. Can he go back? Is there a period of time? Or is it as soon as a new use, that next minute, goes from midnight to 12:01, it’s a change of use and there’s no going backwards?” Chairman Banuski said, “I think that’s probably correct. I think that’s how the law works in every other thing. If a law is passed against murder and robbery and you do that 5 minutes after the law is passed, you are subject to that law. It doesn’t matter if somebody doesn’t find out about it until 3 months later.” Member Buttolph asked, “I’m just wondering. Is this kind of like a building being vacant for a period of time and it losing its - like say it was retail, and they had *Sundance* and *Sundance* says ‘I’m filing for bankruptcy, and I’m leaving. And he just can’t find anyone else to go in there and ‘X’ period of time – goes from twelve to 12:01 and he doesn’t have anyone in there, and it gets a certain period of time where its been vacant, doesn’t he lose retail?” The Chairman said, “I don’t know about vacancy.”

Eggleston said, “my understanding of that answer, because I’ve looked at it for some other applications, the only abandonment of a use – when a use is vacated - is when it’s a non-conforming use. If this was a gas station, and it’s not permitted in the Downtown D District, and it’s allowed to continue as a gas station – it’s allowed to change from QuikFil back to BP to Esso – but once it is vacated for I believe it’s a year, then it loses its grandfather status and could never be a non-conforming use or a gas station. There is no mention of abandonment, so you have an office, and both of these uses - the office and the retail under 3,000 square feet are permitted uses. They are not Special Use Permit uses. They are not Site Plan Review uses. They are permitted uses. So, my understanding is, if you have an office and you vacated it for 10 years, you can still have an office.”

The Chairman said, “the building isn’t abandoned. It’s being maintained, and heated and plumbed.” Battle said, “you are using 2 terms – abandoned and vacant.” The Chairman said, “but vacancy does not change it.” Member Buttolph said, “so it was retail – nobody goes in there for a year, no big deal.” The Chairman said, “another retail comes in there there is no change.” Member Buttolph said, “so the question really is, he screws up, and goes from retail to office, is there any grace period of time where you say hey, you screwed up. He says oh geez, I’m really sorry I will kick these tenants out of here immediately, void their lease and go back.” Eggleston said, “if I were really slick, I would have said well, ReMax didn’t occupy it as an office. They were just trying to find a new tenant by being on-the-spot, right there.” (all laugh)

Doug Clark, applicant said, “are you folks aware of the fact that all this parking here that we are talking about is not Village municipal parking?” The Chairman said, “correct. It’s private land.” Clark continued, “mark Edwards at the Fish fry owns 13 spots behind that brick dining room, and behind the Fish Fry and between the picnic tables and the green - we own 13 spot there. All ours, it’s not part of this (Side B)...so first of all, how many parking places does Kabuki own?” The Chairman said, “none.” Clark asked, “how about Bluewater?” The Chairman said, “I agree.” Clark continued, “Creekside? Now there are a full-fledged restaurant. They started out as a book store and coffee shop for teenagers to hang out. Now you have a full-fledged restaurant there with beer and wine. I don’t care. But what do they have, 3 spaces in front of the place? And you are trying to hold me up for something that we own and we use, and we try to be a good part of the community? How many parking places does ...eve the Pasta? They rent a few places from the church. Where is the violation ma’am? I am confused. What was the violation? Because I went from retail to office?”

Eggleston said, “what I’d like to do to put a sense of order to our discussion is – I believe there are 2 main issues. One is the interpretation. I think it’s appropriate maybe to act upon the interpretation. Then depending on the result of the interpretation, proceed on with the parking variance and we can address that issue, after we get over the interpretation.” Chairman Banuski said, “I will say that when I look at this and when I hear Lee say the reality of so you get rid of this one and you say this one can’t be there, and you are back to retail, which is where you started and have approval. Believe me, I see the illogic of that. It’s not that I fail to see that. I also know how frustrating it must be to see the other places that got these occupancies in before this Parking Law went into effect. Since it’s been in effect, for this Board we are enforcing a law that the Trustees made. It’s not a law that we made. But we are charged with enforcing it.” Member Buttolph said, “and the most vocal critics of it.” The Chairman continued, “we have

Buttolph said, “and the most vocal critics of it.” The Chairman continued, “we have been vocal critics of it. I’m an equally vocal critic of having no parking – a moratorium on parking enforcement. I think that that would be equally as bad. This Law has really been – each individual case - a headache time after time after time. So please believe me when I tell you that I empathize completely. I know it doesn’t sound like it when I say that we have to go by the law, but I really think that we have to go by the law. But, I do understand and appreciate your frustration with your situation. The first thing that we need to do now is decide what we are going to do. I’ve stated my opinion and I think Lee differs from me. So, we ought to vote.”

