**MINUTES**
**VILLAGE of ARDSLEY**
**ZONING BOARD of APPEALS**
**REGULAR MEETING**
**WEDNESDAY, DECEMBER 20, 2017**

**PRESENT:** Michael Wiskind, Chair
Jacob Amir, Esq.
Mort David
Serge DelGrosso
Maureen Gorman-Phelan

## 1) Call to Order

The Chair called the regular meeting to order at 8:01 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, January 17, 2018 at 8:00 pm.[1]

The Chair announced that he is the new Chair of the Zoning Board of Appeals, following the resignation of Patricia Hoffman after more than fourteen years of service. The Chair also announced the recent appointment of the Serge DelGrosso to the Zoning Board of Appeals.

The Chair announced that the Agenda will be taken out of order.

### Approval of Minutes

[1] It was subsequently determined that the next meeting of the Zoning Board of Appeals would take place on Wednesday, January 24, 2018.

Mr. David moved, and Mr. Amir seconded, that the Minutes of the November 22, 2017, meeting be approved as amended. **Vote**: 4 in favor, none opposed, one abstaining, as follows:

| | |
|---|---|
| Michael Wiskind, Chair – | aye |
| Jacob Amir, Esq. – | aye |
| Mort David – | aye |
| Serge DelGrosso – | abstain |
| Maureen Gorman-Phelan – | aye |

**3) Public Hearing**

**Application for Variance from Village Code Requirements**
**John L. Ferrara and Maryann Casale**
**9 Overlook Road, Ardsley, New York**
**Section 6.30, Block 14, Lot 13, in an R-3 One-Family Residential District**
**For a proposed new two-story dwelling, with a West side yard width of less than Fifteen feet (Village Code Section 200-26B).**

**Present:** Michael Wiskind, Chair
Jacob Amir, Esq.
Mort David
Serge DelGrosso
Maureen Gorman-Phelan

Also Present: John L. Ferrara and Maryann Casale
Salvatore J. Triano, P.E., Principal, Crossland Engineering, PLLC, 98 Cross Road, Holmes, NY 12531
Ms. Stephanie Donahue, 11 Overlook Road, Ardsley, NY

The Chair read the Legal Notice.

**Open Public Hearing**

Mr. Triano produced the green cards.

Mr. Triano advised that the proposed approach is to remove the existing structure, maintain the footprint of the foundation, and reduce the size of the existing deck in the back of the house to conform to the rear yard setback. Mr. Triano explained that on the West side of the property, the existing side yard setback is 13.68 feet at the narrowest, and that on the East side of the property, the existing side yard setback is 18.46 feet at the narrowest, for a total of about thirty-two feet. Mr. Triano stated that there is an existing non-conforming house, and that to demo the foundation and construct a new foundation would require

excessive soil and disturbance, add time, and would disrupt the neighborhood more. Mr. Triano explained that the proposed approach will cause the least amount of damage on the property, minimize the disturbance, and keep the footprint where it is. Mr. Triano added that this approach also conserves financial resources.

Mr. David asked why replace rather than repair and use the existing home. Mr. Triano explained that they propose using the existing foundation, but that but that structurally the house has a few issues such as decay, and limitations, such that adding a second story to the existing house would mean a complete reinforcing of the wall system and tearing up a good portion of the floor to get down to supporting footings, which would be a lot of work and which would exceed the cost of taking the entire structure down and replacing it with a new structure.

Mr. David asked about the comparable square footages. Mr. Triano replied that the base square footage of the house is not changing. The Chair clarified that it is the footprint is not changing. Mr. Triano acknowledged that the floor area is increasing.

Mr. Amir asked if this means that they are not changing amount of impervious surface. Mr. Triano replied that this is correct, although they are technically reducing it by cutting the deck back. Mr. Amir asked how much the impervious surface is reducing. Mr. Triano stated that it is reducing just a few feet. The Chair asked if they are taking the rear setback to twenty feet. Mr. Triano replied in the affirmative. Mr. Triano added that they also will be adding a small drywell because the Building Inspector advised that if the existing deck is being removed, then the new deck would be considered a new feature, so storm water prevention is needed to compensate for the new feature being added.

Mr. DelGrosso asked Mr. Triano to show which part of the house would be on the West side of the property, and Mr. Triano so indicated.

Ms. Gorman-Phelan asked what will be upstairs. Ms. Casale stated that there would be three bedrooms and two 2 baths. Ms. Gorman-Phelan asked what would be downstairs. Mr. Triano stated that it would be a kitchen and a family room. Ms. Gorman-Phelan asked how many people live in the house now. Ms. Casale said that three people live in the house, two adults and one child. Ms. Casale added that it is possible that an in-law will be moving in.

Mr. Amir asked if the proposal has no slope issue. Mr. Triano stated that they are proposing a silt fence in the area where they will be working with the deck.

Mr. Amir asked if all the mechanical and other systems will remain the same. Mr. Triano replied that this is correct, that they will be using existing sewer and water lines. Mr. Triano added that this is intended to be of only minor impact on property and neighborhood.

Mr. Amir asked how long the project will last. Mr. Triano replied that it would take no more than a month. Mr. Triano explained that the demolition will be scheduled when the modular is ready to be shipped. Mr. Triano added that the concrete block walls have to be filled with concrete, as they are hollow core and there are a few low points where the modular has to sit, and then the modular can go on the foundation.

Mr. David asked about the garage. Mr. Triano stated that there currently is a garage and that it stays.

The Chair asked about the basement, and if they will be using the existing support rows. Mr. Triano replied that they will be using portions of them, and that he has a steel design for reinforcing them, and that they also will have steel beams using some of the existing post locations. The Chair noted that there seem to be quite a lot of them. Mr. Triano replied that there are, and explained that modular requires us to do something different on the side, to make it easier structurally, and to meet up with the current foundation locations inside the house, so the modular company is asking for a lot of posts there. Mr. Triano added that they will be eliminating the bulk of those.

The Chair asked if applicant had photographs of existing and neighboring homes. Mr. Triano stated that he did not have photographs. Mr. Amir asked if the neighboring houses are similar in size. Mr. Triano stated that the neighboring homes are two stories or one-and-a half stories.

Mr. David asked if any of the runoff patterns are changing and if storm water currently goes into a drywell. Mr. Triano stated that there is a drywell that was installed about ten years ago, and that they will be adding another drywell. Mr. Triano stated that there are no changes to the topography or to the impervious surface, aside from the reduction in the size of the deck, so they are improving the overall storm water system by reducing the impervious surface and adding a drywell too.

Mr. DelGrosso asked about the cost difference to make the new structure conform to the setbacks. Mr. Triano stated that the cost would be more than double the cost of the project as proposed. Mr. Triano explained that to demo the foundation would require taking it out completely in order to shift the footprint of the house by a bit over one foot. Mr. Triano added that they would have to remove some soil and bring new materials in, create more disturbance in entire area, and that even the driveway and sidewalks would have to be torn out to do that work.

The Chair asked if the entire house could be shifted over and kept the same size, and suggested that another option would be to make the house fifteen inches narrower. Mr. Triano stated that he had not considered that structural approach as that would require backfill in the basement area.

Mr. Amir asked the age of the house. Mr. Triano replied that it was probably built in 1950-55. The Chair noted that the property card states that the house was built in 1952.

The Chair asked if any member of the public wished to speak in support of the application.

Ms. Stephanie Donahue, of 11 Overlook Road, introduced herself as the neighbor on the East side of the subject property, the side with the wider setback. Ms. Donahue stated that as long as the footprint does not change, she has no objection to the proposal.

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

The Board members discussed their views on the application as follows. Mr. David commented that, as they are using the existing footprint, the setback will not change. Ms. Gorman-Phelan noted that they are increasing the setback in the rear. The Chair advised that, as a general rule, the Board has been fairly open to maintaining an existing non-conforming setback by going up. The Chair stated that in this case there seems to have been an opportunity to avoid the need for the variance with some additional cost, although as there is already some foundation work being done by bringing in the steel and so on. The Chair added that one of the reasons he would have wanted to see photographs is to have seen how much of the foundation is currently above the ground, whether it was six inches or a couple of feet. Mr. DelGrosso stated that it appears to be about thirty inches, and that if it is block, it is not as bad as breaking up a concrete wall. Mr. Triano said that it is less work but that it is still a good bit of work. Mr. Triano explained that the area that would be most impacted would be the garage, and that based on the interior, the footing for the garage goes below the garage level as well so that it is a full height foundation, so that to demo and remove and re-support things would require going through the concrete slab in the garage, removing all those postings straight down and trying to set up something else like that. Mr. Triano stated that this is a lot of effort for a small adjustment, and that to make the house conform to the setbacks would have a substantial impact on time, effort, money and disturbance.

Mr. David moved, and Ms. Gorman-Phelan seconded, to close the Public Hearing. **Vote:** 4 in favor, none opposed, 1 abstaining, as follows:

| | |
|---|---|
| Michael Wiskind, Chair – | aye |
| Jacob Amir, Esq. – | aye |
| Mort David – | aye |
| Serge DelGrosso – | abstain |
| Maureen Gorman-Phelan – | aye |

**Close Public Hearing**

Mr. Amir proposed, and Mr. David seconded, the following Resolution:

*WHEREAS, John L. Ferrara and Maryann Casale, of 9 Overlook Road, Ardsley, New York, 10502, have 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 9 Overlook Road, Ardsley, New York, and designated on local tax maps as Section 6.30, Block 14, Lot 13, 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 December 20, 2017, after due notice by publication; and*

*WHEREAS, at the Hearing, applicant Maryann Casale and architect Salvatore Triano appeared in support of this application, and neighbor Stephanie Donahue of 11 Overlook Road spoke in support of the application, and no one appeared in opposition to this application; 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 neighboring houses are also two stories, and as the new house will stand on the existing footprint, causing no increase in the width of the encroachment into the side yard setback;*

*(2) the benefits sought by the applicant cannot be feasibly achieved other than by variances, as remediating the current house would present challenging structural and support issues, and as expanding or replacing the house other than on the existing foundation would be cost-prohibitive;*

*(3) the requested variance to erect a two-story house on the existing foundation is not substantial, as it maintains the encroachment of less than a foot and a half into the side yard setback for a second story but does not otherwise increase the encroachment into the side yard setback, and as the proposed plan also replaces the existing deck with a new deck so as to remove the existing rear yard setback*

