A regular meeting of the Town of LaGrange Zoning Board of Appeals was held on Monday, January 7, 2013 at the temporary LaGrange Town Hall, 24 Firemens Way at 7:30 p.m. Chairman Paul Bisceglia called the meeting to order. Board members Nancy Swanson, Mark Christenson and Sandra Lane were present. Marc Komorsky was absent. Audrey Freidrichsen Esq. of the firm of Van DeWater & Van DeWater was also present.

Mr. Bisceglia made a motion to accept the minutes of December 3, 2012 as submitted. Mr. Christenson seconded and the motion carried unanimously. MINUTES ACCEPTED.

OLD BUSINESS

3-12-01 AREA VARIANCE: MYLES LANDSTEIN, 16 VELIE ROAD, LAGRANGEVILLE, NEW YORK Grid No. 6560-01-138549
Seeking relief from Chapter 240-28 Schedule B that states that the maximum height of a building or structure in an R-120 zoning district is 35' and seeking relief from Chapter 240-49(c) Wireless communications towers and facilities which states that the proposed yard setbacks from the property line must be no less than three times the height of the tallest proposed structure or the setback requirements in the existing zoning regulations, whichever is greater in order to construct a ham radio tower with boom antenna with a proposed height of 100' and a boom width of 23 feet

Mr. Bisceglia said the Myles Landstein application is adjourned to the February 4, 2013 meeting.

11-12-01 AREA VARIANCE: CARRINGTON CONSTRUCTION, C/O STEVE PAGE (WHISPERING PINES SUBDIVISION, LOT #8), BUSHWICK ROAD AND ROUTE 55 Grid No. 6360-02-972772
Seeking relief from Chapter 240-28 Schedule B which requires a minimum lot frontage on town r.o.w. line of 75' (50' proposed) and minimum width of lot at any point of 75' (50' proposed)

Mr. Bisceglia said this application has been adjourned to the February 4, 2013 meeting at the request of the applicant.

11-12-02 AREA VARIANCE: NISI, TODD HILL ROAD Grid No. 6460-04-503405
Seeking relief from 240-28 Schedule B which requires a minimum lot frontage on a town r.o.w. line of 80'. Also seeking relief from N.Y. Town Law §280-A. The Nisi lot is a landlocked parcel.

Gary Beck Jr. of Z3 Consultants was present to represent the application.

Ms. Freidrichsen said the last time the applicant had appeared before the board was in December 2012. There had yet to be a decision from the Planning Board regarding SEQR. The Planning Board is lead agency. A favorable discussion had occurred at that meeting and the board had authorized Ms. Freidrichsen to draw up a Resolution of Approval for the board's consideration. In the meantime the Planning Board did issue a determination of non-significance on December 20th so this board is now in a position to move ahead.

Ms. Freidrichsen then went through the Resolution. This was an application made by Z3 Consultants on behalf of Nisi who are seeking a variance from Town Law §280A. In the Whereas clauses it recites that this variance is in association with a lot line realignment which is currently before the Planning Board. It is for taking .46 acres of land from one parcel and adding to Parcel C which is the parcel at issue. It is an existing parcel, however it is landlocked and has access via a 50' right of way. This has been demonstrated by a recorded deed. Ms. Freidrichsen did note that the recorded deed for the Nisi lot, #22004-12239 is incorrect on the map and needs to be corrected. The applicant has requested relief from the requirements of the zoning code for the landlocked parcel. The Zoning Code requires a minimum frontage of 75' on a town road and that is why the variance is necessary. The Town Law provides that this board can grant a variance from that requirement under the same factors that are applied under the Town Law and under the Town Zoning Code. The Resolution states that the Planning Board granted a negative declaration and that the ZBA has fully considered the application for the variance, the supporting information, the comments from the public and the factors for review and issuance of area variances as set in the zoning code. The public hearing is open so they will need to close that prior to voting.

Ms. Freidrichsen briefly went through the factors:

Whether or not it will create an undesirable change in the neighborhood. This variance is requested for creating a buildable lot and developing the parcel with a single family home and the neighborhood is similarly developed so the finding is that there will be no undesirable change in the character of the neighborhood.
Whether the benefit sought by the applicant can be achieved by some other method. There is some other action that the Town Board could take granting an open development area but just like the variance required here, it is a legal relief that is needed that is required either way so there is no other method by which the house can be developed other than granting the variance.
Whether the variance is substantial. The variance is substantial, as it is a variance from the entire 75' requirement however it is beneficial as right now it is an undevelopable landlocked parcel and it will render it accessible via deed
Whether the difficulty is self-created. The difficulty is not necessarily self-created. The board is charged with the knowledge of the requirements of the zoning code, however this was a pre-existing lot and this will render it legal
Whether it will have a significant adverse impact on the environmental conditions. One single family home is being proposed so there is not a significant adverse impact.

