

## ALPINE ZONING BOARD OF ADJUSTMENT

Thursday, July 19, 2012 - 7:30 P.M.

(This meeting was taped in its entirety).

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

This regular meeting of the Alpine Zoning Board of Adjustment was called to order by Chairman Richard Glazer at 7:32 p.m., Thursday, July 19, 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 Thursday, July 19, 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.*

### **ROLL CALL**

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

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

**APPROVAL OF MINUTES** **Resolution: Regular Meeting June 21, 2012** Upon a motion by Mr. Clores, seconded by Mr. Cohen and approved by all those eligible to vote at the regular meeting of the Alpine Zoning Board of Adjustment held on Thursday, July 19, 2012 to approve the minutes of the regular meeting held on June 21, 2012.

**MOTION CARRIED**

### **NEW MATTER CARRIED** **SABATHIA BLOCK 71 LOT 22 – Litchfield way**

No one was present for this matter. It was posted and noted that this meeting will be carried to the August 16, 2012 meeting at the request of the Applicant to accommodate neighbors who wish to be present. Notice to neighbors within 200 feet has been satisfied but Applicant's original newspaper ad had a fatal flaw and they must re-publish notice in the paper.

### **CONTINUED HEARINGS**

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

**Eliott W. Urdang, Esq.** having offices at 19 Engle Street, Tenafly, NJ appeared on behalf of the applicant, **Alpine Citgo, Inc.** along with **Anil Kumar**, 441 Ardsley Road, Scarsdale, NY 10583, a principal of Alpine Citgo, Inc., Applicant's Planner, **David Spatz, PP**, 60 Friend Terrace, Harrington Park, NJ 07640 and **Charles Hoffmann**, 1030 Closter Dock Road, Alpine, NJ 07620 whose family owns the subject property. No one appeared in opposition to this matter.

To refresh, this matter was first scheduled for a hearing on December 15, 2011 but carried on a month to month basis at the request of the Applicant's Attorney due to scheduling conflicts and a quest to have a full complement of Board members present

to hear the matter. Testimony was heard at the January 2012 meeting. Mr. Urdang reviewed that testimony was previously provided by Mr. Kumar as to the operation and origins of the convenience store and by their planner, Mr. Spatz. This evening he would like to add testimony from Mr. Kumar and Mr. Spatz as well as one of the owners, Charles Hoffman, who can provide information on the history of the property. They seek a use variance to permit the continued operation of a convenience store that has operated on the site for about eleven years.

Exhibits received subsequent to the last hearing were noted by list as laid out below. They include affidavits from Board members Anthony Clores and David Kupferschmid who missed the January meeting but subsequently listened to the recording of the meeting and are therefore eligible to hear and review this matter:

- A – 19 Minor Subdivision plat dated 11-9-1998 Last revised 3-30-2006
- A – 20 Unmarked copy floor plan of structure
- A – 21 Marked up copy floor plan of structure depicting space for convenience store
- A – 22 NJ Uniform Fire Code Certificate Inspection dated 12-29-2011
- A – 23 Borough Engineer's letter dated 3-9-2012
- A – 24 Affidavit Anthony Clores affirming listened to recording of 1-11-2012 hearing
- A – 25 Fax from Applicant's Attorney 5-7-2012 request matter be carried to 6-21- 2012
- A – 26 Affidavit David Kupferschmid affirming listened to recording of 1-11-2012 hearing

*And as marked during the course of these proceedings:*

- A – 27 Photos of exterior of site as described below:
  - A – View of gas pump and parking near side of building.
  - B – View of (3) parking spaces on easterly side of lot
  - C – View of (4) parking spaces on westerly side of lot
- A – 28 Photos of interior of site (convenience store area) as described below:
  - A – Facing rear of store and refrigerated coolers
  - B – Facing coffee station
- A – 29 Portion of Alpine Tax Map colorized to indicate various existing uses entitled "Alpine Citgo Application" prepared by David Spatz, P.P. of Community Housing & Planning Associates, Inc.