Eggleston said, “the question to Rick – does an interpretation have a public hearing, or no public hearing? (Galbato looks in the Law.) Obviously we just side stepped that by opening up the public hearing. I know it goes to the ZBA, but sure of it.” Galbato said, “I don’t see it Bob. It’s 225-75C.” Eggleston asked, “you don’t see where it requires a public hearing?” (tape off) The Chairman said, “I did open the public hearing... yes I did.” Eggleston asked, “are you going to invite the public to comment?” Batlle said, “you did not open the floor public comment.” The Chairman said, “that I haven’t done. But I did open the public hearing.”

Member Buttolph said, “the one question I have, and I’m not sure if it was answered. I’m not necessarily opposed to the strict application. The main question that I have that I would like to make sure was answered, was that - it’s 12:01, goes from retail to office. Is there no going back? To me that’s the interpretation. That is, whether I’m for or against, hey I screwed up, OK, they are out. Void the lease.” Member Crompt said, “I see what you mean but you can’t go back at that point.” (multiple conversations) Member Buttolph said, “this is maybe for Rick – I don’t know if this is something that can be answered tonight.” Member Phinney said, “in that the office was never recognized, did it ever exist? And did it always just stay retail because there was never any formal application for it to change from anything other than retail to anything different. So what is that? It was never acknowledged.” Member Buttolph said, “that is what is determining whether I’m for or against. And I don’t know the answer to that. So, I would have a hard time voting for or against without knowing.”

Member Crompt said, “I understand and kind of agree with you. But then like Lisa says, somebody else does the same thing and somebody else does the same thing. What’s to keep the next restaurant or anybody from doing the same thing?” Member Buttolph said, “Jorge.” The Chairman said, “he did. He found it.” Member Crompt continued, “he can’t watch everything.” Member Buttolph said, “I’m looking at it from - somebody made an honest mistake. It’s been rectified. Is there the ability to go back and that’s what I’m asking?” Member Phinney said, “to a lesser situation to what was created that didn’t exist.”

Member Pardee said, “let me say right out of the law, *parking space variance shall be transferable to a new owner or occupant only to the extent that the transferee use requires no greater parking space variance.* So he’s going from greater to lesser, if he’s going from the office to retail.” The Chairman asked, “read the very beginning of that

Parking Law, the very first paragraph... it's the very first paragraph of the Parking Law." Member Pardee said, 'that's what I have. Is that what you are talking about right there?...there is a 228-f was the section that I was in.'

Galbato asked, "Lee what was the mistake?" Buttolph said, "well, he went from retail to office, thinking that that was permissible. Now it's gone back to retail but, let's look at before it went back to retail. He makes the honest mistake. It's the next day. Jorge is now walking in the ReMax – wait a minute, what's this doing here? This isn't allowed to be here. Hey, cease and desist or hey, you need to come and ask and get an application. To your point, it never truly existed – legally existed as office. Was it an office? Or has it always been retail? To your point of the gasoline stations out here." (multiple conversations). Galbato said, "they got a Critical Impact from the Trustees in June of '05 for retail or office." Eggleston said, "I'm asking 2 interpretation questions. A. did the 2005 Critical Impact allow the continuous back and forth of office and retail, when they said it could be either office or retail? B because retail was established, assuming the negative interpretation on the first question, it's not a yo-yo approval. As soon as one is established that's it. It stops at that one use. Assuming that's the answer on the first question, the second question is, because retail was established and office was never granted, applied for or granted and approved, therefore office was never a permitted use and therefore the retail is the grandfathered continuous use, therefore we are going back to retail, correcting the mistake and to your point, it doesn't require Critical Impact because there is not change of use."