*encroachment, and it is not substantial in that there are no changes to the mechanicals or to the water or sewer lines;*

*(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 neither change the topography nor add to the impervious surface, and that the proposal includes improved storm water pollution prevention with an additional drywell, and in that replacing the existing deck with a smaller deck it will remove the encroachment into the rear yard setback; and in that replacing the house on the existing foundation will cause less demolition and less soil disturbance and thus be less disruptive to neighbors; and*

*(5) the circumstance requiring the variances was not self-created in that the house was purchased in its current configuration and owners now anticipate an in-law joining their household.*

*NOW THEREFORE, be it resolved that the application of John L. Ferrara and Joan Maryann Casale is granted.*

PROPOSED BY: Mr. Jacob Amir

SECONDED BY: Mr. Mort David

VOTE: 4 in favor, none opposed, 1 abstention, as follows:

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|---|---|
| Michael Wiskind, Chair – | AYE |
| Jacob Amir – | AYE |
| Mort David – | AYE |
| Serge DelGrosso – | ABSTAIN |
| Maureen Gorman-Phelan – | AYE |

**4) <u>Public Hearing</u>**
**<u>Application for Variance from Village Code Requirements</u>**
**Gary S. and Jill E. Rappaport**
**5 Victoria Road, Ardsley, New York**
**Section 6.20, Block 6, Lot 8, in an R-2 One-Family Residential District**
**For a proposed addition, with a West side yard width of less than Twenty feet and a Rear yard depth of less than Thirty feet (Village Code Sections 200-18B and 200-18C).**

**Present:** Michael Wiskind, Chair
Jacob Amir, Esq.
Mort David
Serge DelGrosso
Maureen Gorman-Phelan

Also Present: Gary S. and Jill E. Rappaport
John Cartunio, architect
Neil Kusherman 116 Huntley Drive, Ardsley, NY
Jeff Axelrod, 118 Huntley Drive, Ardsley, NY

The Chair read the Legal Notice.

**Open Public Hearing**

Mr. Cartunio produced fifteen green cards.

Mr. Cartunio stated that applicants wish to construct an addition in the right rear corner of the house. Mr. Cartunio provided photographs of the house, showing that there is a deck where they intend to put the addition, and showing that there is a shed beneath the deck. Mr. Cartunio stated that the purpose of the addition is to accommodate Mrs. Rappaport's mother, who now lives with applicants, and who cannot navigate stairs so needs to be on the first floor. Mr. Cartunio stated that the proposed addition is a minimum of twelve feet in depth and sixteen feet in width to accommodate a bedroom, closet and bathroom for Mrs. Rappaport's mother. Mr. Cartunio stated that the property is shrubbed and landscaped and fenced on all sides. Mr. Cartunio advised that the property next door on the right side is also non-conforming in the rear yard setback, and that that neighbor [Larry Kaplan of 3 Victoria Road],wrote a letter in support of the application. Mr. Cartunio further advised that another neighbor behind on Huntley [Lisa Shulman of 120 Huntley Drive] also wrote letter stating that they have no objection to the application. Mr. Cartunio added that the Rappaports have lived in this home for a number of years, and further added that he had designed their kitchen several years ago.

Mr. Amir asked what they are doing with the deck in the rear. Mr. Cartunio replied that they are removing the deck because that is where the addition is planned. Mr. Amir asked what is going on top of it. Mr. Cartunio stated that nothing is going on top of it, that it is a one-story addition to provide a bedroom for Mrs. Rappaport's mother on the same floor as the kitchen and living room. Mr. DelGrosso asked if the location would be where the deck is. Mr. Cartunio replied that it would be in that exact location, as they propose replacing the deck with the shed. Mr. Amir asked if the deck is on concrete. Mr. Cartunio stated that the deck is on two posts. Mr. Amir asked if the shed is on concrete, and Mr. Cartunio replied in the affirmative. Mr. Amir asked if that is changing. Mr. Cartunio stated that there will be a little more impervious surface and that they will put in whatever drywells

are done for that. Mr. Cartunio added that right now they just have preliminary plans, and that if the project is approved, they would do construction drawings to show gutters and leaders connected to a drywell.

The Chair noted that, in addition to the bedroom and bathroom, the addition also shows a washer and dryer. Mr. Cartunio stated that this is correct. The Chair asked where the laundry is now. Mr. Cartunio stated that he believes that it is now in the basement. The Chair asked if this proposal maintains the outside entrance. Mr. Cartunio stated that there will be a way to get out, and that instead of a deck, there will be a platform with steps going down to the rear yard.

Ms. Gorman-Phelan asked if there is a bathroom on the ground floor now, and Mr. Cartunio replied that there is none. The Chair asked if there is not a bathroom in the house. Mr. Cartunio stated that there is a bathroom, but on a different level, not on the ground floor.

Mr. David asked if there would be a separate entrance for that area. Mr. Cartunio replied that there will be a separate door to get out, that just like there is a back door now, there will be a back door to the bedroom to get out. Mr. Cartunio added that it is a good safety feature to have, and that it would be the only way to get to the backyard other than through the basement.

The Chair asked if the proposal increases the encroachment into the side yard setback and creates a new encroachment in the rear where none exists now. Mr. Cartunio stated that there is no current encroachment into the rear yard because a deck does not have the same setback requirements. The Chair stated that there still are two different issues. Mr. Cartunio agreed, and added that the side yard will not get any closer. The Chair pointed out that it still is increasing the amount of the encroachment. Mr. Cartunio acknowledged that it will increase the length of the encroachment. Mr. Cartunio added that both variances are pretty minimal, that one is 2.3 feet and the other is 1.6 feet, which is minimal in terms of variances percentage-wise. Mr. Cartunio stated that this property is non-conforming in that it is 8,300 square feet in a 10,000-square foot zone, so the property itself is undersized, but it does comply with all the other restrictions, such as land coverage and FAR. Mr. Cartunio added that they had a new survey done, which is included in packet provided to the Board, to verify the exact setbacks as opposed to the old survey.

Mr. David asked if Huntley Drive is to the rear of the house. Mr. Cartunio replied that yes, that is one of the neighbors. Mr. David asked if that is the immediate neighbor. Mr. Cartunio stated that he thinks it is askew, that it is on an angle.

The Chair asked if any member of the public wished to speak in support of the application.

Applicant Gary Rappaport stated that when he and his wife moved to this home sixteen years ago, they were different people, and that they came from apartments. Mr. Rappaport

stated that they are getting a little "on in life" and the stairs are really becoming a problem for them, especially with the laundry, especially now that their son is a little older and that Mr. Rappaport's mother-in-law is now joining them. Mr. Rappaport added that his mother-in-law is low maintenance but that the load is getting heavier. Mr. Rappaport reported that his wife had said that "we wish we knew coming from the city and apartments that we had gotten a bathroom on the ground floor, and that is what is really always missing, so we always have to go up and down, but the laundry is really another factor here, to bring that laundry room up, the wear and tear on our knees, that is really the key thing, to bring the laundry room up to this room." Mr. Rappaport reiterated Mr. Cartunio's statement that the neighbor next door has no objection, that he thinks it would be a good addition. Mr. Rappaport added that the proposed addition would go into the rear yard and pretty much match what that neighbor at 3 Victoria Road has. Mr. Rappaport also stated that behind his neighbor's property, which parallels subject property, another neighbor has a non-conforming shed on the property line, and adds that Mr. Tomasso allows grandfathered sheds to sit on property lines, whereas the Rappaports' shed is back where it should be, but that the neighbor on the Huntley side who approves of the addition has a shed on the property line, and that Mr. Rappaport cannot see any real objection to this because it would come nowhere close to his property, while he already has a structure right on his property line. Mr. Rappaport stated that they have extensive shrubs, no grass, but large trees so there is a lot of shade and protection.

Mr. Amir asked if there are trees on side between the subject property and 3 Victoria Road. Mr. Cartunio stated that there are trees everywhere and that there is a silver maple with long spindly roots along the fence in the back. Mr. Amir asked if the privacy and topography will remain consistent. Mr. Cartunio said that it would.

The Chair pointed out that, according to the plan, there is not a lot of room in this bedroom. Mr. Cartunio replied that they made it the minimum because they did not want to be greedy. Mr. Cartunio added that it is not a laundry room, that it is a laundry closet. The Chair noted that with all the doors and windows, there is no wall long enough to put a bed on. Mr. Cartunio stated that the bed would be on the back wall. The Chair pointed out that there is a window there. Mr. Cartunio stated that the window is up high and that the bed will be below the window.

The Chair asked if any member of the public wished to speak in opposition to the application.

Neil Kusherman

Mr. Neil Kusherman stated that he lives at 116 Huntley Drive, right in back of the subject back right yard. Mr. Kusherman asked what the reason is for a setback, and if they can be moved at any time if people object, and is it not to insure space and privacy. The Chair replied that that was essentially correct. Mr. Kusherman stated that his bedroom faces the

direction of the proposed addition, and that they currently see the deck and a bit of the house because it is about twelve feet back. Mr. Kusherman stated that coming back twelve feet and then another two or three feet is an impingement on his property, and that it will reduce his property value.

Mr. Kusherman asked if the addition would also involve digging a foundation. Mr. Cartunio replied that it would. Mr. Kusherman stated that there is a tree in the back of the subject property with very large roots that extend. Mr. Kusherman showed photographs taken from the backyard of his house. Mr. David asked if his house is two stories. Mr. Kusherman stated that his bedroom is on the first floor. Mr. Amir asked if fence was his. Mr. Kusherman said that it was. Mr. Kusherman advised that the roots of the tree extend thirty feet, and that he is sure that the roots extend to where they will be digging. Mr. Kusherman stated that the tree roots extend beyond his fence and extend into his yard, so he assumes that the roots extend to where the foundation will be dug. Mr. Kusherman stated that he thinks the huge tree is very dangerous, and added that it is never cabled, and that branches have fallen into his fence and into neighbors' fences, and that he has had to rebuild his fence more than one time, so he is concerned that digging for the foundation will affect that.

Mr. Kusherman stated that he does not want to wake up every morning and see this big structure basically right outside of his bedroom, so he does not approve.