**Site Visitation.** Mr. Glazer asked and received affirmation that Board members who wished to visit the site had done so, noting he visited several months ago and again within the last few weeks.

**Notice.** Mr. Kates questioned if Mr. Urdang had re-noticed for this evening's meeting noting the length of time that has elapsed. Mr. Urdang noted he had not been instructed to do so. He reminded no one had attended the first hearing. It has been noted at the interim meetings that this matter was being carried and notice posted on the bulletin board in the Borough lobby.

**Mr. Kumar** acknowledging he remains under oath stated he is the operator of the Alpine Citgo service station and the convenience store. His operations inside the building consist of a refrigerator box, 300 s.f. of store space and a storage room totaling about 500 s.f. The remaining interior space is occupied by the car service / garage repair operation. Since the last meeting he has stripe painted to clearly outline eight

parking spaces available on the site as depicted in photos he took two days ago [A-27 A-C]. Mr. Kumar identified additional photos [A-28 A-B] as interior views of the convenience store. He noted the store is inspected annually by the Fire Department and is in compliance. The current Certificate of Approval is marked [A-22]. He has never had a problem with patrons accessing the site. No one has to back up into Closter Dock Road to access the parking spaces. There has been no adverse impact on Closter Dock Road traffic. Most people run into the store while their car is being filled with gas and the pumps can accommodate four cars at a time. He has never witnessed any substantial degree of congestion on the site.

The meeting was opened for questions. There were none.

**Charles Hoffmann** was sworn. He resides next door at 1030 Closter Dock Road and has never observed any traffic problems. He accesses his own drive through this facility but does not park on the site. His family owns the subject property. His grandfather built the facility in 1930-1931 as an automotive repair facility/gas station and he recalled it included an automobile dealership at one time. The use did not end after his grandfather retired but rather continued as various successive automotive businesses such as an Esso station, Exxon station, Corvette Country dealership and Palm Beach Motors gas station. The convenience store area was previously a storage area for miscellaneous automotive supplies and was at one time part of the dealership offices.

Responding to the Board's questions, Mr. Urdang recalled Mr. Kumar's testimony that the conversion to a convenience store took place about 11 years ago. Gas deliveries are usually scheduled for nighttime and only occasionally come in the morning.

There were no questions from the audience.

**David Spatz**, acknowledged he is still under oath. He was qualified as a professional planner at the January meeting. Mr. Spatz prepared an exhibit [A-29] consisting of a colorized tax map to denote and describe the various uses (residential, commercial, public, church) along Closter Dock Road between Route 9W and Church Street. He offered the commercial uses comprise almost all of the commercial uses existing in Alpine with the exception of the Kiku Restaurant further north on Route 9W. While Alpine's ordinances do not permit commercial uses the Alpine Master Plan addresses the existing commercial uses under Goal 10 and its concluding rationale:

*"To discourage commercial development in the community.*

*....Consequently, the borough takes the position that commercial activity beyond those few already on Closter Dock Road or other streets is inappropriate for Alpine."*

Mr. Spatz interpreted this to mean that while the Borough does not want additional commercial uses, the existing commercially developed properties along Closter Dock Road should remain. The subject facility was constructed over 80 years ago, prior to the Zoning Ordinance, and has been continually used as a gas station and never as a residence, nor would the property be appropriate for residential use.

Mr. Spatz noted although a convenience store is a common and appropriate ancillary use to a gas station they do not claim the use by right in this case but instead seek a use variance under N.J.S.A. 40:55D-70d(1) for a use not permitted in the zone.

