

**ALPINE ZONING BOARD OF ADJUSTMENT**  
Reorganization & Regular Meeting  
Wednesday, January 11, 2012 - 7:30 P.M.  
(This meeting was taped in its entirety).

**CALL TO ORDER/PLEDGE OF ALLEGIANCE/PUBLIC ANNOUNCEMENT**

This regular and re-organization meeting of the Alpine Zoning Board of Adjustment was called to order by Chairman Glazer at 7:34 p.m., Wednesday, January 11, 2012 at the Alpine Borough Hall, the Pledge of Allegiance recited and the Public Announcement read according to the requirements of the Sunshine Law:

*In accordance with the provisions of the Open Public Meetings Law, the notice of this regular meeting held Wednesday, January 11, 2012 has met the requirements of the law by being published in The Record as part of the Annual Notice on January 6, 2012, posted on the bulletin board in the lobby of the Borough Hall and a copy filed in the office of the Borough Clerk.*

**OATHS** Mayor Tomasko administered the oath of office to

Richard Bonhomme for a four year term as Member of the Alpine Zoning Board of Adjustment expiring 12/31/2015 and

Anthony Barbieri for a two year term as Alternate Member #2 of the Alpine Zoning Board of Adjustment expiring 12/31/2013.

Tony Clores was not present and will be sworn in at the next meeting for a four year term as Member expiring 12/31/2015.

**ROLL CALL**

Richard Glazer	<i>Present</i>	Bob Burns	<i>Present</i>
Tony Clores	<i>Absent</i>	David Kupferschmid	<i>Absent</i>
Ann Ronan	<i>Present</i>	Richard Bonhomme	<i>Present</i>
Larry Shadek	<i>Present</i>	Steve Cohen, Alt I	<i>Present</i>
		Anthony Barbieri, Alt II	<i>Present</i>

**APPOINTMENTS** The following positions were appointed by unanimous affirmation:

**Chairman: Richard Glazer** upon a motion by Mr. Burns seconded by Mr. Shadek

**Vice Chair: Anne Ronan** upon a motion by Mr. Glazer, seconded by Mr. Bonhomme

**Secretary: Nancy Wehmann** upon a motion by Mr. Glazer, seconded by Mr. Barbieri

**Board Attorney:** Upon a motion by Mr. Glazer, seconded by Mr. Shadek at the 2012 reorganization meeting of the Zoning Board of Adjustment of the Borough of Alpine

**WHEREAS**, the Zoning Board of Adjustment has a need to acquire the professional services of **Michael Kates of the firm Kates, Nussman, Rapone Ellis & Farhi, LLP** for Attorney to the Zoning Board of Adjustment of the Borough of Alpine without competitive bidding pursuant to N.J.S.A. 40A:11-5(1)(a)(i) to be provided as a non-fair and open contract pursuant to the provisions of N.J.S.A. 19:44A-20.4 and/or 20.5; and,

**WHEREAS**, the term of this contract is for one year; and

**WHEREAS**, Attorney Kates has submitted a proposal indicating he will provide services for the prices as approved in his letter of agreement; and

**WHEREAS**, these professional services may exceed the aggregate threshold set by N.J.S.A. 19:44A-20.4 and/or 20.5, Attorney Kates has completed and submitted a Business Entity Disclosure Certification certifying neither he nor his firm have made any reportable contributions to a political or candidate committee in the Borough of Alpine for the elected officials in the Borough of Alpine in the previous one year, and

acknowledging this agreement will prohibit he or his firm from making any such reportable contributions through the term of the contract, and

**WHEREAS**, this contract is subject to the Chief Financial Officer of the Borough of Alpine, County of Bergen, State of New Jersey, certifying funds are available in the 2011 municipal budget;

**NOW THEREFORE, BE IT RESOLVED** that the Zoning Board of Adjustment of the Borough of Alpine approves the letter of agreement; and

**BE IT FURTHER RESOLVED** that the Business Disclosure Entity Certification and the Determination of Value, as required, be placed on file with this resolution; and

**BE IT FURTHER RESOLVED** that notice of the award of this Professional Service Agreement will be published in the Press Journal.

Vote: Ayes: Shadek, Bonhomme, Cohen, Barbieri, Ronan, Burns, Glazer

**MOTION APPROVED**

Present on the dais: Michael Kates, Board Attorney, Gary Vander Veer, Borough Engineer, Nancy Wehmann, Board Secretary

### **CONTINUED HEARINGS**

#### **ALPINE CITGO BLOCK 49 LOT 8 – 1026 Closter Dock Road**

(Noticed for December 15, 2011 meeting but carried to this evening as applicant desired to try for a full complement of seven members to hear the matter).