Mr. Amir asked if the deck is being removed. Mr. Cartunio said that the deck is being removed and that in lieu of a deck that has outdoor activity, it will be replaced with an addition that is going to be designed for indoor activity. Mr. Kusherman stated that he does not see the structure of the house for a certain distance from my bedroom. Mr. Amir asked about the size difference between the existing shed which is beneath the deck and the proposed addition. Mr. Cartunio stated that the deck is about the same size as addition. Mr. Amir asked if it is comparable. Mr. Cartunio stated that it is comparable, that the addition is one foot more. Mr. Cartunio added that the shed underneath the deck is smaller, but that the deck is almost the same size in that it is one foot shallower in the rear and one foot narrower on the left side. Mr. Amir asked if the proposed addition is going to be only one foot further out, and Mr. Cartunio said yes, only one foot. Mr. Cartunio added that they tried to make it the same size as the deck, but the room is so small as it is, that they I cannot afford to lose that foot, because then the bedroom is not really a bedroom. Mr. Cartunio pointed out that the corner of the house sticks out by the kitchen, and that the kitchen is cantilevered two feet, so that messes up the bedroom a little bit too.

Mr. Amir asked if there was a plan to put a shed somewhere else on the property or if they are getting rid of it altogether. The Chair asked if they are creating storage underneath the addition. Mr. Cartunio stated that the equivalent of the shed will be underneath, and that they actually will get more storage space than the shed has now. Mr. Amir asked what this

storage will be below. Mr. Cartunio stated that it would be underneath the addition, that where the shed is now, there will still be a shed, but an enclosed shed as part of the addition. Mr. David asked if they will be excavating a new foundation for that area. Mr. Cartunio stated that they will be, that right now there is only a pad for the storage shed, and then there are three concrete piers that hold up the deck, so somebody already excavated three and a half feet down for the three piers that are there now. The Chair sought clarification that it will not be a bedroom hanging over an unexcavated space, that there it will be a solid eight or so feet. Mr. Cartunio stated that this is correct because the basement sticks out of the ground at that point.

The Chair noted that in the photograph from Mr. Kusherman's yard, the subject house is very visible, and that there is no vegetation at all except for the trunk of that tree, and asked if there is some screening that we cannot see for some reason. Mrs. Rappaport stated that it is a winter view when all the leaves are off the trees. Mr. Rappaport stated that there are apple and pear trees on the property. The Chair stated that he sees no trees with branches that low. Mr. Rappaport stated that there are a lot of bushes that are not seen. Mr. Kusherman stated that he is not seeing them either. Mr. Kusherman added that the huge tree is not cabled. Mr. Amir asked how far the tree is from the shed. Mr. Rappaport stated that the tree has been cabled several times. Mrs. Rappaport stated that this is not about a tree, that the tree can always come down, and that she would rather not have her mother fall down looking at a view of his bedroom. Mr. David asked if the tree overhangs Mr. Kusherman's property. Mr. Kusherman stated that he had to repair his fence on multiple occasions, that just a few months ago a twenty-foot limb was broken off the tree and that he had told [the Rappaports] that, and that that had happened on his neighbor's side as well. Mr. DelGrosso stated that it is not about the tree, but about the sight line. Mr. Kusherman stated that he is concerned that if they dig a foundation, it will be digging into roots of a tree which is leaning toward my property. Mr. DelGrosso stated that it then would be their responsibility to remediate. Mr. DelGrosso asked if the addition would be a significant change in the sight line if the sight line of the shed is replaced by an addition that is essentially an addition in the character of the house. Mr. Kusherman stated that it would be a significant change because the deck is not a full structure and it is very close to my bedroom. Mr. Amir pointed out that the proposed addition is roughly within the same footprint of the shed but for one foot and that they would be getting rid of the deck. Mr. Amir asked Mr. Cartunio if the height of the addition is the same as the shed. Mr. Cartunio replied that it is a little bit higher. Mr. Amir asked if the height of the addition is exactly the same as the floor of the shed. Mr. Cartunio stated that the floor of the addition is the same. Mr. Amir asked if the height will be more. Mr. Cartunio stated that [the addition] is a standard eight-foot ceiling. Mr. Amir asked if that will be where the shed is now. The Chair stated that the addition would be above it. Mr. Amir asked how tall the shed is, as he is trying to gauge the line of sight. Mr. Cartunio stated that the shed is under the deck and that it goes to the underside of the deck. Mr. Amir asked if one can stand underneath the deck. Mr. Cartunio stated that one could. Mr. Amir asked for the height of the addition, and how tall the ceiling will be. Mr. Cartunio stated that it will be eight feet. Mr. Amir

stated that it looks like the height of the deck is about seven feet. Mr. Cartunio stated that it is seven to eight feet tall. The Chair pointed out that it is up on the deck. Mr. Amir stated that what he is trying to establish is the dimension of the proposed addition versus the dimension of the shed – the width and height and depth of the proposed addition versus that of the shed – and if there is a significant difference. Mr. Kusherman stated that there is a difference to him in that one is a building and one is an open deck. Mr. Kusherman added that he guesses that the deck has a disadvantage to the neighbors because from the spring until the fall there could be people out there, barbequing, talking, listening to music, whereas once it is enclosed, they will not hear or see that.

Ms. Gorman-Phelan asked if the addition is actually going to be a two-story addition. Mr. Cartunio stated that it is considered one story because the basement does not count. Ms. Gorman-Phelan asked how they will get in and out of the premises. Mr. Cartunio replied that from the back door there will be steps down. Ms. Gorman-Phelan asked where those steps will lead to from the second floor. Mr. Cartunio stated that it is not a second floor, that it is the first floor, but that the steps are adjacent to the house and lead down to the backyard. Ms. Gorman-Phelan asked if those steps exit out of the bedroom. Mr. Cartunio replied that when you exit the bedroom, there is a little landing and then you go down to the ground. The Chair pointed out that on the plans it is referred to as a two-story addition. Mr. Cartunio stated that it is really one story even though it is referred to as two story, and added that it is referred to as a two-story house, but it is a one-story house. The Chair asked if the storage room is exposed, and noted that it is a full-height storage room. Mr. Cartunio stated that the storage room is ceiling height, and that it is not considered a story because it is not totally above grade, that in the back it is above grade, but that as you go toward the front of the house, it is below grade. The Chair asked if the appearance to the neighbors will be two full stories. Mr. Cartunio said that this is correct. Mr. Cartunio restated that the basement is not a full story as it is seven feet. Mr. Amir asked if the façade of the addition will be the same as the existing house. Mr. Rappaport stated that it will have white siding, and Mr. Cartunio pointed out that it says so on the plans. Mr. David asked to return to the height of the deck and the proposed addition. Mr. Cartunio stated that the addition will have an eight-foot ceiling and then will go up another three feet to the peak at the back, so it is the eight feet that you said, but then it pitches up. Mr. David asked if we are talking about eleven feet. Mr. Cartunio stated that this is correct except you did not add the shed, and explained that it is eleven feet from the floor of the existing deck. The Chair asked if this is in addition to seven or eight feet from the ground, and Mr. Cartunio replied that this was correct.

Jeff Axelrod

Mr. Axelrod stated that his property at 118 Huntley Drive and Mr. Kusherman's property border the entire backyard of the subject property. Mr. Axelrod showed photographs of the shed and stated that it is a little structure underneath the deck, and that to try to compare that to an addition is not appropriate. Mr. Axelrod showed photographs of his view of the

deck and the trees which were taken from near the front of his home looking directly back. Mr. Axelrod pointed out that there are large trees with no screening as there are no leaves as all the leaves are twenty-feet up. There ensued a discussion of where each neighbor's property and subject property were in the photographs. Mr. David asked to whom the fencing belonged. Mr. Axelrod stated that on his side the fence was his, and that on Mr. Kusherman's side the fence was Mr. Kusherman's. Mr. Axelrod then showed a photograph showing his view of the setback. Mr. Axelrod pointed out where applicants want a two-and-a-half foot variance, and claimed that if they are to build a second story, it would be much greater, because the shed is relatively nonexistent compared to that on top of this deck there would now be a physical structure.

Mrs. Rappaport stated that Mr. Axelrod is nowhere near this new structure that is going to accommodate my elderly mother. Mrs. Rappaport stated that maybe his view is going to be a solid view instead of a deck, but he has loud parties all through the summertime that she has to witness that she does not complain about. Mrs. Rappaport stated that those two [Messrs. Kusherman and Axelrod] are her vendettas, and stated that her husband has a very nasty text message from Mr. Kusherman. Mr. Kusherman stated that he was willing to share the text. The Chair stated that it was not relevant. Mr. Rappaport stated that he had gotten into a row with Mr. Kusherman because he had gotten a pressure washer and was cleaning Mr. Kusherman's fence on Mr. Rappaport's side, which Mr. Kusherman had neglected for a long time. Mr. Rappaport stated that Mr. Kusherman says that he is worried about seeing my beautiful new structure and he does not clean his side of his fence and his fence is filthy and his backyard is a wreck. The Chair again stated that this was not relevant.

Mr. David asked what zone the subject property is in. The Chair stated that it is in an R-2 zone. Mr. David stated that a thirty-foot rear yard setback is then required. Mr. David asked Messrs. Kusherman and Axelrod if their homes are conforming. Mr. Axelrod stated that he believes so. Mr. Rappaport stated that he does not know how Mr. Axelrod can say that because he has made additions. Mr. Axelrod stated that he has not made any additions, that the addition had been put on there previously. The Chair stated that there is no application from the neighbors, that the Board is considering the Rappaports' application.

Mr. Amir asked if they have explored putting the addition on the other side. Mr. Cartunio stated that it is a split-level house, side to side, so the only place you could be on the first floor is on the right side, and the only place you could do it is in the rear because they do not have room in the front and obviously on right side. Mr. Amir asked if they do not have the ability to extend out on the other side in the rear. Mr. Cartunio stated that that side is on a different level, and that that is a half a flight up. Mr. Cartunio added that somebody else already probably did something there because there is a structure there on the left side of the house, but it is on a different level, so that defeats the whole purpose. Mr. Cartunio stated that they tried every possibility. Mr. Amir asked what the fact that it is on a different level means what to Mr. Cartunio as the architect. Mr. Cartunio stated that it means that it does not accomplish the needs of the owner, as the whole purpose is to create a bathroom

and a bedroom on the main floor level, so that you can roll in from the front door and roll out to the back, and there is no bedroom or bathroom on this level, there is living room, dining area and kitchen on this level. Mr. Amir asked if they had explored the possibility of providing for an addition via some alternative means. Mr. Cartunio stated that they always try to avoid a variance as much as possible, that they tried to fit all this in within the setback but cannot do it, and pointed out that it is so small as it is now that it is a tiny bedroom.

