

**MINUTES
VILLAGE of ARDSLEY
ZONING BOARD of APPEALS
REGULAR MEETING
WEDNESDAY, JANUARY 24, 2018**

PRESENT: Michael Wiskind, Chair
Jacob Amir, Esq.
Mort David
Serge Del Grosso

ALSO PRESENT: Larry Tomasso, Building Inspector

1) **Call to Order**

The Chair called the regular meeting to order at 8:10 pm.

2) **Announcements and Approval of Minutes**

Announcements

The Chair announced that the next meeting of the Zoning Board of Appeals is scheduled for Wednesday, February 28, 2017 at 8:00 pm.

Approval of Minutes

Mr. Amir moved, and Mr. Del Grosso seconded, that the Minutes of the December meeting be approved as amended.

Vote: 4 in favor, none opposed, none abstaining, as follows:

Michael Wiskind, Chair –	aye
Jacob Amir, Esq. –	aye
Mort David –	aye
Serge Del Grosso –	aye

3) **Public Hearing**

Application for Variance

APC Design Build, LLC By Andrew P. Collingham

147 Huntley Drive, Ardsley, New York

Section 6.30, Block 13, Lot 4, in an R-3 One-Family Residential District

For proposed second story addition with North and South side yard setbacks of less than Fifteen Feet (Village Code Section 200-26B).

Present: Michael Wiskind, Chair
Jacob Amir, Esq.
Mort David
Serge Del Grosso

Also Present: Andrew P. Collingham
Larry Tomasso, Building Inspector
Maryann Tina, 145 Huntley Drive, Ardsley, NY

The Chair read the Legal Notice.

Open Public Hearing

Mr. Collingham produced the twenty-one “green cards” received, and reported that he had mailed to 29 homes.

Mr. Collingham introduced himself as the owner of the property and the architect for the proposed addition. Mr. Collingham stated that the existing house is legal non-conforming in regard to the side yard setbacks to the North and South. Mr. Collingham stated that the project entails putting a second story addition on the house using the existing footprint, such that the second story would have the same side yard setbacks as the first story, for which he is requesting the variance. Mr. Collingham drew the Board’s attention to drawings of the site plan that showed the setbacks.

The Chair asked Mr. Collingham if he had photographs or elevation drawings. Mr. Collingham stated that the elevation drawings could be found on page A6 of the application. The Chair asked if there were elevation drawings of the existing house, and Mr. Collingham stated that he had elevation drawings only of the house with the proposed addition and not as existing.

The Chair noted that the house is parallel to the property line on the left side, but is angled in on the right side. Mr. Collingham confirmed that on the right side the setback is narrowest in the back.

Mr. Amir asked Mr. Collingham to describe the house as it is now, what is proposed for the second floor, and the purpose of the proposed addition. Mr. Collingham stated that the existing house is a typical Huntley ranch with three bedrooms, a small kitchen, a small dining area and a decent size living area. The Chair pointed out that four bedrooms are shown. Mr. Collingham explained that the previous owner had made an illegal bedroom in the garage, and that under the proposal, this bedroom will be converted back to a garage. Mr. Collingham continued that the house was built in 1952, at a time when people lived differently, whereas now people want a large kitchen and a family room with bedrooms upstairs, so the proposed second story addition would contain three bedrooms, two bathrooms, and a laundry room.

Mr. Amir asked if the upstairs bedrooms were being contemplated in addition to the existing bedrooms on the first floor. Mr. Collingham explained that on the first floor, he plans to create a larger dining room, to keep the downstairs bedroom in the top right corner as a bedroom, to convert one of the other two bedrooms into a dining room, and to convert the other into an office. Mr. Amir asked which bedroom downstairs will remain a bedroom, and Mr. Collingham stated that the one in back next to bathroom will remain a bedroom.

The Chair asked Mr. Collingham if he proposes pushing the house out a little bit onto the front porch. Mr. Collingham replied that he plans to take off the existing porch and build a new blue stone patio and a portico. The Chair asked if the impervious surface is increasing a bit, and Mr. Collingham replied that it is, but noted that the impervious surface will remain within the amount permitted.

Mr. David asked Mr. Collingham to explain why there are two addresses listed. Mr. Collingham replied that the Yonkers address is his home address. Mr. David asked Mr. Collingham if he plans on living in the home on Huntley, or if he is planning the addition for resale. Mr. Collingham replied that he is uncertain, and explained that he is recently married and in the process of moving from a rental, so that living in this home and selling it are both possible.

Mr. David pointed out that the lot size exceeds that required in an R-3 zone, and wondered why the requisite setbacks were not there at the outset. Mr. Tomasso stated that the side yard setback requirement was only eight feet in that district when the house was constructed.

The Chair asked Mr. Collingham to confirm that nothing is going to be any larger than it is now, and that nothing that is not already non-conforming will be made non-conforming. Mr. Collingham acknowledged that he would just be using what he “inherited.”