Member Buttolph said, "yes, you are allowed to go back to fix a mistake to go back or, is this basically now – does it have to be – he says I'm not paying the fee, is it just a vacant building now? Nothing can go back in there until somebody makes an application for this." Galbato said, "I think if there has been a violation of our code, including the Building Construction Code, or our Zoning Code, the Village can still enforce, exceed penalties even if the violations have ceased. I don't see a time limit of when we can go back. But I wouldn't want to extend it out. Like go past 6 years, when a violation ... (multiple conversations) ... be reasonable and the court would have to look at Village Law. But, I'm not aware of any Statute of Limitations... that this Village is bound under within our Code of how far back we can go to seek penalties against a violation of our Code." Member Buttolph said, "but in the Building Code, says somebody put in some dormers on their house that we happen to find. Their mediation was remove the dormers and go back to the exact same setting. It wasn't remove the dormers and leave a big hole in your house. It's go back to where it was before the violation. Or, submit for a permit for the new dormers. If we permit it, then you can keep them there. So, is this just remediation back to where the starting point was? Or, is this – hey, that building needs to be vacant tomorrow, until an application for either retail or office is in."

Member Crompton asked, "do you want to go down that slippery slope and leave it open for somebody that's going to use that to their advantage and not somebody like Doug, who's just made a mistake and he understands that. Do you want to leave that open for somebody who's just going to go back and forth, back and forth?" Galbato said, "the prior use has taken place and it's ended." Member Buttolph said, "I'm not looking

for a slippery slope. I'm just looking for what's the law. Because if somebody like the Book Store decided hey, I'm going to put in a full-scale restaurant. Gut the place and put in a restaurant, hopefully - the point of having Jorge is to go in and listen and find those things, and go and say cease and desist, you have to remediate this. Well, in case of that, would they be able to go back to the book store or nothing can go back in here now until you do something new and we do parking and all this kind of stuff. Let's just take the parking out of this. Say there's the moratorium on this and there's no fees. Does he have to come back in front of us with an application to go back to retail? No fees or anything, but he still has to in to us? Let's get rid of the - let's say the moratorium is in effect, no parking fees. What would he have to do?" Galbato said, "for a change of use you just get a Critical Impact Permit from the Trustees."

(Multiple conversations)...Member Buttolph said, "that's my question. Is getting rid of the parking fee - what does he have to do here? He's got to go and do an application to go back to retail..." "...there is also any legal documentation anywhere showing that there was an actual change of use," said Member Phinney, "so we all know because we live here, that there was a change of use. But as far as legally, there is nothing on paper anywhere that's been presented to us that there was a change of use." Chairman Banuski said, "there is now. There absolutely is." Member Galbato said, "it's conceded." Member Phinney said, "so we can assume because we know vs. anything that's been legally documented." Galbato said, "there is no denial that ReMax had an office there for some period of time." Member Crompt said, "because they are being honest about it."

Member Pardee asked, "can we look at this from the standpoint of when the initial approval for either office or retail was granted, that the parking - what ever parking that was required was there and approved?" Eggleston said, "and satisfied." Member Pardee continued, "well if they went from retail uses less than the office, but they still had the what ever the approved number, now they went from retail to office and back to retail for a lesser parking requirement." Member Buttolph said, "that's them coming in for an application of rebuttable presumptions. That's where that come in. I've got this many spaces." Member Crompt said, "I see both your points and I see Lisa's point too." Member Buttolph said, "I'm just trying to get to the point - legally what's the law say that he has- what happens to that property once you changed use. It's found out, does it go back? That's the question. I don't have the answer to and I don't know which way to vote.."

The Chairman said, "my answer to that is, as with any law, once a law is in effect, you are subject to that law. It doesn't matter if you steal something from somebody and then you say, well, I'm going to give it back and make it whole again. It's doesn't mean that the infraction, not even an infraction because I don't want to put it in terms of this is either a crime or an infraction. But just in terms of the law, that's my analogy. But you can't undo it just because it reverts back to something. You just can't pretend it never happened." Member Buttolph said, "I'm not trying to pretend that it didn't happen. We have a right to go back for penalties if we so wanted. But what happens to the property once it's found out it's now office - cease and desist order has been issued. What now happens to that property? What is the use of that property now that a cease and desist

order has been put in effect? What's the use of that property. When it went from retail to office illegally? What is now the new use? That's the question that I don't know the answer to." Eggleston said, "what is the approved use." Member Crompt said, "the answer is retail." Member Phinney said, "retail is the approved use."