To satisfy the affirmative criteria whereby the use variance can be granted for special reason(s) that advance the purposes of zoning, Mr. Spatz cited Subsection (g) of the Municipal Land Use Law 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."*

In further support he put forth the fact that this is the only gas station or convenience store in Alpine, convenience stores are commonly associated with gas stations and this site is appropriate as it is already commercially developed and not appropriate for conversion to a conforming residential use. Although the Master Plan frowns on commercial uses it is reasonable to maintain existing commercial uses as long as the additional commercial use does not spread to other properties. The location of this facility at the edge of town near the intersection of major County and State highways further limits impact on residential areas. The facility meets the needs of Alpine residents as well as motorists traveling along Closter Dock Road who stop to get gas and can get a quick cup of coffee, newspaper, lottery ticket, etc. and then continue on their way.

To satisfy the negative criteria Mr. Spatz offered the continued operation of the convenience store poses no substantial detriment to the public good having already been in operation for eleven years with no resultant traffic congestion. Noting January testimony that most of the customers use the store while getting gas adds to the argument that the store is not the main attraction and there is no need for parking beyond what is already there. Mr. Spatz also highlighted the term "substantial" to remind any detriment has to be extreme where the small nature of this operation does not rise to that level. He also put forth there would be no substantial impairment to the Master Plan which already provides that existing uses can remain as long as they don't expand to other properties or areas in Alpine. A use variance is not precedential and would not open the door to broader commercial uses in Alpine; this facility is unique in its location and history. Again, this property has been continually used for automotive purposes for over 80 years predating zoning. Granting permission for the convenience store area, a lighter retail use, would actually diminish the heavier commercial automotive use and serve to further reduce any negative impact.

Mr. Urdang asked Mr. Spatz to apply the enhanced standard of proof as required under *Medici v. BPR*, 107 N.J. 1 (1987) [that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance]. Mr. Spatz noted you have to look at the rationale for the use's exclusion from the Zoning Ordinance. He opined these commercial uses have existed for many years, are in an extremely small area within Alpine, and there is the policy of not wanting to suggest expansion into other areas of the Borough. It is therefore appropriate not to have a commercial zone where the reasonable assumption is you have these grandfathered commercial uses that are not appropriate for anything else such as the nursery, real estate offices and gas station and there is no need to create zoning standards for them; they'll just remain as is.

There were no questions from the public.

Mr. Kates questioned the Applicant's use of a d(1) approach, which would essentially categorize the convenience store as a use on its own rather than an accessory to the gasoline service station, and whether the ordinance permits two principle uses on a property. He posited a better approach might be a d(2) variance for expansion of the pre-existing nonconforming use resulting from a conversion of storage space. Mr. Urdang agreed the application falls on the cusp noting a d(2) would require a lesser standard of proof. They are really just changing a component of the nonconforming use from automotive to retail which would ordinarily be considered somewhat of an upgrade and the pumping of gas is part of the operation.

Mr. Kates requested further substantiation as to their claim that the property would not be suitable for a residential use noting there are homes in the area. Referring to [A-29] Mr. Vander Veer wished to clarify Block 43 Lots 6.01-6.03 is actually a residential COAH-1 zone and not commercial as colored on the plan. Mr. Spatz acknowledged there is a home across the street and the property owner's home is next door but put forth 80 years of heavy automotive use on the property mitigates against it being converted to residential use. Mr. Urdang added that a nonconforming use is a valuable property right. Mr. Kates asked if it was ever tested as a marketable lot and Mr. Hoffmann responded that as a residential application it would probably be impossible to improve because of the septic system requirements for a residence in this town. Mr. Kupferschmid questioned the relevance regarding potential for residential use and offered he, too, preferred a d(2) approach.

There was no public comment.