Mr. Amir asked if he would be using the existing heating and mechanical systems, and if there was anything unusual planned in the second-floor addition. Mr. Collingham stated that there would be brand new heating and cooling systems, as the house has its original

ductwork which is shot. Mr. Amir asked how long Mr. Collingham expected the work to take, and Mr. Collingham replied about seven months.

The Chair asked Mr. Collingham if he had photographs. Mr. Collingham stated that he did not have photographs as he did not know that this was required. The Chair stated that it is always helpful to have photographs to get a sense of how the proposed work fits into neighborhood. Mr. Del Grosso said that he too was concerned about how the proposal would fit into the character of the neighborhood. Mr. Collingham stated that he modeled the design on a traditional colonial, without too many large overhangs or other characteristics that are out of the ordinary or that stand out. Mr. Collingham pointed out that nowadays you see homes with big, chunky overhangs, but that he did not design it like that as he thinks that is a “developer” look. Mr. Collingham continued that he wanted the house to look as original as possible, noting that the dormers on the windows in front give it a nice feel, and the ridge line is higher than the ridge line of the gabled roof of the front, which is the master, to create a hierarchy there. Mr. Collingham concluded that the proposed house will fit in nicely with the rest of the houses on the street, and that it will be a major improvement over the original which is almost in a state of disrepair. Mr. Collingham added that there are houses on the street that have done the same concept of leaving the driveway where it is and enclosing the front porch. The Chair stated that although the Board members know the town and know that to be true, in the future it would be helpful to have photographs.

Mr. Del Grosso asked if the proposal would interfere with sight lines of adjacent neighbors. Mr. Amir asked Mr. Collingham to describe the topography and greenery of the property. Mr. Collingham stated that on the South side there is one large oak tree that is just inside the property line, and that otherwise it is pretty open, like a slightly rolling grassy area, and that on the North side there is a concrete curb on the property line and that after that is a shrubbed bushy area near the neighbor on the North side with much more vegetation separating the two houses. Mr. Collingham added that the house to North sits on a slightly higher elevation than the subject house, and that the house to the South it is slightly lower. Mr. Del Grosso asked if there are any proposed tree removals or other changes in topography. Mr. Collingham stated that the one large tree might have to be trimmed back in order to put up the second story, and that he does not plan to remove any trees.

The Chair pointed out that included in the application materials is a diagram showing where the neighbors are on the adjacent lots, and noted that the house on the North side is quite a bit back toward the street corner, but not so the house on the South side.

Mr. David asked about the plans for drywells. Mr. Collingham reported that they will provide Cultec units with 330-gallon storm water chambers. Mr. Collingham stated that the volume calculations have not yet been done, but that he plans to utilize the pretty large back yard to put in the necessary amount of storm water chambers. Mr. David asked if the storm water chambers would be placed in the front as well as the rear. Mr. Collingham

replied that he will attempt to place all the storm water chambers in the rear yard and to take all the leaders to the back to create a draining system in the rear yard. Mr. David asked if this would handle the front drainage too, and Mr. Collingham replied that it will. Mr. Collingham acknowledged that he has yet to do the calculations, but that this is the preliminary plan.

The Chair noted that a new fence is proposed, and mentioned that this is an issue for the Board of Architectural Review. Mr. Collingham stated that the fence is to create privacy, as the house to the South side is closer and there is less vegetation there.

The Chair stated that the lot coverage increases from 21.2 to 22.5 because of the front patio and the porch, and asked if anything else changes. Mr. Collingham reported that there is a concrete platform proposed in the rear yard, where currently there is a dilapidated and rotted wood platform. Mr. Collingham explained that the plan is to remove that wood platform and create a new concrete one to match the existing concrete platform in the rear yard, and to give it a bluestone finish. The Chair stated that the lot coverage is still much less than that permitted, and Mr. Collingham confirmed that this is correct.

Mr. David asked if the adjacent homes are original Huntley ranches, and Mr. Collingham replied that they are single-story homes. Ms. Maryann Tina, the neighbor at 145 Huntley Drive, brought her cell phone to the Board, showing photographs of her house to the right of subject house as seen from the street. The Chair thanked Ms. Tina.

Mr. Amir asked Mr. Collingham if there is any way to achieve his goals with alternative means, such as reconfiguring the interior or expanding back. Mr. Collingham stated that there is room in the rear yard, because the house is fifty-seven feet from the property line where only twenty feet is required, but that would still have the same side yard constraints. The Chair noted that the side yard impingement would be even greater as the property line angles to become narrower in the back. Mr. Collingham pointed out that another issue in expanding back is room for the drywell Cultec system, which must be ten feet both from the property line and from the house. Mr. Collingham added that expanding back would increase the impervious surface, which would require a larger drywell system.

The Chair asked if any member of the public wished to speak in support of the application, and no one so wished.

The Chair asked if any member of the public wished to speak in opposition to the application, and Ms. Maryann Tina again introduced herself as the neighbor to the South.