Member Buttolph said, "that's the approved use 6 months before hand. What is now the approved use? If it's retail, then it's penalties that we should be going after for violating the law 15 months. If it's nothing, then it's maybe penalties too, but it's re-application for retail with the full parking." Member Phinney asked, "add to a situation that they have already been previously approved back in '05?" Member Buttolph said, "this is just my heartache on this. I just don't know which way to vote. Yes, you owe all the parking. Or no you don't because I don't know the answer to – you broke the law. Cease and desist, what is now the use of that property that you can go forward doing?"

Eggleston said, "my concern is, we are taking too big a bite here. What we need to do is go back to the first question of the interpretation. Then go back to the second question of interpretation. Then if those require it, go to the question of the parking variance." Member Buttolph said, "to me this seems – I don't think we are taking a big bite. I think this is the central answer – the central question that needs to be answered is, what's the use after it's changed in a cease and desist order has been issued?" Galbato said, "there is no cease and desist." Member Buttolph said, "there wasn't because he changed it and raised his hand and said, hey, I'm sorry I did this. But, let's just take the case where Jorge found out a month in. Issued a cease and desist. You are not allowed to have office in here. What is the use of that property at that point?"

Member Crompt replied, "it would go back to retail." Member Buttolph said, "ok, if that's the answer, there's no parking violation." Member Crompt said, "there is because he leased it out to the office." Member Buttolph said, "there's legal penalties of the \$7500 a day, times so many days. But that's a different thing. That's a fine we are going after him for. But, he doesn't owe us anything for parking because we are sending him back to where he started. If we want to go after him for fines, that's a whole different discussion. But, what's the use when the infraction has been found out and he says OK, I'm going to remediate. I'm kicking them out. Now what can I do here?"

Galbato said, "could the Village require him when he changed to – required the owner when he changed to office to comply with the parking. Then seek a retroactive variance for the office use that's began and ended prior to Village action?" Member Buttolph asked, "that would be Jorge saying per this cease and desist you have to come and submit an application for office?" Galbato said, "no. You were talking about after the fact. The use has come and gone. The office use has come and gone." (multiple conversations) You say go after him for penalties. We could conceive a scenario where you try ask them to make a retroactive application for a variance for a use that has already come and gone." The Chairman said, "the reality is, we are never going to do that. The practical application of that is, that's never going to happen. We are not going back to make the office illegal. We are facing that we have a current law and we have a change of use that took place after the law was enacted. I really think that this is not any

bigger than that or any more complicated than that. I think we just address this then from the rebuttable presumption. Doug has information for us about the parking that's available there. The shared parking that's privately owned that we can take into consideration. We have done this a couple of times before when we have extenuating circumstances. We can grant a 20% variance and recommend to the Trustees, as we have before, that they waive the parking fee for the remainder of the difference in the parking spaces. I think to go back and say, well what if they did this or what if they did this? You know what, we are never going back to enforce any of that stuff. The Trustees go back and forth on anything. That's the reality. They are even talking about a 16 month moratorium on enforcing anything. So, let's forget about the hypotheticals and deal with the calendar issue that we have. The law was passed in 2005. We have a change of use that makes it subject to the Parking Law. It is. I think that's pretty cut and dried."

Member Buttolph said, "Lisa, the only thing that I'd like to finish off with on is that I agree with all of that. The not going back and stuff. But, I seem a little worried that we don't know the answer to that question, because anybody down here could – you know, they are retail and they now go to an office. The OK we figured that out do they not go back to retail?" (multiple conversations) Galbato said, "the general principle of Municipal Law is a property owner can't be advantaged by engaging in an illegal use. In other word, they don't get any rights, inherent rights by an illegal use, no matter how long that use occurs. That's a general principle of municipal law." Member Buttolph said, "so the building has to go vacant if you go from retail to office and they don't want to pay fines or pay parking. That's my question. Say he doesn't want to pay the parking, what happens to that building? Say they come back with a rebuttable presumption and we say nope, not good enough?" The Chairman said, "but that's what if. Why are we doing hypotheticals?"

Eggleston said, "first of all, have we opened this for public comment?" The Chairman said, "we can." (Tape E) Eggleston said, "I believe this is public comment on the question of the interpretation." The Chairman said, "Ok, who am I hearing from though, you?" Eggleston said, "yes, if you'll ask if there's any one who wants to speak with regards to this application on the interpretation. That's what you normally ask for." The Chairman said, "ok, is there anyone here who'd like to speak in favor – in regards to the interpretation, either for or against?"