**Elliott W. Urdang, Esq.** having offices at 19 Engle Street, Tenafly, NJ appeared on behalf of the applicant, Alpine Citgo, Inc.

Mr. Urdang stated Mr. Kumar, a principal in Alpine Citgo, Inc., previously operated a Texaco station that was located at the corner of Church Street and Closter Dock Road which no longer exists due to environmental problems. In conjunction with the operation of the gas station, he also operated a convenience store at the site. Subsequently he did not operate in Alpine for about 2½ years. He was then asked by the owner of the subject property if he would take over operation of the Citgo station located a few blocks to the east, nearer to Route 9W. He did take it over and in conjunction with dispensing gas began the operation of a convenience store. He now realizes he did so without a permit and it was not appropriate for him to do that, however it was clearly done out in the open and innocently. It has been in operation now for a number of years which at least provides a track record as to what the empirical effect is of that operation.

They are requesting a (d)1 variance for a use that is not permitted in the zone. They intend to address the positive and negative criteria with two witnesses: Mr. Kumar and Professional Planner, David Spatz.

The following Exhibit List was entered into the record by mutual acknowledgement.

- A – 1 Proof of Publication The Record on 12-1-2011
- A – 2 Proof of Notice to Residents within 200' 11-28-2011 based on TA list 10/27/2011
- A – 3 Application received 11-2-2011 including
  - Proof taxes paid through 2011 4<sup>th</sup> quarter
  - Proposal and Reasons
- A – 4 Zoning Officer's Letter 04-12-2011

- A – 5 Survey dated 4-23-1956 prepared by Robert A. Peachey of Englewood, NJ
- A – 6 Copy of portion of Alpine Tax Map #4 depicting property
- A – 7 Prior Resolution Zoning Board 7-6-2004
- A – 8 Prior Resolution Zoning Board 3-2-1999
- A – 9 Prior Resolution Zoning Board 7-6-2004
- A – 10 Prior Resolution Zoning Board 6-4-1992
- A – 11 Prior Resolution Zoning Board 11-2-1983
- A – 12 Prior Resolution Zoning Board 5-20-1975
- A – 13 Prior Resolution Zoning Board 3-7-1960
- A – 14 Photographs (set of 8)
- A – 15 Borough Engineer's letter dated 11-9-2011
- A – 16 Letter dated 1-17-2011 from Applicant's Attorney requesting waivers from certain checklist items.
- A – 17 Borough Health Officer's Report w/photos dated 12-15-2011
- A – 18 Letter dated 12-15-2011 from Applicant's Attorney requesting continuance

**Anil Kumar**, 441 Ardsley Road, Scarsdale, NY 10583 stated he is a principal of Alpine Citgo, Inc. In 2001 he entered into a 5 year written lease with the owner of the subject property. Subsequently and currently he is a month to month tenant. He previously operated the Texaco station at the corner of Church Street and Closter Dock Road for about 7 to 7½ years in conjunction with a convenience store at that location. The station closed due to environmental problems and it no longer exists. Two years later, in 2001, he was invited by Mr. Hoffmann to operate the Citgo gas station. He also commenced operation of a convenience store of a size a little smaller than it is today. The gas station has two pumps and can service 4 cars at a time. In the years that followed he had no visits from municipal officials until a recent letter [A-4] advised him of this violation. As soon as he was so advised he asked Mr. Urdang to represent him and file this variance application.

The station operates 5 AM – 10 PM Monday through Friday and 7 AM – 10 PM on Saturday and Sunday. He only dispenses gas and operates the convenience store. He is not involved with the auto repair shop or car service office also on premises. Items sold in the store include, cigarettes, coffee, candy, soda, cakes, buns, milk, etc. The people who use the convenience store consist of: 65-75% use the store to run in and grab a few items while their car is being fueled, some stop by as part of their commute and the remainder are local patrons typically residents of Alpine or Closter, neighboring businesses and municipal workers who stop in during the course of the day. Most of their business, about 75%, occurs during the rush hour periods of 7 – 10AM and 3:30 – 6:30 PM with the morning being the most intense; but a steady clientele comes in spread out through the day. There are 5-6 spaces on site for additional cars to park. He has never had a problem and feels he has adequate room to accommodate all of the activity that comes to the site without having cars blocking or spilling out onto Closter Dock Road. The convenience store is typical of those associated with gas stations in other towns and he offered that new stations now are typically built with a minimart or convenience store component.

If he is not permitted to operate the convenience store he will be out of business as he cannot make enough money selling only gas.