Ms. Gorman-Phelan read into the record two letters that applicant provided the Board at the meeting. The letter from Lisa Shulman, the neighbor at 120 Huntley Drive, states: *"Dear Jill and Gary, I am the owner of 120 Huntley Drive. I have no objection to your planned addition. Thank you, Lisa Shulman."* The letter from Larry Kaplan, the neighbor at 3 Victoria Road, states: *"Hi Gary, the Kaplans at 3 Victoria Road, Ardsley, NY, have no objection to your proceeding with the deck and shed replacement and other improvements in the rear of your house at 5 Victoria. I am sure it will add value to your property which is good for everybody. Larry Kaplan."*

Mr. Axelrod asked about reconfiguring the interior. The Chair advised that the question was not appropriate coming from a neighbor, as it is not directed at the Board.

Mr. David asked how many notices of the meeting had been mailed and received. Mr. Cartunio stated that they had mailed twenty and received fifteen back.

The Chair stated that the most relevant neighbors, those most directly impacted, the two behind and one to the side of the addition, have been heard from. The Chair stated that he takes seriously the issues raised by the two most immediately affected neighbors, particularly about the lack of screening, as it is very clear in these photographs that part of the year there definitely is nothing blocking the line of sight, and that even if the leaves were out, the branches are high enough that they would not provide adequate cover. The Chair stated that, although he is sympathetic to families and what applicants are trying to do, it is a relatively transitory situation that can be addressed in ways other than something that is going to impact the neighbors for a very long period of time. The Chair noted that the Board has historically not favored increasing a non-conformity rather than maintaining a non-conformity, such as by building up, not that that would be appropriate here. The Chair pointed out that not only is the proposed addition increasing the non-conformity on the side yard, it is creating a new non-conformity in the rear yard that is not present currently. The Chair stated that he thinks that there is a lot more blockage and visual impact from the multi-story structure versus the open structure of the shed and deck. The Chair concluded that for all of those reasons, he is not in favor of this application.

Mrs. Rappaport asked what is the other way to deal with the situation. The Chair replied that interior renovations would be one way, and that another way would be an exterior renovation within the setback that extended back to a greater degree, and pointed out that

the addition could extend further along the back where the kitchen window is and where the proposed new piece of decking is, and also pointed out that the bedroom square footage could be maintained within the setback if it did not include a washer and dryer in the closet and it was just usable as bedroom, which would also free up a lot of wall space because you wouldn't need all the doors. The Chair concluded that he is not an architect, but that he thinks that there were other things that could have been considered so as not to need a variance for either setback.

Mr. Amir moved, and Ms. Gorman-Phelan seconded, to close the Public Hearing.
**Vote:** 5 in favor, none opposed, none abstaining, as follows:

| | |
|---|---|
| Michael Wiskind, Chair – | aye |
| Jacob Amir, Esq. – | aye |
| Mort David – | aye |
| Serge DelGrosso – | aye |
| Maureen Gorman-Phelan – | aye |

**Close Public Hearing**

Mr. David proposed, and Mr. Amir seconded, the following Resolution:

*WHEREAS, Gary and Jill Rappaport, of 5 Victoria Road, Ardsley, New York, 10502, have applied to this Board for a variance from strict application of the requirements of Section 200-18 Subdivisions B and C of the Zoning Ordinance of the Village of Ardsley, which require a minimum side yard setback of Twenty Feet and a minimum rear yard setback of Thirty 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 5 Victoria Road, Ardsley, New York, and designated on local tax maps as Section 6.20, Block 6, Lot 8, in an R-2 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 December 20, 2017, after due notice by publication; and*

*WHEREAS, at the Hearing, applicants Gary and Jill Rappaport and architect John Cartunio appeared in support of this application, and applicants provided letters from neighbors Liz Shulman, of 120 Huntley Drive, and Larry Kaplan, of 3 Victoria Road, stating that they did not object to the application, and neighbors Neil Kusherman, of 116 Huntley Drive, and Jeff Axelrod, of 118 Huntley Drive, spoke in opposition to this application; 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 the new encroachment into the rear yard setback is comparable to the rear yard setback encroachment of the immediately adjacent property;*

*(2) the benefits sought by the applicant cannot be feasibly achieved other than by variances, as there is no other reasonable location for an additional bedroom accessible by few steps;*

*(3) the requested variance is not substantial in that the proposed addition will built in approximately the same location as an existing shed and deck such that the encroachment into the side yard setback will be increased but only to a total of 1.6 feet, and in that the new encroachment into the rear yard setback will be only 2.3 feet;*

*(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 constructing the addition in a location above the existing deck and shed, there will be little if any change to topography, and in that the land coverage, while increasing minimally, will remain well below the basic amount permitted; and*

*(5) the circumstance requiring the variances was not self-created in that the house was purchased in its current configuration and owners now anticipate the possibility that an aging relative who has difficulty with stairs will live with them.*

*NOW THEREFORE, be it resolved that the application of Gary and Jill Rappaport is granted.*

PROPOSED BY: Mr. Mort David

SECONDED BY: Mr. Jacob Amir

VOTE: 4 in favor, 1 opposed, none abstaining, as follows:

| | |
|---|---|
| Michael Wiskind, Chair – | NAY |
| Jacob Amir – | AYE |
| Mort David – | AYE |
| Serge DelGrosso – | AYE |
| Maureen Gorman-Phelan – | AYE |

**5) <u>Continuation of Public Hearing</u>**
**<u>Interpretation of Village Code Requirements</u>**
**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).**

The Chair read the Legal Notice, and noted that this matter was originally on the Zoning Board of Appeals agenda for August 23, 2017, but was postponed at the applicant's request, and was postponed again in September 2017, and that a hearing was held on October 25, 2017, which hearing was continued on November 22, 2017, and which is being continued this evening. The Chair noted that since the previous meeting, the Board has received additional materials from the applicant.

**<u>Continuation of Public Hearing</u>**

**Present:** Michael Wiskind, Chair
Jacob Amir, Esq. (not on the dais, recused)
Mort David
Serge DelGrosso
Maureen Gorman-Phelan

**Attendees:** Cynthia Thorpe Carey, of the Thorpe-McCartney Family Limited Partnership
Andrea Thorpe-Rosenberry, 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 the Thorpe-McCartney Family Limited Partnership

Donald Elmendorf, Licensed Professional Engineer
Armand Boyagian, 23 Grandview Avenue, Ardsley, NY
Dr. Marc Kowalsky, 13 Captain Honeywell's Road, Ardsley, NY
Gary S. Rappaport, Esq., 5 Victoria Road, Ardsley, NY
Ellen Slipp, 12 Abington Avenue, Ardsley, NY

Ms. Denise D'Ambrosio introduced herself as representing applicant Thornwood Four Corners LLC (hereinafter "Thornwood"), and advised that she also is appearing on behalf of the owner, The Thorpe-McCartney Family Limited Partnership (hereinafter "Partnership"), which has joined applicant in this application. Ms. D'Ambrosio stated that she has already submitted to the Board her comments on the last two meetings, including an Affidavit of Mr. Elmendorf dated December 15, 2017.

Ms. D'Ambrosio stated that, unless the Board has any questions, she would address only those points with regard to what came up in the most recent submittals and with regard to what was raised in the last meeting. Ms. D'Ambrosio stated that one of the issues was whether or not there were any cases on point addressing this particular circumstance, which is the necessity of ceasing pumping gas due to an improvement project, that she had indicated that there were no such cases particularly on point, and that she still maintains that to be the case, which the Board would have gathered from the submission she made, in which she distinguished the cases that were raised to say otherwise.

Ms. D'Ambrosio stated that she also brought to the Board's attention the other project that was discussed last time, which would have precedential bearing on this matter here before you today, and if not precedential value, that it would be persuasive. Ms. D'Ambrosio stated that the site of 731 Saw Mill River Road is more in tune with the facts here than any case that has been brought to this Board to date, either by herself or by people opposed to the project. Ms. D'Ambrosio elaborated that that project took one hundred and ten weeks. Ms. D'Ambrosio further elaborated that, most importantly, that project had Zoning Board involvement, which was to approve the variances with regard to that project. Ms. D'Ambrosio pointed out that that project was in a B-1 zone and that it was a non-conforming use. Ms. D'Ambrosio stated that it was raised by the then Board member and formerly Chair of this Board whether the Board should be concerned about the abandonment provision, and that another Board member responded that "no, it is not applicable here." Ms. D'Ambrosio stated that the issue was never addressed in full, and she contended that it is like *dicta* in a legal case, which is that implicit in that Zoning Board determination was that the Section 200-100 deemed abandonment was not applicable. Ms. D'Ambrosio contended that, while that may not be binding, it is certainly persuasive, and that for this Board not to seriously consider that Board's determination would be a factor in an arbitrary and capricious determination.

Ms. D'Ambrosio stated that she also raised in her recent submittal to the Board, and earlier as well, that this is not a development statute, that it is an abandonment statute, an

abandonment of the use, and that neither applicant nor owner abandoned the use, but basically proceeded to an improvement project. Ms. D'Ambrosio contended that the time frame for projects is governed by the Building Code, and is not governed by abandonment statutes. Ms. D'Ambrosio stated that that is in her papers and does not need to go into it any further, but that essentially, she thinks that this Board should determine, in reading all the statutes of the Zoning Code together, which were discussed and raised over the course of the three meetings, that there has been no abandonment here.

Ms. Gorman-Phelan commented that Ms. D'Ambrosio had indicated that the Board had made a determination that there was no abandonment in the prior case. Ms. Gorman-Phelan stated that there was no determination made, that there was one member who said that the statute did not apply, and the Board did not discuss it, there was no argument, and there was no request for interpretation, so she wants the record to be clear that there was no determination that the statute did not apply. Ms. D'Ambrosio responded, asking to be forgiven if she said that, and that she knows that she also said that implicit in it was that there was a determination, because it was raised, and that she had said that it was implicit like *dicta* in a legal case that it was not applicable. Ms. D'Ambrosio stated that indeed it was not a determination of the Board, so if she said that, she appreciates Ms. Gorman-Phelan correcting that. The Chair pointed out that we do not really know the degree of discussion because the Minutes from that meeting ten years ago are fairly skimpy, and noted that the Minutes do reference it, but we do not know if it was a passing remark or the subject of a serious discussion. Ms. D'Ambrosio added that she had said that she does not deem it necessarily precedent, and that she does not believe that the Board is bound by it, as each case turns on its own facts, but that her argument is that it is persuasive and is certainly indicative that another Board thought that it was not intended to cover this situation, and this Board is rendering an interpretation.