Doug Clark said, "so if this tenant decides to move out, or doesn't become successful, and I want to go back to office, then I have more problems?" Eggleston said, "you have to make an application." The Chairman said, "correct. Any time that you have a use change, under this current Parking Law that we have, you have to come and face parking rebuttable presumptions every single time. If you go office-retail, office-retail, you can come back and have the Planning Board approve and have us approve and it's going to be subject to a parking – a whole rebuttable presumptions scenario every single time."

Clark continued, "I'm not too good at figures. Is it correct in thinking that I could actually end up paying somebody about 40 grand?" The Chairman said, "in theory, yes."

That's exactly correct." Clark asked, "then if in a year later I want to go back to office, I will be whacked a little more?" Eggleston said, "no. This gets to the second question which we are not at yet. But right now if they decide that – the first question is, was the original Critical Impact that was granted for interchangeably office and retail and you could go back and forth? That's the first question. Was it a flexible approval. Which allows you to go back and forth office to retail, to office to retail. In which case, if they find in favor of that interpretation, then there's no need for a Critical Impact, because we are within the original approval.

The second question on the interpretation – assuming that they do not agree with the first question, is that because retail was established, and office was never approved, and you abandoned the office. Not we went back to retail and there is no change of use because the office approved use was retail, therefore no Critical Impact is required. Those are the 2 questions that are now before them. Then what will happen is, if they decide to the negative on that, then we will go through the parking variance, rebuttable presumption. In which case they'll decide the \$75000 payment for parking is required because you have no parking spaces on-site." The Chairman said, "I would say that's a very good overview of the steps that we are looking at tonight." Member Phinney said, "seventy five hundred, not thousand. It's bad enough that it's at 7500." Eggleston said, "seventy five hundred times 5 is \$37,500 is what he'd be subject to."

Doug Clark asked, "were you folks involved with the Subway sandwich deal with Byrne Dairy? Isn't there more parking needed for restaurant than retail. The Byrne Dairy was a retail. Now it's half retail and half restaurant, right?" The Chairman said, "and office supply store." Eggleston said, "when the time comes to that if you want an answer to that, I can give you an answer to that, on how that was handled. As I see, we are not there yet. We are asking about the interpretation. To keep it simple, we need to stick only to the interpretation right now."

Galbato said, "the problem now is, the 2 interpretations that you are asking for are rules that the parking applies, you seem to be limiting the public hearing just for the interpretations." Eggleston said, "no, then we will open the public hearing portion." Galbato asked, "you want to close this public hearing..." "...what I'm saying, we are only talking two. I think it's necessary to first address - we have 2 things going on here. We have interpretation and then we also have the variance for parking. So it is critical that we first address an answer to the interpretation. Then we know whether or not – so, in other words, we have 2 public hearings going on here. One for the interpretation and one for the parking variance." The Chairman said, "it's a 2 for one night, and actually literally opened both of them by just reading the application." Eggleston said, "and we are only taking comments on the interpretation." The Chairman said, "yes at this point. So, for the first one, the question is did the Planning Board approval back in 2005 grant a continual back and forth option of office and retail? We will vote on that, but I will just refer back to the comments at the end of that Planning Board meeting that says they could have a tenant. As soon as this one moves here and this moves he can find a tenant. They move in. If they want anything else they would have to come back for that specific

proposal. So based on that, I would say that that was not the intent of the Planning Board was to provide on-going back and forth office to retail. I think they were doing it – their intent to do it, and Lee this is a great concept that you did with intent, I think their intent was to specifically say that it would not be a restaurant at that meeting.” Eggleston said, “and we could have either or but we didn’t know who it was at that time.”