Ms. Tina stated that the subject house is extremely close to her home on the side of her home that is her access to her yard where it is already narrow. Ms. Tina stated her belief that the proposed addition will affect her property value, and that it will create a mold

situation on her bluestone on the North side of her home, and that it will impede the light to the detriment of perennials and shrubs.

Ms. Tina stated that the subject house is already imposing because it is on a higher elevation, which would be exacerbated by a second story. Ms. Tina stated that for the proposed new house to be cantilevered will be a tremendous hardship to her house. The Chair stated that the proposal is that the proposed house would not protrude further, only higher. Ms. Tina stated that she understands that the top is going to protrude further than the bottom, that the second story will hang over the first floor. Mr. Collingham stated that Ms. Tina is correct, that there is a slight cantilever in the front where the bay window is, so that instead of having a bay window that projects out with a roof over it, the roof creates the base of the second floor, so that bay window would tuck underneath the second floor that will provide the coverage for the window. Mr. Collingham stated that drawing number one on elevation A-6 on page number 1 showed the right side of the bay window and the projection from top, and pointed out that this projection is within the boundaries of the front yard setback. Mr. Collingham added that the side of the proposed addition is cleanly vertical, and the second story does not get any closer to the property line.

Mr. Amir asked Ms. Tina if her home is a ranch. Ms. Tina stated that her home is the original Huntley ranch. Ms. Tina estimated that ninety-seven percent of the homes on that street are the original configuration, that some are more cape-like but those are still low, that maybe only two houses on Huntley from Heatherdell all the way up have a second floor, and that having an imposing second floor will throw off the symmetry of that street.

The Chair asked Ms. Tina what portion of her house is on the side of the subject property. Ms. Tina reported that on that side is the garage and behind the garage a mudroom which eventually can be converted to living space within the house, so it is almost a part of the kitchen. The Chair asked Ms. Tina if her house has windows on that side, and Mrs. Tina stated that there are two small windows off the mudroom.

Ms. Tina stated that it is a very close pathway when she is going into her yard, that it is the narrowest part of subject property and her property. Ms. Tina stated that, except for dealing with a hardship, she does not see why new construction should not conform to the existing zoning laws, because otherwise the houses will not conform to the serenity and beauty of that neighborhood, which was the original "Huntley Estates."

Mr. David addressed the concern about sunlight. Ms. Tina stated that the proposed addition will be imposing and will afford no sunlight and thus will create a mold situation. Mr. David asked Ms. Tina the direction the front of her house faces, and Ms. Tina replied that the front of her house faces West. Mr. David asked Ms. Tina if she gets afternoon sun, and Ms. Tina replied that she gets a little bit. Mr. David asked Ms. Tina if, as her house is to the South of the subject property, she gets virtually no sun on the North side because her house is blocking it itself. Ms. Tina replied that this is correct, but that you do get light.

Mr. David suggested that the sun was coming from the other direction. Ms. Tina conceded that the light is coming from another direction, but stated that a high thing creates a shadow and you lose whatever light you do have, so she believes you would have a lot of mold.

Mr. Amir asked if the square footages of Ms. Tina's house and applicant's house are comparable. Ms. Tina and Mr. Collingham both said that the square footages are the same. Mr. Amir suggested that therefore a build-up would not strictly affect shade in the back yard. The Chair asked if the fronts of Ms. Tina's house and applicant's house are pretty much parallel, and both Ms. Tina and Mr. Collingham stated that they are roughly parallel. The Chair asked what the elevation difference is between the two houses. Mr. Collingham stated that it is about four feet, and Ms. Tina added that it is a gradual slope. Mr. Collingham opined that, due to the direction of the sunlight, his proposed addition would not affect Ms. Tina too much, whereas the immediate neighbor to Ms. Tina's South – a two-story home similar to that proposed here – affects Ms. Tina's light much more. Ms. Tina stated that the Southerly neighbor's house does not affect the light as much as the proposed addition will because even though it is to her South, it is much further away from her house than the subject property is. The Chair remarked that this is due to the nature of the lots and where the houses were sited on the lots.

Mr. Del Grosso asked if the house to Ms. Tina's South was a build-up and a fundamental change to the Huntley design. Ms. Tina stated that it was, and added that it is the only one like it along Huntley drive up from Heatherdell Road. The Chair pointed out that from the silhouettes on the plat, one can tell which houses have changed and which have not, noting that the three across the street at 144, 146 and 148 Huntley Road are the original silhouette, whereas others like 143 Huntley and one behind on Overlook Road are not. Ms. Tina stated that those were original capes. Mr. Collingham stated that many people have improved the Huntley Ranch by putting in dormers or a partial second floor if not a full second story.