Mr. Kumar received the Board of Health report (A-17) and understands that if the Board grants the requested variance, he must still satisfy all of the requirements of the Board of Health and that if, for some reason, he can't do that, notwithstanding the variance, he will still not be able to operate.

There were no questions from the public. (In addition to Mr. Urdang and his two witnesses only Mayor Tomasko was present in the audience.)

Attorney Kates sought to clarify if Mr. Urdang was suggesting as his approach, not just the (d) 1 variance, but that this might be considered as an accessory use to the gasoline service station. Mr. Urdang responded he was not seriously advancing that but he is suggesting that it is a common accessory use.

Ms. Ronan asked how the town came to take issue with the operation. Mr. Kumar recalled a customer complained there was fungi on a piece of coffee cake in a sealed package.

Attorney Kates noted the Texaco resolution placed limitations on what could be sold. Mr. Urdang offered that was a different situation being an interpretation of a pre-existing nonconforming use where in this case they are seeking a variance to continue to sell what he has been selling for the last ten years. Mr. Urdang felt limitations on items sold, while within the Board's jurisdiction, would make enforcement difficult.

The Board further questioned the procedural history of the application. It was explained that when Mr. Kumar was sent a letter [A-4] notifying him of the violation he contacted Mr. Urdang who had represented him in the Texaco matter and who then proceeded to file this application. Mr. Urdang put forth it is then typical for officials to forego further enforcement steps pending the Board's decision. A court summons was never issued. The convenience store has and continues to operate. Mr. Urdang stated they received no communication from the Board of Health until they received the report just before the last meeting and that was probably in response to their filing of this application. He explained some delay in the actual filing was relative to unresolved issues with the property itself which has a long and torturous history and took some time to figure out. Briefly, he learned the property was the subject of a subdivision which apparently was never perfected; there were a multiplicity of deeds and a number of resolutions. The owner is Charles Hoffmann and it was finally determined that as those issues did not directly impact this application, they should proceed. The owner's consent is part of the application [A-3].

Ms. Ronan asked if any approval by the Board would stay in effect beyond this tenant and Attorney Kates noted any variance would run with the land.

Attorney Kates noted photos depicting the convenience store within the confines of the building to question the square footage. Mr. Kumar estimated the convenience store takes up an area 15'x10' or about 150 s.f. of interior space.

Mr. Burns questioned a notation about attempts to install a septic system [A-15 Borough Engineer's letter page 2]. Mr. Kumar explained that's a different part of the

property and Mr. Urdang stated that was part of the subdivision issue. Mr. Kumar stated the landlord is responsible for the septic system.

Mr. Glazer observed the potential for serious health issues and Mr. Burns questioned compliance with all the Board of Health requirements. Mr. Urdang repeated his statement that Mr. Kumar understands he must comply with those and all other agency requirements or he cannot operate the store.

Mr. Barbieri questioned application of the term "convenience store" to the existing gas station when it's just a gas station. Mr. Urdang explained if the gas station were a "permitted" use instead of a "legal pre-existing nonconforming" use he would have argued that a convenience store is a normal and customary accessory use to a gas station and they would not have needed a use variance but only approval by the Zoning Officer. The wrinkle in this case is that the gas station itself is not a permitted use but only here because it existed prior to the Borough Ordinance that eliminated the commercial zone in Alpine and as such, they cannot just tack on the convenience store as a common accessory use as a matter of right; they need to seek the use variance.

Mr. Glazer recalled the Borough, in its wisdom, eliminated commercial zones by ordinance. Mr. Kates observed the culture of the community in Alpine has been to confine commercial uses and not to tolerate them unless they pre-exist the zone, thus Mr. Urdang's analysis of such uses as being a common accessory to a gas station is not an Alpine concept which is why they need a use variance. Mr. Urdang noted such a use previously existed in the Texaco station a few blocks west which Mr. Kates reminded was severely delimited owing to Alpine's culture. Mr. Urdang respectfully pointed out that the same statute that gives Council the right to craft an ordinance also created this Board to be able to give relief from that ordinance in certain instances. He further reminded any relief does not create a precedent.

The Board expressed concerns with fire safety relative to the density of the convenience store and narrowness of aisles. Mr. Kumar advised they have two exit doors. Mr. Urdang noted they would have to satisfy the applicable fire codes.

The Board questioned if the use could be changed or expanded into a Dunkin' Donuts or mini-mall type establishment. Mr. Kates noted that is controllable via preventative conditions the Board could attach to any approval.

**David Spatz, PP** 60 Friend Terrace, Harrington Park, NJ 07640 was sworn, presented his credentials<sup>1</sup> and qualified as an expert in professional planning.