The Chairman said, “**I will make a motion that the interpretation of that first question is that the Planning Board did not intend it to be back and forth, back and forth.** I could either get a second or if no one wants to second we’ll take a motion the other way. Seconded by Member Crompton. Voting YES was Members Crompton, Banuski, Phinney. The Chairman said, “you don’t have to. Everyone has an opinion. Do you think the Planning Board intended them to be able to shift back and forth the occupancies?” Member Pardee said, “the only thing that I have to go is that right there. That’s the first I’ve seen it.” The Chairman asked, “the Planning Board minutes from then?” Member Pardee said, “well, that’s 4 years ago.” Member Buttolph said, “if we’d seen that I probably would have voted the other way.” The Chairman said, “we all got it in the e-mail. I’ve got your names all on here. Everybody got it, minutes from the Planning Board meeting. And I highlighted those parts.” Battelle asked, for a recap of the vote. Member Pardee said, “I haven’t voted yet.” Member Pardee said, “I guess I have to vote YES.” Member Buttolph said, “and YES.”

The Chairman said. “the second interpretation – the 2nd question of this, would you actually verbalize it again for me so I can figure out a motion.” Eggleston said, “in that the retail was ultimately established with the occupancy of *Sundance* in April of 2006, and in that the use of the office space from November 2007 to 2009 never applied for and never received zoning approval, does that make the approved use of the building retail, and therefore the occupancy of *Echoes off the Lake* is a continuation of the approved use, not requiring Critical Impact review.” The Chairman said, “I think this is where there’s a little bit more leeway with interpretation. I think that the first question of the interpretation was pretty clear to me one way or the other. I think that this one is the one that we all are wrestling with.”

Member Buttolph asked, “is this something that we can have some research done or a little bit more legal counseling. To me this is the central question. I’m willing to vote YES or NO either way, based on, from a legal standpoint – I just haven’t seen anything in writing yet that says it’s one way or the other. This is just my frustration. I’m willing to vote. I just don’t know on what side to vote.” The Chairman said, “I’m not sure that it is ever going to get more clear than this. We are trying to figure out intent from people 3 and 4 and 5 years ago, and how does that gel with the intent of the Parking Law?” Member Buttolph said, “I see this as a legal question that I would hope is written down that you go from one use – from a permitted use to a non-permitted use...” “..approved,” said Eggleston. The Chairman said, “they are all permitted.” Member Buttolph said, “it seems like that should be written down in the code somewhere. That doesn’t seem like an interpretation question. That seems like a legal question. I know Rick is looking through stuff right now but, it just seems like a legal question to me and not an interpretation. That’s what I’m grappling with. I’d like to see a paragraph or something that kind of,

even if the paragraph was wishy-washy and we could interpret off of the paragraph. There is no paragraph that even lets us sort of make an interpretation off. It seems like we are going on our gut instinct on it. It seems more legal.”

The Chairman said, “in this case this is probably what we are going to get as far as cut and dried, and out here right in front of us. We have a certain set of circumstances, and may not be able to recreate it somewhere else.”

Eggleston said, “in light of this particular application, and I understand that every application has to be looked at on its own merits. We have stated and Doug will testify to the fact that there was no intent to avoid going through proper zoning approvals because Doug had the misunderstanding that it was not a flexible approval of which he did not receive a formal interpretation until tonight. So, there is no basis for him to not think that he was not complying to November 2007 when he allowed the office to be there. They left. So, unlike some applicants, or some things going on here that avoid notice or stop and desist or warn. There was no warning. It was done innocently.”

Member Buttolph said, “but we say that it’s not repeatable. What if Linda Roche was in here last month, what if she was in front of us and she’d gone from her office to the retail store, and she was in here and she sis it illegally. She didn’t know any better. What would we have told her? I think this is a very repeatable thing. What does the law say?” Chairman Banuski said, “she’s not the first one that we’ve done that for.” Member Buttolph said, “she held them out. What if she hadn’t? Would she have been able to go back and say, all right this is too much hassle, I’m putting my office back in here?” Battle explained that Roche could put an office back in the building, but the problems was that that tenant for the office space was a competitor.

Member Buttolph asked, “but what if she had put the painting store in there, without realizing she needed to get the permit?” The Chairman said, “she’s be subject to those parking laws.” Member Buttolph asked, “would she have been able to put her office back in there?” All said, “yes.” Member Buttolph asked, “then why can’t he?”