Ms. Tina stated that she is also concerned that privacy will be an issue for both houses, and that one will hear everything through open windows. The Chair remarked that the Northern side of Ms. Tina's house is not where people are living. Ms. Tina stated that the Northern side is where she has access to her yard, and that she accesses her yard more than she use the front egress. Mr. Collingham asked Ms. Tina if it would it be better for privacy if they put in a fence or a row of arbor vitae along the whole property line. Ms. Tina replied that it would help the aesthetics, but not help the issues of the second floor. Mr. Collingham stated that it also would help with noise were that a concern. Ms. Tina reiterated that she thinks it is extremely narrow there. Mr. Amir pointed out that the narrowness does not change with a second-floor addition. Ms. Tina conceded that it does not, but commented that the second-floor addition makes it very imposing.

The Chair asked if any Board member had any further questions. Mr. Amir stated that pictures would be helpful. The Chair stated that he does not like to put things off, but agreed that it would be preferable to have photographs, and suggested adjourning the

matter until the following month after photographs of neighboring properties could be provided, but the other Board members indicated their readiness to vote on the matter immediately.

Mr. David moved, and Mr. Amir seconded, to close the Public Hearing.

Vote: 4 in favor, none opposed, none abstaining, as follows:

Michael Wiskind, Chair – aye

Jacob Amir, Esq. – aye

Mort David – aye

Serge Del Grosso – aye

Close Public Hearing

Mr. Amir moved, and Mr. Del Grosso seconded, the following Resolution:

WHEREAS, APC Design Build, LLC, by Andrew P. Collingham, of 44 Standish Avenue, Yonkers, New York, has applied to this Board for a variance from strict application of the requirements of Section 200-26 Subdivision B of the Zoning Ordinance of the Village of Ardsley, which requires a minimum side yard setback of Fifteen Feet; and

WHEREAS, this application is made under the authority of Section 200-97 Subdivision B of the Zoning Ordinance of the Village of Ardsley, affecting premises known as 147 Huntley Drive, Ardsley, New York, and designated on local tax maps as Section 6.30, Block 13, Lot 4, in an R-3 One-Family Residential District; and

WHEREAS, a Public Hearing on this application was held by the Zoning Board of Appeals at the Municipal Building, 507 Ashford Avenue, Ardsley, New York, on January 24, 2018, after due notice by publication; and

WHEREAS, at the Hearing, applicant APC Design Build, LLC was represented by Andrew P. Collingham who appeared in support of this application, and neighbor Maryann Tina of 145 Huntley Drive, Ardsley, NY, spoke in opposition to this application, and all those who desired to be heard were heard and had their testimony recorded; and

WHEREAS, this Board, after carefully considering all testimony and the application, finds the following:

WHEREAS, this Board, in weighing both the potential benefit to the applicant and the potential detriment to the health, safety and welfare of the neighborhood if the variance is granted, has determined that:

- (1) neither an undesirable change in the character of the neighborhood nor a detriment to nearby properties will be created by the granting of the variance, as some neighboring houses are also two stories, and as the proposed second story addition will cause no change to the width of the encroachments into the side yard setbacks;
- (2) the benefits sought by the applicant cannot be feasibly achieved other than by variances, as expanding the current house by constructing toward the rear rather than building up would involve significantly greater expense, would increase the impervious surface to an unacceptable degree, and would render it impossible to install the requisite drywells at an appropriate distance from house and property line;
- (3) the requested variance to erect a second story on the existing first story is not substantial, as it does not change the footprint of the building but extends upwards the existing encroachments of approximately one foot into the North side yard setback and approximately three feet into the South side yard setback for a second story but does not otherwise increase the encroachment into the side yard setback, and it is not substantial in that the widest encroachment, of 2.9 feet into the South side yard setback, is only at the narrowest point, whereas expanding the house toward the back would not only extend the side yard encroachments along the same line but would increase the encroachment on the Southerly side yard due to the relative angles of the house and Southern property line;
- (4) the proposed variances will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district in that by maintaining the existing footprint the proposed addition will not change the topography, will add to the impervious surface minimally from the changes to the front porch and back patio but will remain well below the maximum land coverage permitted, and will cause less excavation and less soil disturbance than extending the house in any other way and thus will be less disruptive to neighbors; and
- (5) the circumstance requiring the variances was not self-created in that the house was originally built at a time when side yard setbacks were only eight feet.

NOW THEREFORE, be it resolved that the application of APC Design Build, LLC by Andrew P. Collingham is granted.

PROPOSED BY: Mr. Jacob Amir
SECONDED BY: Mr. Serge Del Grosso

VOTE: 4 in favor, none opposed, none abstaining, as follows:
Michael Wiskind, Chair – AYE
Jacob Amir – AYE
Mort David – AYE
Serge Del Grosso – AYE

4) Proposed Resolution

Interpretation of Village Code Requirements

The Thorpe-McCartney Family Limited Partnership

(by Thornwood Four Corners, LLC, Lessee)

657 Saw Mill River Road, Ardsley, New York

Section 6.50, Block 35, Lots 8, 9, 10 and 11, in the B-1 General Business District

**For a determination whether legal non-conforming gas station use is abandoned
(Village Code Section 200-100D).**

Present: Michael Wiskind, Chair
Jacob Amir, Esq. (recused)
Mort David
Serge Del Grosso