Mr. Warren Cohen introduced himself as the attorney for the Partnership. Mr. Cohen stated that, with regard to the issue of the Zoning Board meeting of November 2005, he agrees that there was no determination made, but that obviously it was referenced. Mr. Cohen stated that, taking the situation, there was a two-year project, very similar to this one, where there was an old station and a variance was sought to expand the use. Mr. Cohen continued that there was never, ever, an issue that there was an abandonment of the non-conforming use, although construction went on for, he guesses, two years from beginning to end, from the removal of the tanks until the new lessee operated the new station.

Mr. Cohen also stated that he has heard a lot of mention from neighbors or other people who live in Ardsley that "we don't need another gas station in Ardsley." Mr. Cohen contended that in fact this is not "another" gas station, but a gas station that has been in Ardsley since at least since 1930, and that it has been in the Thorpe-McCartney family for some 87+ years, and that it has always operated as a gas station. Mr. Cohen explained

that for more than fifty years it was leased to Getty, that Getty ended the lease and removed the tanks, and that the Partnership leased the premises to the new tenant.

Mr. Cohen stated that the subject station was old, as it was a building that was constructed in 1930, and that it needed renovation and upgrade. Mr. Cohen contended that *"To take away the pre-existing non-conforming use because structural alterations are needed, because you have to take out tanks and put in new tanks and there was a spill and DEC would not allow anything to happen during that time, it just cannot be possible that it is the intent of the Zoning Code to have construction of a site be deemed abandoned by virtue of the fact that gas is not pumped. Maybe as a similar type of example, if you had a two-family house that was in a one-family zone, and it was a pre-existing non-conforming use, and there was a fire, let's say, and it took more than six months to rehab it back to being a two-family home, I highly doubt that that would be deemed to be an abandonment. It just doesn't make any sense. My client, as the owner, never abandoned this use, they leased the property strictly to be a service station and convenience store as per the lease, that's what it's always been, that's what it was intended to be, and there has never been an intent to abandon."*[2]

The Chair asked if any member of the public wished to speak in support of the application.

Ms. Andrea Thorpe-Rosenberry introduced herself as a principal of the Partnership. Mr. Rappaport asked where she lived. Ms. Thorpe-Rosenberry replied that she lives at 40 Bradley Avenue, White Plains, New York. The Chair advised that property owners, regardless of residency, are entitled to speak. Mr. Rappaport stated that he just wanted the record to be clear where she resides.

Ms. Thorpe-Rosenberry stated that Mr. Cohen gave a good history of what has been happening in her family. Ms. Thorpe-Rosenberry stated that her family has been here since 1900, that her grandfather built the subject gas station, that it was a Texaco station at the time, that he built the properties at 475, 477 and 479 Ashford Avenue, and 47 Ridge Road was his house. Ms. Thorpe-Rosenberry stated that her family has always been part of the community, that she worked in the insurance agency in the Village her whole life, that her great-grandfather, grandfather, uncle and father are all bricks at the Fire Memorial, and that she has been in the Ambulance Corps for twenty-seven years, in which she has served as the Captain and the First Lieutenant. Ms. Thorpe-Rosenberry stated that her family has always tried to improve the village, that they are not abandoning anything, that they are trying to build and to make things better. Ms. Thorpe-Rosenberry stated that she wanted to share the family history with the Board to show that

[2] It is the normally the custom of this Board to have the Minutes in the third person, without excessive direct quotes. However, in this meeting, several speaker's lengthier remarks lent themselves to being clearer as quotes. In these Minutes, such quotes are italicized, and anything quoted within those remarks are unitalicized.

they are still doing what they did before. Ms. Thorpe-Rosenberry stated that she hopes that the Board can say that they have not abandoned the property, which they have not.

The Chair asked if any member of the public wished to speak with new information in opposition to the application.

Marc Kowalsky

Dr. Kowalsky stated that for the past few meetings, they have been as patient as they could be in having an opportunity to speak, so he will try not to go on too long. Dr. Kowalsky asked if there is a time limit. The Chair replied that remarks should have relevant and ideally new information.

Dr. Kowalsky continued, *"Before addressing the issue of the definition of abandonment, we must first recognize the relevance of zoning restrictions, and the elimination of non-conforming uses when the opportunity arises. The purpose of zoning is to protect public health, safety and welfare, and to preserve property value. That is the charge, in part, of the Zoning Board of Appeals. The property in question exists in a B-1 zone, which prohibits the presence of gas stations, such as the one under consideration. As the attorney mentioned, there is already one .2 miles North on 9A, and one .3 miles South on 9A. The primary reason so many residents have been so vocal about their opposing is that we don't need additional stations, and we certainly do not need one in this location. And the village board agrees, by their having rezoned that area as a B-1 zone. It is well accepted that once an area has been rezoned and therefore if a business discontinues its operation as a non-conforming use, abandonment statutes are an integral instrument in eliminating non-conforming uses when possible. The village board agrees with this notion as well, having passed our own abandonment statute, which you read at the beginning of this meeting. Whenever a non-conforming use has been discontinued or ceases operation for six months or more, or it is changed to a conforming use, such non-conforming use shall therefore not be re-established. We talk a lot about abandonment, but that is not in the language of the statute. 'Ceases to exist' or 'ceases operation,' that's what we're talking about. Abandonment is just the title of the statute. The village board went to the extra length to define the language for you, so that you don't have to interpret it. The question is, did they cease operation, not whether they abandoned or didn't abandon. Did they cease operation for six months or more."* Dr. Kowalsky then quoted Mr. Rappaport as having said at a prior meeting, *"use the non-conforming use within six months or lose it."* Dr. Kowalsky then continued, *"It is not the charge of the Zoning Board of Appeals to desperately find reasons to perpetuate non-conforming uses. Quite the opposite. The charge of the Zoning Board is to be vigilant in applying the statute to maintain the zoning regulations that have been passed. It is the applicant's charge to provide evidence that they have not discontinued operation over a six-month period. If they cannot provide this evidence, then they lose their non-conforming use, period. It's very simple."*

Dr. Kowalsky continued, *"The next issue under consideration is whether the applicant has provided evidence that they have not discontinued operation over a six-month period. They certainly have not over these several meetings. The gas station was closed in February 2016. In March, the applicant entered into a lease. The missteps and misadventures of the renovation and rehab are well documented in previous minutes. With respect to the primary question, was operation discontinued for any six-month period, the applicant provides only a suggestion that perhaps he sold gas in several months during 2016 and March and September 2017."* Dr. Kowalsky then stated that Mr. Ali had stated *"I insisted I sold a bit more to make sure that this six-month thing is technically what people look for. We are well aware of the six-month use thing here and I have been in the gas business for 28 years, and just for the sake of technicalities in certain jurisdictions, I intended to sell or trade the fuel at the location in these times to make sure the continuation selling of the fuel happened. Certain people would like to create issues."* Dr. Kowalsky then continued, *"For a person with three decades of business experience, who anticipated the six month time frame and who allegedly purposely sold gas to contractors for the sole purpose of continuing operation, one would think that he would take accurate and detailed records of these sales. When asked for invoices in October and then again in November, he was unable to provide it. [This is] at best careless if not disingenuous and misleading. It is the applicant's obligation to provide concrete explicit proof that he continued to sell gas in this location to justify continuation of the non-conforming use. It is the Board's obligation to insist on this proof. In the absence of proof, there was no sale of gasoline, and the non-conforming use must be prohibited."*

Dr. Kowalsky continued further, *"At the last Board meeting and again tonight, there was an implication that because the same owner leased the property with a closed gas station to the same applicant ten years ago."* Mr. Cohen stated that it is not the same applicant, but the same owner. Dr. Kowalsky acknowledged this correction and continued, *"It was granted continuation of a non-conforming use, the board is therefore obligated to grant this non-conforming use so as not to appear arbitrary and capricious. This argument is fallacious. As both attorneys have stipulated, it is not binding, perhaps persuasive. The current Board should not be bound by the decisions of prior Boards, and shouldn't accountable to those decisions, as I mentioned at the last meeting. A mistake made by a Board ten years ago should not obligate the current Board to commit yet another mistake that will affect this Village for decades. Moreover, any difference between the situations justify the different outcomes, and there are plenty. The previous gas station was located on the edge of a B-1 zone. This property is in the heart of the Village's business district. The previous gas station was on a single roadway. This property is at the busiest intersection of the Village which has become notorious for gridlock. The entrance of this property is only feet from this major intersection, into the right turn lane for Ashford [sic] Road would have additional detrimental effect on traffic in our Village. The proximity of this property to residential zones also differs from the other property, and*

*would have a detrimental effect on property value, one of the charges of the Board. For these reasons and others, the Board is obligated to treat this matter independently, different and distinct from 730 Saw Mill River Road."*

Dr. Kowalsky added, *"The final question is that of hardship. We first have to recognize that nowhere in the statute is a requirement to grant a non-conforming use or variance based on hardship. However, if the board is compelled to consider hardship, then the following issues have to be considered. Number one, financial hardship is not sufficient. Number two, this particular hardship is self-inflicted. Number three, the variance would have an adverse effect on surrounding properties. Number four, there are other reasonable uses of the property in the applicable zone. Number five, there are alternatives available to the applicant. I ask the property owner to respect Village law and respect the Village residents. The applicant can open a gas station in Ardsley or in a nearby village in an appropriate zone, and the property owner can lease the land to a business permitted in this zone."*

Dr. Kowalsky concluded, *"There are many critical issues facing Ardsley. These cannot all be addressed at once, but when we have the opportunity, detriments to the welfare of our Village must be resolved. This is one such opportunity. And it's a simple task for the board. Not nearly as complicated as the multiple continuances and the testimony of the applicant, experts and lawyers would have you believe. The area where this property resides was rezoned. The previous gas station closed, and gas was not sold for a period of far longer than six months, and therefore, according to Village Code, this non-conforming use must therefore not be re-established."*

Armand Boyagian

Mr. Boyagian stated that he resides at 23 Grandview Avenue, and that he also owns the building at 486 Ashford Avenue, which abuts 657 Saw Mill River Road. Mr. Boyagian added that the line between the two properties is the Bramble Brook. Mr. Boyagian reminded the Board that he had previously mentioned the damage to his property during the course of the construction operations that are still in motion when it resumes. Mr. Boyagian also reminded the Board that he had previously stated that there was entry onto his property without his permission. Mr. Boyagian stated that this is evidenced a couple of ways. Mr. Boyagian stated that his new comment is that he has learned that dumping of contaminated material is illegal, and that he intends to pursue this with the authorities, due to the dumping on his property at 486 Ashford Avenue.