The Chairman said, “right. So that is exactly the interpretation that we are looking at right now. That’s what we are being asked to make – that decision. Right now. That’s the second part of the interpretation.” Member Buttolph said, “so the law is that you can go back. That’s what you just told me. If Linda Roche was in here and mistakenly put the painting store in there and came and said...” “...all of that happened all at once,” said the Chairman. Buttolph continued, “said she wanted to go back to the office, could she go back to putting her office back in there? The answer is YES, then why can’t he? If the answer is NO she can’t...” “...so that’s your vote on this issue, on this interpretation,” said the Chairman. Member Buttolph asked, “is that the law? Could she put her office back in there?” The Chairman said, “yes.” Member Phinney said, “it is our job to interpret what we feel that that interpretation is in that instance.” The Chairman said, “no one is saying that Doug is culpable in this. The reality is that the office was in there for a certain amount of time, and no one said anything. It was the occupancy reverting back to the approved one that triggered it. It was that change of occupancy. So, it is a unique set

of circumstances. You are right, as far as what you are talking about, what could Linda Roche do, and that's what we are interpreting in this second question."

Member Buttolph said, "I know that I've been talking a lot, and thanks to me we've carried this on for a while – that's the only answer that I wanted. YES you can go back because what I've been hearing the whole time was No you can't go back. You just told me that YES you can go back to office." The Chairman said, "I said that Linda could do that (multiple conversations)...this is a little bit different just over the time span that it happened - it does make a difference. She's talking about a proposed use and if she's going to get shot down then she's going to go back to an office there."

Buttolph said, "they are in there, the painting store is in there." The Chairman said, "right, we handled it as a variance and sent it to the Trustees with a recommendation to waive the parking fee." Member Buttolph said, "but she hasn't put them in there yet. I'm saying Linda has put the painting store in there and hypothetically flaunted the law – she's put them in there and we say nope, you can't. Can she go back and put her office in there? Does that have to sit vacant?" The Chairman said, "no, it can go back to being an office." Member Buttolph asked, "so why can't he?" The Chairman said, "that's your vote on this issue. That's exactly right, Lee. That's your interpretation of this question. If that's the way it works in a case like this, than that's how we should apply it over the years that led up to this situation." Member Buttolph said, "that's great. That was the only answer I wanted. I would he like to have seen something actually, a paragraph written in the code...to me that seems like that's a legal question of can you go back?"

Eggleston said, "what you will find is that a use that has not been approved has not rights, no standing." The Chairman said, "you can't gain any rights by doing it illegally." Member Buttolph asked, "but you get to keep the existing rights that you have?" Member Phinney said, "before he made the mistake." Member Buttolph asked, "why didn't we say this an hour ago?" Galbato said, "the Parking ordinance says *USE* and use is defined under the definitions." (multiple conversations) Member Buttolph said, "this was the question." Member Crompt said, "as Craig said, in between there then you have the new Parking Law going into effect." Member Phinney said, "which changed the scenario." The Chairman said, "and that's what's really different about the two." Member Phinney said, "originally, if Doug when he originally applied, the Parking Law had been in effect, different bailiwick than having it start and then in the middle of when he changed the use, having the Parking Law come into effect. It's a timing issue. Either way he could still revert back. It just what you'd have to do to revert back. You could revert back in wither instance either before the Parking Law or after the Parking Law? It's just a matter of hoops you have to jump through after the Parking Law changed, for a change of use?"

Galbato said, "it's 2 different things. One is Critical Impact Permit under the code provision for Critical Impact which is triggered and also you have a Parking ordinance issue too and that is triggered by the change of use. The Critical Impact permit was issued in June of 2005, by the Board of Trustees."

The Chairman said, “the paragraph in this e-mail that Bob is asking us to make an interpretation of *because the ReMax office was never granted approval does that make the current approval for this building retail, based on the March 2005 action?* I would say to that, yes. The current approval for the occupancy for that building that was granted by the Planning Board in 2005 is retail. The illegal use in the meantime doesn’t negate the retail occupancy approved by – I shouldn’t say illegal – the unapproved use as an office and the change of use doesn’t change the Planning Board’s intent to approve a retail use for that space. So, **I would move that we interpret that the Planning Board’s decision of 2005, and their intent was to approve the use of retail space in this building. And that the intervening unapproved use does not effect that. And therefore no Critical Impact review is required because there is no change of use.**”

Seconded by Member Phinney. Member Buttolph asked, “a YES vote means what do they have to do?” Eggleston said, “therefore no Critical Impact is required for this. And there is no change of use.”

The vote was 5-0 in favor of the motion The meeting was closed at 8:54pm.

cc email: Eggleston, ZBA

cc: Mayor + Trustees