Attendees: Cynthia Thorpe Carey, of the Thorpe-McCartney Family
Limited Partnership
Osama Ali, project manager, Thornwood Four Corners LLC
Denise D'Ambrosio, Esq., Allen & Denoyer LLP, counsel
for Thornwood Four Corners LLC
Warren Cohen, Esq., attorney for Thorpe-McCartney Family
Limited Partnership
Larry Tomasso, Building Inspector
Armand Boyagian, 486 Ashford Avenue, Ardsley, NY
Marc Kowalsky, 13 Captain Honeywell's Road, Ardsley, NY
Gary Rappaport, 5 Victoria Road, Ardsley, NY
Ellen Slipp, 12 Abington Avenue, Ardsley, NY

Board Discussion of Proposed Resolution

The Chair stated that this meeting is for a proposed Resolution in response to a request by the Village Board of Trustees for an interpretation of Village Code requirements with respect to an application from the Thorpe-McCartney Family Limited Partnership, by Thornwood Four Corners LLC, for a determination of whether a legal non-conforming gas station use has been abandoned, as defined in Village Code Section 200-100(B).

The Chair noted that this matter was originally scheduled for Public Hearing in August 2017, and was deferred to October 2017. The Chair stated that the Public Hearing opened at the October meeting and remained open at the November and December meeting, and that at the December meeting, the Public Hearing was closed.

The Chair explained that this matter is an interpretation of Village Code requirements, and that the quorum and voting requirements for matters of interpretation are different than those of more typical variance applications. The Chair stated that in interpretation matters, a majority of Board members (at least three of five) must vote the same way in either direction. The Chair noted that one Board member, Jacob Amir, has recused himself throughout these proceedings, and therefore, four members of the Board are eligible to vote on this matter. The Chair stated that at the December meeting of the Zoning Board of Appeals, after the Public Hearing was closed, he polled Board members and gave them the opportunity to share their opinions with each other. The Chair noted that Ms. Gorman-Phelan shared the reasons she was inclined to find abandonment, that Mr. David shared his thinking about non-abandonment, that the Chair shared his opinion about non-abandonment, and that Mr. Del Grosso, who had newly joined the Board as of that meeting, deferred offering his opinion until he had an opportunity to review the material. The Chair concluded that Mr. Del Grosso has now reviewed the material and will be sharing his opinion with his fellow Board members this evening.

Mr. David raised a Point of Order. Mr. David suggested that Mr. Del Grosso had abstained at the December meeting, and that a vote this evening would require a Motion to Reconsider. The Chair stated that the Board is not reconsidering, but rather is still considering, so a motion to reconsider would be inappropriate. The Chair pointed out that there could not have been a vote at the December meeting, as no Resolution was presented upon which to vote.

Mr. Del Grosso moved, and Mr. David seconded, that the Zoning Board of Appeals go into executive session to discuss the procedural matter presented by Mr. David, with no discussion of the substance of the interpretation.

Vote: 4 in favor, none opposed, none abstaining, as follows:

Michael Wiskind, Chair –	Aye
Jacob E. Amir, Esq. –	Aye ¹
Mort David –	Aye
Serge Del Grosso –	Aye

Executive Session

Building Inspector Larry Tomasso joined the Executive Session to advise the Board. The Recording Secretary was not at the Executive Session, and no minutes were taken.

¹ Mr. Amir voted on the procedural matter of going into Executive Session, participated in the Executive Session, and continued his recusal upon the Board's return from Executive Session.

Board Discussion, Resumed

The Chair reiterated that during three lengthy meetings, the applicant and the public had the opportunity to speak, that toward the end of the December meeting, the Public Hearing was closed. The Chair explained that after a Public Hearing is closed, there is no further opportunity for an applicant or the public to speak with the Board, though Board members may continue to discuss their opinions with each other. The Chair reported that although there was no Resolution proposed at the December meeting, several Board members had shared their thoughts, that Mr. Del Grosso had not yet formed an opinion, which he now has, and which he is ready to share.

Mr. Del Grosso stated:

“To recap, the purpose of this hearing is to provide an interpretation of Section 200-100D of the Code of the Village of Ardsley for a determination of whether Getty Properties Corp’s former legal non-conforming gas station use of the premises has in fact been abandoned according to the definition provided in this statute.”

“In the Zoning Board of Appeals meeting of December 20, 2017, I had abstained from providing my opinion since this was my first meeting as a newly appointed member of the Zoning Board of Appeals and had not had enough time to adequately study the issue. Since that meeting, I have done my own research, reviewed the documentation provided, and I am prepared to share my point of view today.”

“To interpret the abandonment statute in this situation, I have focused on two primary factors: the intent of the applicant to use the property and what comprises the definition of ‘use’; the activities that occurred during the critical six months that according to the Code would provide evidence that the property was, in fact, abandoned.”