Mr. Urdang's summation acknowledged Alpine is within its right to omit commercial uses in its zoning but drew a distinction between the Zoning Ordinance and the Master Plan which are legislative acts painted with a broad brush as compared to the quasi-judicial function of the Zoning Board which is to see if a variance is justified essentially painting with a small brush. Their action is not precedential, is very site based, and is very fact based as opposed to the general principles that guide creation of the Master Plan or a Zoning Ordinance. Whether considered as a d(1) or d(2) the structure of their inquiry would remain the same: 1) special reasons that further the purposes of zoning under the MLUL providing a variety of uses to benefits all the citizens of NJ 2) any substantial detriment to the public good from traffic or noise where this property has been used for commercial automotive purposes on a continuing basis since 1931 and there has been no evidence of any traffic implications, lack of parking or any negative impact on the neighborhood or community at large that would rise to the level of a substantial detriment. There is no detriment to the Master Plan per the guidance therein which encourages Alpine to be a residential community but also appropriately acknowledges that the nonconforming commercial uses that do exist have a right to remain; a valuable property right protected by statute. Virtually all these nonconforming commercial uses, except for the Kiku Restaurant, are located in this specific area and even though there are residences nearby one couldn't say that the predominant use of that general neighborhood is residential; it's really commercial and a church.

If the Board considers a d(2) variance more applicable the standard is significantly less than what is required for a d(1) variance and Mr. Urdang would argue that by getting rid of a portion of the automotive use and introducing a convenience store, which is not having any adverse impact, they are doing the sort of improvement to the property that is noted in the Burbridge case. [Burbridge v. Mine Hill Twp. , 117 N.J. 376 , 385 (1990)] This is a use that does not substantially change the existing use, it is of some benefit not only to the citizens of Alpine but also to passers by without inflicting any substantial harm on the overall zoning or creating problems with traffic or congestion.

Discussion followed where the Board considered application of a d(2) variance. Mr. Kupferschmid noted concerns regarding control of the retail use if approved under d(1) were raised during the January hearing and the d(2) approach may be more limiting making it ancillary to the gas station. Mr. Kates recalled talk of a condition making it contingent on the operator of the gasoline station owning and controlling it as opposed to a stand-alone use which led him to consider d(2) as the better approach. Mr. Urdang agreed they are talking about continuing the operation as it exists now where it is a common ownership and only selling the items that it is selling now and has been selling for the last 11 years. Mr. Glazer concurred. He recalled the former gas station in town had a convenience store incidental to the gasoline operation. Mr. Kates did not feel the Board should limit product per se but leave that up to whatever meets the health code. Mr. Glazer offered they could add a condition prohibiting "open fire" so for example no gas burners would be permitted but they could allow for the coffeemaker and the microwave oven.

Mr. Burns noted testimony that there have been no complaints about traffic or parking but nothing specific relative to any complaints regarding the convenience store itself. Mr. Urdang noted the issue that prompted this whole matter was a complaint lodged with the Alpine Board of Health that apparently emanated from a packaged product that was opened and found to be stale or molding. He noted the Board had also raised a concern regarding fire safety and they provided proof that they are in compliance. If there is a Health Code violation that is within the jurisdiction of the Board of Health and they will be responsible to that Board for rectifying it. Mr. Burns observed the hearing had been advertised as required and no one had appeared to make a complaint or speak in opposition. Mr. Kates solicited that the Applicant agrees to the limitation of the store to the 300 square feet it now occupies and to meet the requirements of all governmental agencies having jurisdiction including the Board of Health.

Mr. Vander Veer asked who would monitor maintenance of the parking striping and Mr. Urdang affirmed that Mr. Kumar as the tenant is responsible.

Mr. Glazer offered he has returned to the convenience store a couple of times and found it to be neater and the food that's offered is all packaged. He would ask there be an additional restriction that no open food be part of the operation so no butter or cream cheese, etc., just food that's pre-packaged along with the sale of coffee and tea.

**Resolution:** Upon a motion by Mr. Bonhomme, seconded by Mr. Cohen to grant a use variance under N.J.S.A. 40:55D-70d(2) with the provisions as outlined in the above discussion.

**Vote: Ayes:** Cohen, Bonhomme, Clores, Burns, Kupferschmid, Ronan, Glazer

**MOTION CARRIED**

Mr. Kupferschmid requested and was granted permission to leave at this time. Mr. Barbieri who had remained in the audience also left at this time.