Gary Rappaport

Mr. Rappaport stated that *"Grandfathered non-conforming uses are intended to protect long-standing and substantial businesses. This is a newly formed business entity that has*

*never pumped any gas or serviced any cars at this location. So what they are really doing is creating a wholly new gas station and convenience store."*

Mr. Rappaport also stated that *"They seem to have abandoned the attempt to insert words into the Statute that intent is part of the Code here, because it is not. I am glad to see that applicants finally agree with me that intent is foreclosed under our Statute. As Mr. David noted, they could have continued at least one part of the definition of gasoline station under our Code as a service station. Which they elected not to. Chairman Wiskind asked about the six-month rule of intent in the law, and here I believe the applicant initially said well, intent is part of the Statute. But as I submitted in my post-November 22nd submission to you, intent again is foreclosed under our zoning law. The facts of each case where a lapsed statute, as here, refer not to intent but whether the facts of the non-conforming use stopped. It's use it or lose it. They didn't use it, they lost it. And I agree with my neighbor, Dr. Kowalski, this is really not that complicated. If you look at the cases that I have provided you, Court of Appeals, Appellate Division, gasoline stations, how many tanks, marketing the property, are all irrelevant. It's actual use. Not I intend to use, or I plan to use it, or I want to use it. They didn't sell gas, they didn't service any vehicles, and these stubborn facts are devastating to their claim."*

Mr. Rappaport also stated that there is a *"Concept of* 'falsus in uno, falsus in omnibus,' *which holds that the false testimony to one thing allows you to presume that the testimony is false in all things. Throughout this proceeding, we heard a lot from Mr. Ali, the alleged project manager. We never received any evidence as to his firm for whom he worked for, and I asked for it. He then told the Board that he had receipts for the sale of gas obtained from another location, but after careful probing by Mrs. Gorman [Ms. Gorman-Phelan], this turned out to be totally not true. He said that the plan was to be up and running in two and a half months, it didn't happen everything went wrong, and it wasn't our fault. Isn't that just what a parent hears from a kid. As Ellen [Ms. Slipp] said, why should we be responsible for all their miscues and all their mismanagement and poor business judgment. We shouldn't be. Again, I ask, this gentleman came here and said he had gas receipts and it was up for two and a half months. We saw no contractor came here, no time tables to support these claims. Even the principals of the applicant didn't show up here. They just sent their paid surrogate, so Mr. Ali, whether you believe him or not, I don't think you can, he's self-interested, he wants to get this project going, we're a big bother to him, we're a nuisance to him, we're in his way, but I live here and I'm not self-interested in this project, just as a resident. Ellen [Ms. Slipp] and Dr. Kowalski are not. Maybe Armand to some degree because he's got adjoining property and a gasoline station next to his property is a detriment, but he himself said that he's been in the construction business 44 years and never saw such slip shod work, such careless management of a project. He said the drive to get the job done was absent. He was right, and the pictures show that. We want permitted uses in the general business district and there are plenty of them. And again, the case law I submitted to you talk about the only excuse for a lapsed statute for non-conforming use is where government*

*puts their hand on the applicant and stalls, or maybe in some extreme force majeure situation, a war, a strike, a real casualty. There wasn't that here, this was just incompetence. And the applicant didn't dispute any of this. They didn't dispute any of the cases I showed. So there's no excuse here."*

Mr. Rappaport added that *"As a matter of fact, they claim the efforts of our building inspector* 'he was so helpful to us' *until the clock ran out. Well then, he did his job. He said I'm sorry you missed the deadline. So that excuse of government interference is nonsense because government tried to help them, but they couldn't help themselves."*

Mr. Rappaport also stated, *"So I am a little disappointed in the appeal by the family, they're here a long time, give us a break maybe. I think it does matter. I think it is unfortunate that other speakers were cut off by the former Chair on this topic. These owners are not real owners as you and I might understand property owners. They are really absentee landlords who look the other way. I don't know why it's not relevant. They're absentee owners and there's no indication that they'll be anything but absentee owners. You have the record before you. Thirteen spills. Every year and a half there's a spill on this property. People have said that they can smell gasoline. This is a polluted property. They look the other way. This has got to stop. We can't have an applicant say* 'oh, I didn't know there were spills here, and Getty gave us a clean slate.' *Well, go to Getty. Getty's got plenty of money. Getty's been in business a long time. Let them get the money from Getty, not from us. I'm still disappointed that you're not going to, that you don't want to even consider the fact, let's look at the folks that they are involved with. You have the record before you. Very unfortunate. We should have no sympathy for people who deal with these people."*

The Chair stated that this [the people] is not relevant. Mr. David added that the Board does not have to hear about the character of applicants.

Mr. Rappaport stated, *"Well some people feel it's relevant. Perhaps not. A fair review of the evidence before you, the facts and the law, which is really very clear and unrebutted appellate division case I submitted to you, the failure alone to sell gasoline is determinative under a lapsed statute. This closed gasoline station was abandoned under Section 200-100D of our Zoning Code, and should remain closed the same way seventy years ago the blacksmith over there closed. Life in Ardsley continued and will do so and even better with the elimination of non-conforming uses."*

Ms. Thorpe-Rosenberry stated that Mr. Rappaport's comments were not kind.

Mr. David stated that he would like to fact check the veracity of Mr. Rappaport's statement that Ms. D'Ambrosio has relinquished her argument of intent.

Ms. D'Ambrosio stated that *"There are a lot of misstatements of fact. And no, I have not abandoned any of my arguments. I am not going to go point for point with what Mr. Rappaport characterized as what's on this record, because there are many inaccuracies. There's been, first of all, no record of thirteen spills, I don't know what he's talking about, there's no evidence here before this Board. The fact that I haven't refuted any of his legal arguments and his case law is totally untrue. It's in my submission. I said point for point that the three cases he mentioned are not applicable here. They're distinguishable, and none of them involve a construction case. There's many instances, but I'm going to let you, you heard all the testimony here, you know the record, you know what's accurate and what's inaccurate, and I'm not going to waste your time going through it because you obviously are familiar with it."*

Ms. D'Ambrosio continued that *"The Focus of the people who spoke in opposition was that you have to focus on ceasing operation. It's easy to say ceasing operation for a gas station is pumping gas. But I go back to Mr. Cohen's argument, when you have a two-family house that is now in an illegal non-conforming zone, you are now in a single family zone, is your statute going to be read that you have to reconstruct that house when you want to rebuild it, when you take it down, like your prior applicant here, and you take it down to the foundation, you can't live in a foundation, if you interpret this statute to be that. You have to redevelop every single project in a legally non-conforming zone within six months, then that applicant would have to live in his basement. This cannot be what this statute intended. This is a redevelopment project and it shouldn't have to read to be done in a six-month period. So cease operation is not merely pumping gas."*

Ms. Gorman-Phelan asked if there is a variance, like for a house, and [the work] cannot be completed within six months, does the owner have a vested right, and wouldn't the property owner have the right, regardless of non-conforming use, abandoned or not. Ms. D'Ambrosio stated that she had said in her first submission that one had a vested right in one's property to redevelop it, and that you cannot interpret abandonment to be applicable to a redevelopment project in an illegal non-conforming use.

Ms. Gorman-Phelan asked if, even if you found abandonment, would the property owner's or tenant's right supersede abandonment under constitutional principles. Ms. D'Ambrosio stated that she believes it would, and that she believes that one has a vested right to redevelop that property. Ms. D'Ambrosio contended that whether there was gas pumping is not the issue, that intent should be read into it. Ms. D'Ambrosio also contended that it is persuasive what the other Board thought about intent. Ms. D'Ambrosio also suggested that this is not a building statute, and the Ardsley Building Code basically gives a development project two years. Ms. D'Ambrosio explained that you get a building permit, that you must commence it within a year, and that if you have not commenced, you can seek an extension, so you get two years to commence, and added that you then can extend the two years for another third year. Ms. D'Ambrosio asked why a project in a legal non-conforming zone not entitled to the same benefits that

any other project has under the Building Code and your Zoning Code. Ms. D'Ambrosio pointed out that the abandonment code does not say that it overrules the Building Code, and that there is no way they [do not] have to be read together. Therefore, Ms. D'Ambrosio contends, the emphasis on ceasing operation is not the issue here. Ms. D'Ambrosio added that it was raised that the Board should not be looking at hardship in the factors for special use or a variance, and stated that these are not before the Board and that all those alluded to are not relevant here.

Ellen Slipp

Ms. Slipp said that she is now a citizen and not a Board member, and the Chair reminded her that they are not incompatible, as all Board members are citizens.

Ms. Slipp greeted Mr. DelGrosso, stating that it is nice to see him on the dais again, and Ms. Slipp congratulated the Chair on his Chairmanship.