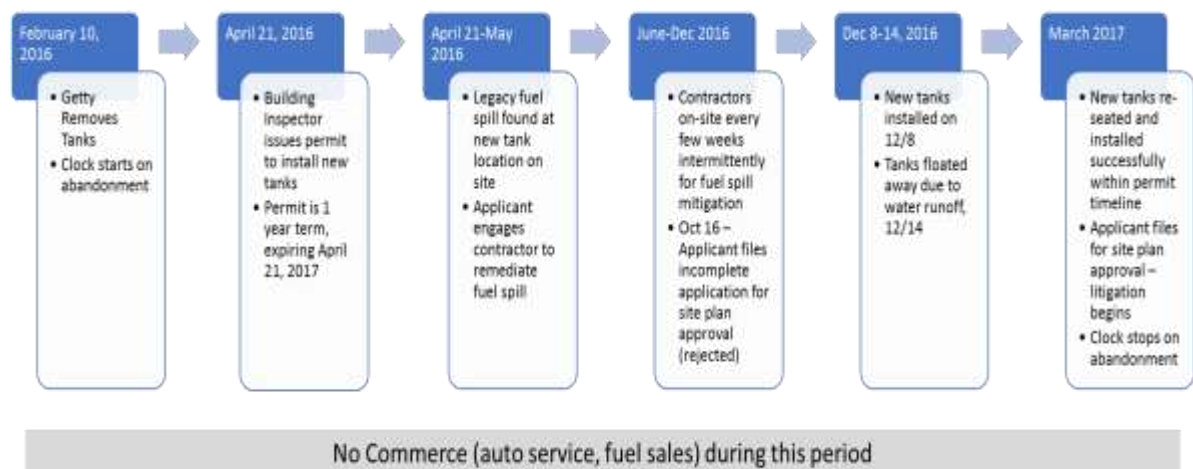
“Regarding the definition of ‘use’, a strict interpretation is whether commerce occurred on the property consistent with its historical non-conforming use as a gas and auto service station. It is documented that Getty removed the station’s gas tanks on February 10, 2016 and no fuel of any kind was sold at the site since that time. I do not have any record in the documents that I reviewed of whether auto service was still provided, but assume that this service was also suspended on or about the time gas service stopped. Consequently, no commerce has occurred on this site since February 2016. Is this abandonment?”

“According to Gary D. Taylor, Director for the Community and Economic Development program of Iowa State University Extension and Outreach, in an article published on July 10, 2013,² ‘The issue of what constitutes abandonment is one that is generally the subject of much state court case law, with some courts requiring that an “intent to

² <http://articles.extension.org/pages/26487/nonconforming-uses-aka-grandfathered-uses-in-zoning>

abandon” be shown before the non-conforming use is considered to be terminated. The intent to abandon may be something like a list of criteria, in the zoning ordinance, from which “abandoned” is established from a preponderance of facts about the particular situation.”

“In the documentation provided to the Zoning Board of Appeals as well as to the Ardsley Village Board of Trustees, the applicant states that there were a number of activities that occurred since the site stopped selling auto and gas service to demonstrate that there was, in fact, an intent to use, and not abandon, the site. To verify this for myself, on December 22, 2017, I interviewed Larry Tomasso, the Village of Ardsley’s Building Inspector. Larry outlined the permits that were filed through his office as well as provided insight based on his direct observation of the activities related to the property. Using both the documented evidence as well as incorporating the information provided in this interview, I created the following timeline illustration of the key activities during the period Feb 2016 – March 2017:



I would stipulate that during this entire time, no commerce (auto service, fuel sale) occurred that critical period.”

“Based on this timeline of activities, while no commerce occurred during the period which would constitute abandonment, there is clear evidence that there was an intent to prepare this property for commercial use. The contractor that was hired to remediate the fuel spill clearly did not do so, nor was equipped to complete the remediation in a timely manner. Once the site was remediated, the fact that the tanks could not be seated properly due to water run-off is consistent with the topography of our Village and related storm water management. Finally, the new gas tanks were seated before the expiration of the approved installation permit. Taking all of these facts into consideration, it is therefore my

interpretation of Section 200-100D of the Ardsley Zoning Code that this site was not abandoned.”

“To conclude, I believe it is important to recognize that the role of the Zoning Board of Appeals is to interpret and apply our zoning laws, and not overreach into determining the type of businesses that should exist in our Village. That is a consideration for our Village Board of Trustees and should continue to be actively considered and debated in that forum.”

The Chair stated that in advance of the meeting this evening, Mr. Del Grosso had shared his inclination, which allowed the Chair to ask the Village Attorney to assist the Board in preparing a Resolution on this matter. The Chair distributed copies of the Resolution he intended to move to Board members. The Chair stated that, although the Public Hearing is closed, copies of the Resolution he intended to move are available to any applicants or members of the public who wished to review it, and he then distributed copies.

The Chair moved, and Mr. David seconded, the following Resolution.