Mr. Spatz testified he is familiar with the subject property and its environs. Although they are all pre-existing nonconforming uses, this area on Closter Dock Road is primarily commercial and really the only area with commercial uses within Alpine. In addition to the gas station he observed two real estate offices, a small vacant building

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<sup>1</sup> Mr. Spatz is a licensed professional planner in the State of New Jersey since 1986, received a Masters in Urban Planning from New York University, currently a planning consultant for Union City and Hudson County and special projects in Edgewater and Westwood, has appeared before 50-60 NJ Boards.

that was a real estate office, Alpine Gardens, and an electric business establishment. There is one house across the street from the gas station. There is also some vacant and Green Acres land nearby.

Mr. Spatz offered the application rightly seeks a d(1) variance because although the gas station has been pre-existing for at least 50 years that they could determine, a convenience store, typically considered a common accessory use to a gas station, would in this case be considered a new use requiring a variance.

To satisfy the affirmative criteria of establishing special reasons that further the purpose of zoning, he cited NJSA 40:55D-70(2)g which states "*To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;*" Mr. Spatz elaborated by noting Alpine's ordinance does not provide for any commercial zones and while they are not required to do so, an appropriate use could be provided by variance. This particular site would be the most appropriate location for a convenience store as there is already a gas station that has existed on the site for at least 50 years and this is the one area of Alpine where commercial uses have sprung up probably owing to its location on the periphery of Alpine on a heavily trafficked county road, Closter Dock Road, and near the intersections with two heavily trafficked interstate highways, State Route 9W and the Palisades Interstate Parkway. This cluster of commercial uses is not duplicated anywhere else in Alpine and so he opined this is an area where you could have some commercial uses without having them impact on the residential properties within Alpine. Typically modern gas stations have convenience stores within them. In a community that permits gas stations, a convenience store would be acceptable as an accessory use the same as auto repair and would serve the needs of all NJ residents inclusive of all travelers passing through as well as Alpine residents. The proposed use would satisfy this.

To satisfy the negative criteria Mr. Spatz put forth the proposed would not have any substantial detriment on the public good. He noted per Mr. Kumar's testimony that 65-75% of the patrons of the convenience store are already on site to buy gas and there are 5-6 parking places for the approximately 10% of patrons who stop by the convenience store during their commute specifically to pick up items like coffee or a newspaper. Thus, this is not a destination that creates traffic; the traffic is already there, at least during peak hours. There is also no evidence that traffic would be a problem during the rest of the day.

Furthermore the proposed would not substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance. Mr. Spatz offered while any variance has some negative impact because it goes against what an ordinance states the question becomes whether the impact is "substantial." In this instance, the proposed convenience store does not rise to that level for several reasons: the gas station has existed, the convenience store has existed on site for approximately ten years without any issues, and a gas station with a convenience store accepted by variance did exist just up the road on the corner and that, too, had no particular impact. No other areas in Alpine have gas stations or would be appropriate for the use so approval would not generate additional uses of this type. That said, any approval would not be

precedential and owing to the uniqueness of this situation would not apply anywhere else in Alpine.

Addressing the enhanced burden of proof associated with a (d)1 variance under Medici, Mr. Spatz noted that despite the Borough's policy not to have commercial uses, the site is particularly well suited because you have this limited area close to the highway at the end of the Borough. There is no need to create a special zone or zones to accommodate the different uses such as real estate offices and the gas station which would not make sense when they can be treated as pre-existing nonconforming uses allowing them to come before the Board for any modifications.

Attorney Kates asked Mr. Spatz what delimiting conditions he would deem reasonable to prevent this 1.37 acre site from becoming a mini-mall instead of a gas station with a modest convenience side to it. Mr. Spatz offered they could limit the size of the convenience store to what it is now, 150 s.f., and not permit any increase extending into the existing interior space or via new construction. He felt this would be enforceable and the market would best control the type of items sold. Attorney Kates noted the Board would need a floor plan with a delimitation of that square footage.

The Board questioned, however, if not limiting what could be sold might allow for the sale of things like liquor, a bong, rolling papers, and other non-food based items. It was noted a liquor license would first be required and Mr. Spatz agreed it might be appropriate to control the sale of some marginal items such as the type of smoke shop items they referenced in some way, but maintained most sales would be most appropriately determined by the market, the limited space and health department rules and regulations.