Ms. Slipp stated that *"I probably spoke too long two meetings ago. I missed the last meeting because it was on the eve of Thanksgiving and I was away with my family. On the eve of a holiday season, the temperature in the room has to come down. There has been snickering on applicant's side, which I thought was distasteful. I also want to put on the record that Jacob [Mr. Amir], a good friend of mine, has recused himself but he has stayed in the room and I am not sure of the propriety of that. I think if you recuse yourself, as he did from the storage unit situation, you need to leave and not just stay in the room and eavesdrop."*

Ms. Slipp reported that she was describing what was before the Board to her children, and that her children said that "a rule's a rule." Ms. Slipp continued that *"You have six months within which not to abandon your use of the property. As they didn't abide by that rule, they're not entitled to rehabilitate that use of the property. We have a big move afflux [sic] to change the village, and we have spent a lot of money on consultants and the like. This is a hub of the village and this is an opportunity for the Village to do something different to make it look better, to do something other than a gas station. There was an incident two days ago at the Sunoco station where there was a spill, and there was forty-five minutes of traffic jams going North and South on 9-A. If that happens at the intersection of Ashford Avenue and 9-A, we're talking about hours. So we have to ask ourselves,* 'do we need this use and did they abide by the laws.' *The Village previously could have said that they were willing to give people a year or eighteen months, whatever, and they decided on six months. We have to be an institution and a Village of laws and not wink-wink, because there are people with big footprints in the Village and long-term relationships. I am appreciative of all those things. I too am a long-time resident, and my husband was the EMT captain, and I taught CCD at OLPH, I've been on your board, I believe in the village, I devote a lot of my time to the village. I don't think we can look the other way. 'A rule is a rule.' We teach our children that and*

*I think that's what the rule should be. I wish everyone on this Board and in this room a very Merry Christmas and a Happy Chanukah and a Healthy and Happy New Year."*

Ms. D'Ambrosio stated that with regard to Ms. Gorman-Phelan's question, she did cite in her papers that in New York, the vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further development. The Court of Appeals case of *Town of Orangetown v. McGee*, 88 N.Y.2d 41. Ms. D'Ambrosio stated that applicant was issued a permit to remove tanks, and then, as the Board will recall, there were complicating factors after that.

Mr. David moved, and Ms. Gorman-Phelan seconded, to close the Public Hearing. Vote: 4 in favor, none opposed, none abstaining, as follows:

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| Michael Wiskind, Chair – | AYE |
| Mort David – | AYE |
| Serge DelGrosso – | AYE |
| Maureen Gorman-Phelan – | AYE |

The Chair stated that he has an administrative matter that he should have mentioned at the beginning, and that is that one of the Board members has recused himself from this matter, so there are four members of the Board, but that Mr. DelGrosso is new to the Board and needs to 'get up to speed.' The Chair continued that normally, such as for an area variance application such as the two the Board dealt with earlier, applicants need a majority of the Board, which is three votes out of five, and that if they do not get three out of five votes in their favor, then the application is denied, and the applicant has to wait a year to reapply. The Chair explained that this is a different matter as this is a request for an interpretation. The Chair advised that, given the make-up of the Board as it is tonight, any vote would need to be three out of three, and the Village Attorney confirms that this is correct. The Chair continued that if a vote tonight is less than unanimous, then there will have been no decision, because you need a majority of a five-member Board. The Chair stated that if it were the case that a vote tonight was not unanimous, then nothing will have been determined and applicant will come back to the Board in January, when Mr. DelGrosso will have had the opportunity (or possibly longer) to "get up to speed," although at that time, the Chair conceded that a January vote could theoretically be 2-2, in which case the Zoning Board of Appeals would still be stuck. The Chair added that normally for an area variance, the Board asks the applicant if they want the Board to take a vote, knowing that if it goes against you, such as if it is 2-1, then applicant is out of the running for a while. The Chair pointed out that this would not be the case here, and that it would not be any more of a disadvantage than it already is.

Ms. D'Ambrosio asked if there were a vote tonight that is not unanimous, would there be a continuation of the Public Hearing in January or would there just be a revote. After reflection, the Chair stated that it would not make sense to reopen the Public Hearing

unless something completely new came up, as it would be a matter of Mr. DelGrosso having read the transcript and being able to vote. The Chair pointed out that if there were no decision this evening, in January, assuming tonight's votes remain the same, Mr. DelGrosso's vote will either turn the tide or not. The Chair continued that if the Board were then to be deadlocked in January, this matter would go back to the Village Board of Trustees with the notification that this Board was deadlocked and was unable to make a determination one way or another.

Ms. Gorman-Phelan recommended to the Chair that Mr. DelGrosso not be present when Board members make comments with respect to our various positions, so that he not be unduly influenced. The Chair pointed out that Mr. DelGrosso will be expected to review the transcript from this and prior evenings.

Ms. D'Ambrosio asked if it is possible to put all your decisions over until January.

Mr. David reported that Mr. DelGrosso suggested that the Board go into executive session.

Mr. Kowalski asked if there is a quorum what is the issue about voting, and stated that as this matter has been continued since August, it seems it is time for a vote. Mr. David advised that the Board customarily leaves it to the applicant [if there should be a vote with less than a full complement].

Ms. D'Ambrosio stated that it is her understanding that if the Board votes tonight and the result is not unanimous, then the Board will reconvene in January at which time Mr. DelGrosso would vote and then the Board will have the final decision. Ms. D'Ambrosio then advised the Chair that if her understanding was correct, then applicant is prepared for the Board to vote tonight.

Mr. Rappaport stated that [at the first meeting of this Public Hearing], the former Chair had informed applicant that there were three Board members that night and had said that there must be three unanimous votes, and that the option was given to them, and that they [applicants and counsel] went outside and conferred and said that they understood and wanted to proceed. Ms. D'Ambrosio stated that they had said the same thing tonight.

Mr. Rappaport stated that the former Chair had said that for applicant to prevail, all three Board members must agree, and that if not all three vote in favor of the applicant, then the applicant will not prevail, and this is different than what the Village Attorney is saying. The Chair reiterated that if three votes say that the use was not abandoned, that determination will go to the Village Board; that if three votes say that the use was abandoned, then that determination will go to the Village Board; but that if it is 2-1 or 1-2, then the Zoning Board will not have reached a decision and it will stay with the Zoning

Board to be re-voted with an additional member, with the possibility that the Board could be deadlocked with that additional member as well, if the vote were to be 2-2.

Mr. David suggested that the Board could, under parliamentary law, move to reconsider the closing of the Public Hearing and keep it open. The Chair stated that this would be advisable if there were anything new to present, and pointed out that the Public Hearing has been continued several times and there has been a lot of evidence.

Ms. D'Ambrosio asked if the Board could adjourn solely for the purpose of decision and consultation with legal counsel. The Chair reported that the Village Attorney had recommended that the Board vote with comments as appropriate and then work with him to put together a Resolution consistent with that decision, which would be adopted by the Board at the next meeting. The Chair added that if the Board cannot reach a decision, then that gets put on hold.

The Board then discussed their opinions as follows.

The Chair stated that he does not consider it to be abandoned, that he thinks there has been too much focus on the narrow meaning of use, and that he sees "use" as more than the sale of gas or the servicing of vehicles, as the Village Code, directly in the definition section, says that the word "use" includes preparing to be used. The Chair added that he takes the example of the duplex as persuasive, as it is not realistic to expect a major construction project to be finished within a six-month time frame. The Chair stated that, although he is not a lawyer, he finds that, as Ms. D'Ambrosio pointed out, the cases cited as indicative of abandonment are where a gas station was converted to another use and then sought to be re-used as a gas station, which is not the case here, or where it was literally abandoned by an owner who walked away from it and did nothing to it for an extended period of time, which is not the case here. The Chair stated that the Shell station up the road is different in some respects, but not substantially different, and noted that the Zoning Board did conclude that this did not apply, while it was a much longer period of construction, although again not abandonment in the walking away from sense. The Chair stated that he thinks there are some other bases, such as the issue of the vested right, which is a different argument but, he believes, ultimately comes to the same conclusion by saying that under that aspect of the law, an applicant is to be considered still entitled to finish their construction project. The Chair concluded that that is the basis upon which he would base a Resolution to declare that it has not been abandoned.

Ms. Gorman-Phelan shared her opinion, stating: *"I really struggled with this. I personally would like to address some of the issues that other people have spoken about this evening. First, on the situation of what occurred in 2006-7 before the Zoning Board, and that's why I wanted to make sure that the record was clear, because at that time there was no interpretation of the code. The Board was not asked to make any kind of determination regarding whether that property fit within the time limitations of the non-*

*conforming use. Without discussion, analysis or debate, the issue was dismissed perfunctorily. And therefore I am not going to consider that. I am limiting my remarks to the matter before the Board. And that is whether or not the property here fell within the abandonment statute. There is also an issue raised by numerous people here in opposition,* "we don't need another gas station, two gas stations is enough." *That may be true, but my role as a member of this Board is to limit my interpretation based on evaluating and balancing the needs of the residents of this community and desires with the property owner's and tenant owner's use of property. Again, the fact that there is more than one or two gas stations, the Code was designed to protect the property owner. And here it is a non-conforming use. On June 13, 2017, having received an application for a permit for demolition, the Building Inspector then denied the application and forwarded it to the board. The question before the Board is whether there was abandonment, which is defined in Section 200-100D. That section provides that* "a non-conforming use has been discontinued or ceased operation for a period of six months or more, or has changed to a conforming use, such non-conforming use shall thereafter not be reestablished." *So the question becomes whether or not this is a non-conforming use that has been abandoned. There has been a lot of discussion as to whether use as defined under our statute* "intended, arranged or designed to" *should be used to expand the original definition of non-conforming use. In interpreting the Village Code, the Board is guided by the cases from the Court of Appeals and the Second Department. In particular, the Court of Appeals in* ToysRUS v. Silva, 89 N.Y.2d 411, 421-22, *held that when there is a specific lapse period in the zoning provision, the owner's intent to resume operations activity is irrelevant to abandonment. There is also the Second Department. It is clear in* Matter of Spicer v. Houlihan & the ZBA of the Village of Piermont. *I researched each one of these cases while coming to this conclusion, and pulled the codes that were applicable in each one of those cases. In each one of those cases they have the similar usage definition that is applicable here, "to intend, arrange or design to be used or occupied." In* Spicer, *that involved a tavern, which was non-conforming in a residential district, and they obtained a building permit to renovate and operate a restaurant on that premises. The premises lay dormant for two-plus years and the owner applied for another permit. The ZBA denied the permit finding that where an ordinance specified that a non-conforming use has been discontinued for a period, in that case one year, such use may not be thereafter reestablished. And the fact that the purchaser did not intend to abandon the use of the property was irrelevant. Likewise, in* Matter of Sun Oil Company of Pennsylvania v. Board of Zoning Appeals of the Town of Harrison, *it too has the same statute. Harrison Zoning Code Sections 235-3(4)(g). The Court interpreted the same code that is before here with respect to the definition of what usage is. They held the effect of the zoning ordinance concerning abandonment such as in a town ordinance, which provides a prior non-conforming use which has been discontinued for a period in excess of ten months is deemed to be abandoned. It is an automatic foreclosure of any inquiry as to the owners' intent to abandon, if the specified period of time is reasonable on its face. Now no one has argued here that six months is unreasonable on its face, so the Board should deem it to be reasonable. In* Sun Oil, *the*