Ms. Freidrichsen said the conclusion is that the ZBA finds that the benefit to the applicant by the granting of the variance outweighs any detriment to the health, safety or welfare of the neighborhood. Ms. Freidrichsen added a space for any condition the board may or may not put on the variance. A condition might be to correct the plat with the correct recorded deed number.

At that time Mr. Bisceglia made a motion to re-open the public hearing. Ms. Lane seconded and the motion carried unanimously. There being no comments, Mr. Bisceglia made a motion to close the public hearing. Ms. Swanson seconded and the motion carried unanimously. PUBLIC HEARING CLOSED.

Ms. Swanson said that Ms. Freidrichsen had earlier stated that they needed updated deeds. Had that requirement been satisfied? Ms. Freidrichsen said this application is still before the Planning Board so with regard to all of the requirements of the Town Code, the Planning Board will be taking those into consideration with the subdivision that is before them. But to answer Ms. Swanson's question, Ms. Freidrichsen said she had been provided with a copy of the deed for this parcel and it does have right of ingress and egress on foot, with vehicles of all kinds including the right to install and maintain service lines for public utilities in, on and along the lot.

Mr. Bisceglia said that based on the Resolution that Ms. Freidrichsen had prepared, he made a motion to grant a variance to Nisi on Todd Hill Road. Ms. Lane seconded and the motion carried unanimously. AREA VARIANCE GRANTED

01-13-01 M. SPIEGEL & SONS OIL CORP., 1215 ROUTE 55 Grid No. 6460-02-802900
To hear an appeal from a determination of the Building Inspector of the Town of LaGrange dated October 1, 2012

Richard Olson, Esq. of the firm of McCabe & Mack was present to represent the application, together with Patrick Dunn, Environmental Manager for American Petroleum and Jeffrey Spiegel and Robert Spiegel, officers of the corporation. Mr. Christenson swore in all applicants.

Mr. Olson explained that the Town of LaGrange has a casualty provision that allows 24 months for the restoration of a property following a casualty. He said the facts had been outlined in the supplement submitted to the board. They are not contending the fact that they pumped gas from December 2010 until they were told to stop work in September 2012. That is not the issue. The issue is dealing with the casualties and the work they were doing to restore the property so they could resume the nonconforming use. In addition to the exhibits that the board has, Mr. Olson presented to the board additional exhibits that included a January 3, 2012 from his client to the building inspector, a January 5, 2012 memo from the building inspector to his client requesting additional DEC information, a January 13th response from his client, a February 27th memo from the building inspector to Mr. Cantor stating there was additional time to re-establish nonconforming uses under the statute. Also an additional response from his client to the building inspector and also including an email message received by Mr. Dunn from the DEC dated March 1, 2012 advising Mr. Dunn of additional work that needed to be done on the site. Finally, a September 17, 2012 memo from the building inspector which was a memorialization of the stop work order that was given to his client.

Mr. Olson said the Town of LaGrange statute is fairly unique. He had not been able to find any of the nonconforming use provisions that provide for this extended 24 month period. However, he was able to find a case that dealt with the interpretation of what a casualty may be and that is what they were asking the board to decide. He did find an appellate division case that dealt with the question of whether or not fire or other casualty could include environmental issues. This happened to be in the context of a lease provision and the appellate division determined that an environmental underground contamination could be considered a casualty. He offered that there is precedent for that interpretation but he

understands that is for this board to make their decision. Mr. Olson continued that since he had presented the supplemental submission and he had this evening provided a note from the DEC stating that as of March 1 2012 additional remediation work was being required by the DEC he would ask Mr. Dunn if he would state what happened from March 2012 through September when the town issued a Stop Work Order on the property.