WHEREAS, the Thorpe-McCartney Family Limited Partnership (“Thorpe”) by Thornwood Four Corners, LLC, Lessee (“Thornwood”) as owner and lessee of the property located at 657 Saw Mill River Road and designated as Section 6.50, Block 35, Lots 8, 9, 10 & 11 on local tax maps (“the Property”) and located in the B-1 General Business District on the official Zoning Map of the Village of Ardsley (“Ardsley”) has requested site plan approval for the proposal of a new gas station and a convenience store including a new building, pump islands and canopy at that location from the Board of Trustees of the Village of Ardsley (“the Board”); and

WHEREAS, the Board has referred this application to the Ardsley Zoning Board of Appeals (“ZBA”) for a determination whether the prior tenant Getty Properties Corp.’s (“Getty”) legal non-conforming gas station use of the premises has been abandoned, and further for an interpretation of Section 200-100D of the Code of the Village of the Village of Ardsley (“the Code”); and

WHEREAS, this application was noticed for a public hearing before the ZBA to commence at 8:00 p.m. on August 23, 2017, and was continued on adjourned dates, October 25, 2017, November 22, 2017 and December 20, 2017; and

WHEREAS, at such regularly convened public hearings both the applicant and members of the public were provided the opportunity to be heard; and

WHEREAS, both the applicant and the general public were provided the opportunity to submit comments both in favor of and in opposition to the application and those written comments were made a part of the record of this application; and

WHEREAS, the ZBA has entertained this application and deliberated in accordance with its obligations pursuant to the Code and has reviewed the testimony of those who spoke at the public meeting, weighed their credibility and the relevance of the various comments and submittals, and applied the applicable law;

The ZBA now determines as follows:

FINDINGS OF FACT:

The property is located in a B-1 General Business Zone on the official zoning map of the Village of Ardsley. The Code, adopted in 1959, makes no provision for the creation or operation within that zone for the operation of a gas station. It is both represented and conceded that prior to the enactment of the Code, a gasoline service station was constructed and operated continually until February 10, 2016.

Section 200-2 of the Code provides as follows:

GASOLINE, STATION: Any area of land, including structures thereon, that is used for the sale of gasoline or other motor vehicle fuel or oil and other lubricating substances, including sale of motor vehicle accessories, and which may or may not include facilities for lubricating, washing or otherwise servicing motor vehicles, but not including the painting thereof by any means.

The applicant's gas station preceded substantially the enactment of the Code as adopted in 1959 and was permitted to continue its operation as a preexisting non-conforming use.

The Code provides in Section 200-2:

NONCONFORMING USE: A building, structure or use of land existing at the time of enactment of this chapter which does not conform to the regulations of the district or zone in which it is situated.

Section 200-100D of the Code provides as follows:

ABANDONMENT: Whenever a nonconforming use has been discontinued or ceases operation for a period of six (6) months or more, or is changed to a conforming use, such nonconforming use shall not thereafter be reestablished, and any future use of the premises shall be in conformity with the provisions of this chapter.

Section 200-1 of the Code provides:

WORD USAGE: “...the words “used” or “occupied” as applied to any land or building shall be construed to include the words “intended, arranged or designed to be used or occupied.”

The following facts are equally undisputed:

On or about February 10, 2016, in conjunction with the expiration of the lease of the prior tenant Getty, and as part of their obligation, Getty removed from the premises the existing underground gasoline tanks and for all intents and purposes the owner of the property actively ceased pumping gas on that date. The property was simultaneously leased to Thornwood, a company actively engaged in the gasoline sales business who intended to install new tanks and commence operations as a gasoline station. On or about that time an open spill violation was reported which required closure by the New York State Department of Conservation. That spill violation and open permit were subsequently closed by the New York State Department of Environmental Conservation (“DEC”).

On April 21, 2016, the Ardsley Building Department (“Building Department”) issued a permit to Thornwood to install new tanks. That permit was to expire within one year on April 21, 2017, substantially beyond the period when the non-conforming use herein could potentially be considered abandoned.

On or about April 21, 2016 through May 2016, another spill attributed to a prior tenant was located on the site and Thornwood engaged a contractor to remediate the fuel spill/site contamination which was left behind but undetected prior to occupancy. At the time Thornwood executed their lease agreement with Thorpe they were unaware of this spill and/or contamination.

On or about June 16, 2016 thru December 2016 contractors were on site intermittently to remediate the spill/contamination but were apparently not properly equipped or capable of performing the task and were subsequently replaced.

On or about October 2016, Thornwood applied to Ardsley through its Building Department for site plan approval to construct a new station building in lieu of maintaining the old facility, eliminating any provision for automobile repairs and substituting a convenience store (permitted in a B-1 zone). It was determined at that time that the prior facility was so old and in such disrepair that a newer building was more appropriate.

On or about December 8, 2016, an attempt was made to install new gasoline tanks. This was unsuccessful as the result of extreme flooding, the topography of the site and heavy rains. These issues required constant dewatering, re-engineering, and re-siting.