The Board again raised the issue of safety relative to the narrow confines of the convenience store to question regulations relative to aisle sizes, ingress, egress whereupon Attorney Kates offered site plan review would be appropriate in reviewing a d(1) variance application to review some of these issues including parking. Mr. Urdang agreed but offered while this could be done, part of the difficulty with site plan review for this property would be the multiple uses on the property which are hard to segregate out. He offered they are dealing with a small area only a few feet from the pumps and that the fire code would provide regulations to meet their safety concerns. Attorney Kates observed the Board still requires a certain comfort level. Mr. Urdang responded that there is some sharing of jurisdictions in this matter where they are before the Board to address the land use issues while they are also aware they have to satisfy the Board of Health and the Fire Code because that's part of the process. A brief discussion clarifying for the Board how and what municipal, state and international health and building codes apply and the uniformity of same followed. The Mayor offered now or in the future there should be input from the Health Officer. Mr. Urdang emphasized again whether or not the Board makes it a specific condition or not they will have to go to all agencies having jurisdiction including the Board of Health. He acknowledged the Board of Health has expressed some concerns and they will have to work that out with them or they can't operate regardless of what this Board says and that's where the Board's protection is; it's not all put on the Board as there are other agencies such as the Fire Code that also have jurisdiction.

Mr. Glazer offered he is personally uncomfortable with his lack of knowledge in this area and would really like to hear from the Fire Department and Health Department about what they should be thinking about before granting this type of variance. The Mayor noted the Fire Official and Health Officer make regular inspections of legitimate facilities. Other food service establishments exist at the Kiku Restaurant, Montammy Golf Club and Boy Scout Camp. Ms. Ronan offered this would create more work for the Borough. Mr. Glazer maintained he would still like to see a report from the Health Department regarding compliance. Mr. Kates repeated they need a floor plan.

Mr. Urdang offered he had no objection to amending the application to include a request for amended site plan approval with the caveat noted that they are not dealing with the entire site and agreed to continue the matter with clarification from the Board as to what needs to be provided before the next meeting. After discussion the following was determined:

Mr. Urdang will meet with Mr. Galdi regarding the health code issues. He will also provide the Board with a floor plan and a site plan delineating the area used for the convenience store and also showing the additional parking spaces he referenced. The Board will be responsible for obtaining additional information it wants in regard to health and fire codes.

Mr. Spatz does not need to return however Attorney Kates had a final question for him relative to the affirmative criteria presented being if this municipality has zoned out commercial uses then the rationale that this is an appropriate use, never minding the gas station, to furnish all kinds of uses loses some of its luster; he doesn't need Alpine to get a cup of coffee as he can get one in a neighboring town. Mr. Urdang preferred use of the phrasing that the Borough "had not zoned in commercial uses" because there are commercial uses located right by us and although pre-existing the question is whether the Board should ignore that fact because variances are built upon the uniqueness of a situation. Mr. Kates clarified the subsection criterion just doesn't appear to hold in the abstract but perhaps in a more site specific analysis. Mr. Urdang intimated he would provide same in his summation.

This matter will be carried to the next regular meeting scheduled for Thursday, February 16, 2012 at 7:30 p.m. or as soon thereafter as the matter can be heard without need for further public notice.

## **COMMUNICATIONS**

- Acknowledgement thank you note received from the Kupferschmid Family for condolences sent regarding the passing of Mr. Kupferschmid's mother.
- Save the Date notice for BC Bar Association's Annual Land Use Committee Symposium scheduled for Saturday, March 10, 2012

**PROCEDURAL MOTIONS**

**Resolution: Approval of Minutes: Regular Meeting December 15, 2011** Upon a motion by Mr. Bonhomme, seconded by Mr. Barbieri and approved by all those eligible to vote at the reorganization and regular meeting of the Alpine Zoning Board of Adjustment held on Wednesday, January 11, 2012 to approve the minutes of the regular meeting held on December 15, 2011.

**Resolution: Return of Escrow:** On a motion offered by Ms. Ronan, seconded by Mr. Barbieri and approved by all those eligible to vote at a regular meeting of the Alpine Zoning Board of Adjustment held on Wednesday, January 11, 2012 to approve the return of escrow as listed below:

Fa Y and Hyran Park 121 Palmer Place Leonia, NJ 07605	Block 74 Lot 7 25 Dogwood Lane	Trust AC 70107 App withdrawn 12-1-2011	\$1,411.50
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**MOTION CARRIED**

**OTHER BUSINESS**

**Internal Contact List** The Board was asked to review and advise the Secretary of any changes to their internal contact list.

**2012 Budget Recommendation** The proposed budget (zero increase) was reviewed and without objection will be forwarded as a recommendation to the Mayor and Council.

**ADJOURNMENT** at 9:09 p.m. upon motion by Mr. Bonhomme, seconded by Mr. Cohen and approved by all.

Respectfully submitted,

Nancy Wehmann, Secretary