*Second Department was faced with the same definition as here. There was an auto service station, which was a permitted use in a commercial district. A variance was necessary, and it was obtained, to rebuild and improve the structure. The Court noted that no gasoline was sold, and no business was otherwise conducted on the property. Thereafter, the area was rezoned, and the petitioner applied for a new variance. It was denied, finding that the non-conforming use was discontinued for a period of ten months and therefore deemed to be abandoned. Undisputed, this station has been shut here for in excess of at least a year, if not more. The petitioner in that case argued to the Second Department what the applicants are arguing here, that there was intent and therefore no abandonment of the prior non-conforming use. But the Second Department rejected that argument, even taking into consideration the usage statute to try to expand what abandonment was."*

Ms. Gorman-Phelan continued, *"In the matter before the Board, it is undisputed that tanks were removed from the property February 10, 2016. Since that time, no gasoline has been sold. I do want to say that I reject the notion proposed by Mr. Ali at the hearing on October 2017 that he was selling gas for purposes of continuing the non-conforming use. It also demonstrates to me that he was aware of the knowledge of the six-month lapse period, and he stated on the record that he intended to maintain the non-conforming use by trying to, or alleged to have, sold gasoline. I asked [him] to provide documentation to support his claim, and then the applicant had provided us with documentation that contradicted his claim that he sold diesel during that period of time. Also, the tenant failed to submit proof to establish any actual sale or that the gas station was open for any business, or any reliable evidence. There was some mention that an anonymous, unnamed individual, who was not an employee of the tenant or the owner, and who was acting as a holdover sub-lessee, performed inspections of vehicles sometime after the tanks were removed. No one was identified as the individual conducting these inspections, no affidavit was provided by anyone, or an employee or an individual, no records from the DMV were provided, no receipts from inspections or copies of bills or receipts or bank statements. However, I do credit my fellow member of the Board who stated that he had his vehicle inspected there, and the inspection sticker indicated April 15, 2016. So although the applicant failed to provide acceptable proof that some gas station service was performed, I will use Mr. David's inspection date as the beginning date of when the non-conforming use stopped]. The Board is bound by the New York Court of Appeals and the Second Department cases mentioned by the parties interpreting the Ardsley Village Code. In each of these cases previously mentioned, the code has similar language as our code to determine usage. Each time, the Court, be that the Court of Appeals or the Second Department, rejected the propositions that the applicants are now raising before this Board, that there was no abandonment because there was no intent by the owner or the tenant to abandon the non-conforming use, here the gas station. The Village Code reads that a* 'non-conforming use is discontinued or ceased operation for a period of six months or more is considered abandoned, and this non-conforming use cannot be reestablished.' *As I stated previously, it is uncontroverted that*

*the property discontinued and ceased to operate as a gas station from the date of April 15, 2016. I also want to put on the record as a side note too that the record silent as to when the clock actually started to run with respect to the six-month period, because the applicants provided no evidence when the last sale of gasoline or inspection was made on this property prior to the tenant's possession of the March of 2016, despite inquiry by numerous Board members during different dates of the Hearing. The tenant admitted that they did not secure keys to the property until August of 2016. We know that the tanks were removed on February 10, 2016. However, no evidence was presented to demonstrate that there was no lapse of the non-conforming use prior to the current tenancy. Here, there is a lapse of time provision specified in the Ardsley Village Code. It is uncontroverted that the property was not operated as a gas station, and the lapse of the non-conforming use clearly exceeds the six-month period. I find that the use has been abandoned. An ordinance such as this automatically forecloses inquiry into the owner's or tenant's intent to abandon the non-conforming use. I don't want to cite all of the cases regarding overriding public policy regarding zoning. I do want to note that it is unfortunate for the owners that due to the tenant's action the non-conforming use of the property has been abandoned. In the matter of* Hannah v. Crossley, 40 A.D.2d 577, *a Fourth Department case of 1972 – and I note for the record that the applicant cited a lower court case of* Hannah v. Crossley, *that this Fourth Department case has reversed, to support their proposition. The Court held that there was uncontroverted evidence in the record to the effect that the use of the premises as a gasoline station had been abandoned. There, the fact that the owner had relinquished possession to a tenant does not mandate a different result. Such ordinances are deemed to supply the element of intent as a matter of law. In* Village of Spencerport v. Webaco Oil Company, 33 A.D.2d 634, *the Fourth Department has determined that intent to abandon is established as a matter of law by the discontinuance of the use, regardless if it is the owner or the tenant, if the time period is reasonable."*

Ms. Gorman-Phelan continued, *"What I am struggling with in trying to balance is the constitutional aspects of this Code, because when I reviewed the role of a member of the Zoning Board of Appeal, it is to interpret the provisions of the Village of Ardsley Zoning Code. The Board is guided by the principles of due process and also the full protection under the law of the basic concept of nondiscriminatory treatment of persons similarly situated, and the fairness, both to the individual and the residents of the Village as a whole. In exercising our discretion, Board members have to consider protection of the individual from unnecessary and non-self-imposed hardships, protection of the character of the Village, protection of the property value, of the individual and the residents, and protection of the residents against nuisances and hazards, and against every kind of unreasonable undue interferences with peace, enjoyment, safety and the general welfare. Village of Ardsley Code, Sections 200-97 and 200-99. In doing so, under New York law, a property owner has no right to the existing zoning status of his land unless his right has somehow become vested. In order for a right to vest, the property owner or tenant must have undertaken substantial construction, and must have made substantial expenditures,*

*prior to the enactment of a more restrictive zoning ordinance. Here, the tenants have claimed that they have a vested right. Here also, the tenants applied for and was granted a permit to install tanks and pumps for a gas station, and a permit was approved as an integrated project by the Building Inspector. That application was then extended to December 12, 2016. Thornwood completed the substantial installation of the tanks for the benefit of the non-conforming use to be used as a gas station, and incurred substantial expenditures in good faith reliance on the continuing use of the property as a gas station upon the approval of the Building Inspector. He was present throughout all the remediation processes and observed the work and cost incurred in placing the tanks. He was present through the project and never called attention to the lapse of the continuous non-conforming use, even after the six-month period, when the tenants were continuing to work on the property and continuing to spend substantial money. Therefore, although the non-conforming use was abandoned, I do not believe Thornwood was divested of its rights to use the property in accordance with the approved plan. It is well established that legislative enactments such as the Village Code must be construed to avoid any constitutional issues, if such construction is fairly possible. Therefore, in conjunction with my duties as a Board member in interpreting the applicable statutes of the Code, guided by the principle of due process and equal protection under the law, and conducting all the balances I spoke of previously, the former legal non-conforming gas station use of the premises of 657 Saw Mill River Road was abandoned. That is, the non-conforming use of the gas station has been discontinued and ceased to operate for such a period of more than six months, irrespective of the applicant's intention to use the property. And although the non-conforming use is abandoned, Thornwood is not divested of its right to use the property in accordance with the approved plan. And that's my finding. I find that it is abandoned, but I believe that there are other remedies that they could explore."*

Mr. David stated that he also had prepared comments to describe how he arrived at the position he has taken, which he thinks is important to note for the record, as these proceedings may be subject to review. Mr. David stated that the Board has had many faceted looks at this matter, including the legal facet; the issue of do we need a gas station or another gas station or not; the aesthetics, etc. Mr. David noted that there have been numerous Village residents who have spoken out on aesthetic grounds, and on the issue of need, and stated that we should consider the property abandoned. Mr. David also stated that the Board has had myriad legal decisions presented to us. Mr. David shared that he has read them all, and that as a non-attorney, they have been difficult to parse, especially as he does not know which decision may or may not apply and which Court has ruled on it, and which Court's decisions are the most binding. Mr. David stated that he has taken his oath seriously from when he first took office as a member of the Zoning Board, and that in furtherance of his membership on the Board, he has taken umpteen seminars on Zoning Board issues. Mr. David stated that it all comes back to him that the pertinent issue is his reading of the Village Code, and that this is what he would base his decision on. Mr. David stated that it is clear and unambiguous in reading the

abandonment section, but that he also must look at the legislative intent, because counsel for the applicant has brought in the issue of intent, and present meaning future, which is part of our Village Code, so counsel is not taking it out of left field. Mr. David stated that he has have come to the decision, and it has not been an easy one, entailing at least fifty hours of time, that he is of the opinion that, whether by mishap or mismanagement, there was never an intent to abandon the property. Mr. David stated that therefore his opinion, which he will vote on when given the opportunity, will be to deny the issue of abandonment, and state that it was never the intent to abandon.

The Chair summed up that at this point the Board has not reached the required majority conclusion because, like Mr. David, I do not feel that this was abandoned, even ruling out the whole issue of intent, but for the reasons I outlined earlier, that the definition section of the Village Code includes "preparing to be used," even leaving out "intending," and that the applicant and the landlord did not walk away from the property but were engaged in it, with the expectation from the departure of the prior tenant that it would continue to be used as it had been used since the 1930s.

The Chair stated that the Board has two members who find that there is not abandonment and one member who finds that that there was abandonment, and therefore we will have to bring this back in January, when we will look to our new member to have reviewed the various materials. The Chair reiterated that if Mr. DelGrosso also finds that there was not abandonment then the Board will return the matter to the Village Board with a 3-1 opinion, and if Mr. DelGrosso finds otherwise, then we will be deadlocked, and we will go back to the Village Board with that.

Mr. David stated that he would like to expand on his earlier remarks, because he did not fully develop the concept of improving the property. Mr. David stated that he does not think, when this section was added to the Village Code, that they took into account that it is virtually impossible to rehab a building that was allegedly built in 1932, to bring it up to code, and the engineer of the project, Mr. Elmendorf, indicated that it was an unsafe property, so the Board has to also take into account whether it is possible to renovate within the stated period of time.

The Chair announced that the next meeting of the Ardsley Zoning Board of Appeals will be held on January 24, 2018.

The Chair stated, for the benefit of the Board members, that he plans to circulate a meeting schedule for the coming year so that they do not have to plan the next meeting each month.

6) **Adjournment**

On motion of Mr. David, seconded by Ms. Gorman-Phelan, which motion passed unanimously with a vote of 4 in favor, none opposed, and none abstaining, the meeting was adjourned at 10:50 PM.

Respectfully submitted,
Judith Calder
Recording Secretary