On or about March 2017, new gasoline tanks were reseated and installed successfully, within the original permit installation period provided by Ardsley. The applicant then applied to the Board for site plan approval. Upon review of the application by the Building Department and the Board of Trustees, the application was referred to the ZBA for an interpretation to determine whether both Thorpe and Thornwood had abandoned the right to utilize the property as a preexisting non-conforming gasoline station or whether that use had been preserved in accordance with Code Section 200-100D.

The foregoing time line is substantiated by the affidavits of Donald Elmendorf, P.E. ("Elmendorf") of the consulting firm representing Thornwood, and Osama Ali ("Ali") the office manager and project coordinator of Thornwood for this project, together with the testimony presented at the various hearings.

Thornwood further alleges in the affidavit of Osama Ali that Thornwood has expended \$682,320.60 to date to maintain and improve the continued use of the property, that the project has never been abandoned but was faced with a series of difficulties not of Thornwood's making and that while it would have been in their best interests to complete the renovation sooner, circumstances beyond their control did not allow that to happen.

The record further indicates that a substantial period of delay was caused by a contractor who ultimately was relieved of his assignment.

Additional facts contained in the record have been reviewed and considered and are incorporated by reference, including but not limited to the comments and submissions of the public and the comments into the record of the ZBA.

CONCLUSIONS OF LAW:

Section 200-97 of the Code provides:

POWERS AND DUTIES: The Board shall have all the powers and duties prescribed or permitted by law and/or this chapter..... A. Interpretation: Upon appeal from any decision, determination, order or requirement by an administrative official or upon the request of any official or Board of the Village, to decide any question involving the interpretation of any provision of this chapter, including determination of the exact location of any district boundaries if there is any uncertainty with respect thereto.

The standard of review is one of substantial evidence. Substantial evidence consists of proof within a whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from the proof as a premise, a

conclusion or ultimate fact may be extracted reasonably, probatively, and logically. (*FMA Corp. [Peroxygen Chems Div.] v. Unmack*, 92 NY2d 179, 188 [1998, quoting *300 Gramatan Ave. Assoc. v. State Division of Human Rights*, 45 NY2d 176, 181 [1978]). The requirement of “substantial evidence” is long standing. The Court of Appeals has noted that the standard has been “proof sufficient to satisfy a reasonable man of all the facts necessary to be proved to authorize the determination.” *Matter of Weber v. Town of Cheektowaga*, 284 NY 377, 380 (1940); *see also, Matter of 300 Gramatan Avenue Assoc. v. State Division of Human Rights*, 45 NY2d 176 (1978); *Matter of Duran v. Gunn*, 135 AD2d 628, 629 (2d Dept. 1987); *Star Rubbish Removal Corp. Martinez*, 15 A.D.3d 587 (2d Dept. 2005). It is further well established that the courts will not interfere with an administrative determination based upon substantial evidence.

RESOLVED:

After reviewing all of the facts and circumstances of this application, hearing the testimony of the applicant and the general public, both in support of and in opposition to continuation of the site as a gasoline station, and after reviewing the written comments and law submitted both in support of and in opposition to the application, and after due deliberation and engaging in a collegial exchange between the members of the ZBA, it is the determination of the ZBA that the applicant, by credible and substantial evidence, has sustained its application that the use of the property as a gasoline station has not been abandoned pursuant to Code Section 200-100D, and that at all times, albeit not with the alacrity required by statute, Thornwood has continued to take those meaningful steps in the retention of contractors and consultants, interaction with the appropriate government agencies and substantial expenditure of funds to continue its preexisting use as a gasoline station. It is further determined, that based upon the record, and by substantial evidence, that the applicant has affirmatively abandoned the preexisting non-conforming use that permitted the servicing of automobiles.

The foregoing constitutes the decision and determination of the ZBA. This matter is referred to the Building Department and Board of Trustees for any further proceedings.

Moved By:	Michael Wiskind, Chair
Seconded By:	Mort David
Vote:	3-0. (3 in favor, none opposed, none abstaining)
Roll Call:	Michael Wiskind, Chair – AYE
	Mort David – AYE
	Serge Del Grosso – AYE
	Maureen Gorman-Phelan – NOT PRESENT
	Jacob Amir – RECUSED

The Chair recorded the vote of 3 in favor of the Resolution, none opposed, and none abstaining, noting that Ms. Gorman-Phelan is unable to vote as she is not present, and that Mr. Amir is recused on this matter.

Mr. David stated that Ms. Gorman-Phelan's eloquent presentation at the December meeting made him think that to have denied the application would have deprived the property owner of the right to renovate and would have presented a constitutional issue of taking of property without due process, and that this is part of his reason for having supported the Resolution.

5) **Adjournment**

On motion of Mr. Del Grosso, seconded by Mr. Amir, the meeting of the Zoning Board of Appeals was adjourned at 9:40 PM.

Respectfully submitted,
Judith Calder
Recording Secretary