**COMMUNICATIONS** During discussion of the Siboni memorialization, Mr. Vander Veer noted correspondence reviews applicants' compliance with conditions as set by the Board:

- 1) From Hubschman Engineering 6-27-2012 Follow-up Siboni 22/1
- 2) From Borough Engineer 7-5-2012 Review of above submission

**MEMORIALIZATION- SIBONI Block 22 Lot 1 – 6 Tulip Tree Lane**

Attorney Kates circulated and reviewed the resolution memorializing action taken at the June 19, 2012 meeting. It was noted the Applicant subsequently submitted documentation requested by the Board as a condition of approval which has been reviewed by the Borough Engineer (See COMMUNICATION above) and found to comply with the Board's requests. He further noted the proposed plantings shall be consistent with the Buffer Maintenance Guidelines dated October 24, 2003 as appended to the resolution.

Ms. Ronan questioned the width of the berm which Mr. Kates will add to the resolution (page 6 bullet 3) being a maximum permitted width of six feet.

**Resolution:** Upon a motion by Mr. Clores, seconded by Mr. Cohen at the regular meeting of the Alpine Zoning Board of Adjustment held on Thursday, July 19, 2012 to memorialize a resolution for Judy and Sylvain Siboni approving an application for a use variance under N.J.S.A. 40:55-70(d) from Borough ordinances 220 9D and 220 9E for disturbance of the 200 foot Buffer Zone subject to strict conditions as outlined in the resolution for his property located at 6 Tulip Tree Lane designated as Block 22 Lot 1 on the Tax Assessment Map of Alpine, New Jersey, Bergen County.

**Discussion:** Mr. Vander Veer requested clarification whether any deviation from the plan as submitted would require referral back to the Board for reconsideration. He noted the Applicant's Attorney has already advised they are considering asking for permission to make the berm higher because the proposed plantings, substantially in excess of six feet of height, have a sizeable root ball and they're concerned there may be an inadequate amount of soil in an 18" high berm to support the root ball on top of the rock. After a brief discussion with the Board noting they had indicated at the hearing that expert testimony from a Landscape Planner would have been appropriate, the Board clarified that the applicant must return to the Board if they deviate from the plan and want to increase the height of the berm.

**VOTES: AYES:** Mr. Clores, Mr. Cohen, Mr. Burns, Ms. Ronan, Mr. Glazer

**MOTION CARRIED**

*A copy of the resolution is appended to these minutes.*

**PROCEDURAL MOTIONS**

**Resolution: Approval of Bills and Claims** Upon a motion by Mr. Clores, seconded by Mr. Bonhomme and approved by all those eligible to vote at the regular meeting of the Alpine Zoning Board of Adjustment held on Thursday, July 19, 2012 to approve the following Bills and Claims:

<i>Azzolina &amp; Feury Engineering</i>	<i>Patel 121/3</i>	<i>Inv. 57952(Escrow)</i>	<i>429.50</i>
<i>Azzolina &amp; Feury Engineering</i>	<i>Siboni 22/1</i>	<i>Inv. 57966 (Escrow)</i>	<i>535.00</i>
<i>North Jersey Media Group</i>	<i>Patel 121/3</i>	<i>Ref. 3319144 (Escrow)</i>	<i>20.79</i>
<i>Kates, Nussman</i>	<i>Siboni 22/1</i>	<i>Inv. 1682</i>	<i>762.00</i>

**MOTION CARRIED**

**COMMUNICATIONS**

Mayor Tomasko was invited to address the Board. He advised Alpine's property tax rate will remain the same as last year and tax bills will be going out soon.

**ADJOURNMENT** at 8:47 p.m. upon motion by Mr. Clores, seconded by Mr. Cohen and approved by all.

Respectfully submitted,

Nancy Wehmann, Secretary