Mr. Dunn said on March 1, 2012 New York State required additional work in addition to the first phase of work that was outside of the canopy area. Based on some preliminary soil borings there were exceedings in the ground. The DEC came back and wanted additional work under the canopy area that resulted in removal of the tank island and pads and some associated piping in order to get to the contaminated soil. Their word to them was to remove the accessible material and this was in order to obtain closure of the open spill number. In May of 2012 the excavating of the soils under the canopy began. That process took until June 14, 2012. In addition the State asked for additional work to be done as to soil and ground water studies so that once they removed the impacted soils they would know that down gradient water was not impacted so they could base their site closure on that. On June 20th they obtained that ground water quality and in July the final report was submitted to DEC on July 24th. They are still awaiting a response from DEC as to site closure.

Mr. Olson said they began work in September to repair some piping on the site. Mr. Dunn said they returned to the site in order to get the station back into operation. They approached the town in order to obtain building permits but they were not able to get those permits. They knew winter was coming and they had to get blacktop and concrete work done so they went back to the site in order to repair one of the lines and that is when the building inspector came out and said no work was allowed so they were not able to get the station back into operation. Mr. Olson asked Mr. Dunn if he had received a permit to undertake the work, would he have been able to resume gasoline pumping operations on the site prior to December 2012. Mr. Dunn said yes.

Mr. Olson said that is the information they wanted to give to the board at that time. He added that Mr. Spiegel could also give additional information.

Mr. Jeffrey Spiegel explained that Hurricane Irene hit and their business in Tuxedo was hit pretty hard causing their business to be out for 24 hours. Because of the devastation of their business, for about six months the only thing on Mr. Spiegel's mind was to save his business and he was not thinking about his LaGrange site or any other site. He then received a letter from the building inspector in about the third week in December stating that he had not sold gasoline in over a year. Mr. Spiegel answered the letter and moved ahead with the full intent of opening up. They had spent in excess of $300,000 and still more money has to be spent.

Mr. Olson said this is the issue they are presenting before the board. How do they interpret casualty under the Town's statues. Mr. Bisceglia asked if the applicant had a building permit. Mr. Olson said a building permit was not required for the restoration work and a building permit would not be required until there were things that had to be replaced. Mr. Dunn said they had to replace the product line and Mr. Olson said that was the work that was being done when they received the Stop Work Order. Prior to that there was no building permit required as they were doing ground remediation.

Mr. Robert Spiegel said he was not sure that there was ever a building permit required to replace a section of pipe. They went to the site to replace the pipe and the building inspector stopped them on site and told them they needed to get a permit. Mr. Olson said in the materials presented to the board was included an application for a mechanical permit which was what the building inspector was requiring and what was filled out in order to move the project forward. That is what the building inspector denied following the Stop Work Order.

Ms. Lane asked when did the property cease their use. Mr. Olson said that was in December 2010. That is not disputed. Ms. Lane asked why. Mr. Olson said they had some environmental issues and they were also marketing the station. They started the repair of an 8,000 underground storage tank. Mr. Olson said the convenience store closed as well. They did not have any activity on the site apart from remediation during that 24 month period of time.

Ms. Swanson asked for clarification of the dates mentioned at the beginning of Mr. Olson's statement. He said December 2010 but to what point? Mr. Olson said he was looking at the statute for the 24 month period, and as Mr. Dunn had testified, they would have been up and running by December 2012.

Ms. Lane said as she understood it, they stopped in December 2010 and when was the building permit taken out? Mr. Olson said a building permit was taken out for removal of an underground storage tank, which was the first casualty in 2011. It was after that permit was closed out that additional contamination was discovered which was in connection with the potential marketing of the property and that is the contamination they have been dealing with since April 2011 until September 2012 when that work was stopped. But a building permit was not required to do the soil remediation.

Ms. Swanson said Mr. Olson had mentioned marketing in respect to December 2010. She asked what date. Mr. Olson said they were going to sell the station. Ms. Swanson said why does that mean they would stop doing business. Mr. Olson said they pulled the tank initially, they were then undertaking negotiations to sell the station and part of the negotiations were who was going to pay for the remediation so they did not resume that. After that when the deal through it fell solely on the owner of the property to deal with that contamination. Ms. Swanson said Mr. Olson had mentioned at the beginning that he had been advised by counsel who had shared information with him. She did not know what counsel he was referring to. Mr. Olson indicated two gentlemen sitting there who had kindly provided their comments to him. He said they were not contesting the fact that they operated on that site. They are looking solely at the town's casualty provision and the restoration that was done during that 24 month period of time.

Ms. Lane said as she understood it the convenience store was closed as well in 2010. Mr. Olson said that was correct. Mr. Robert Spiegel said in 2010 the tenant left and they did not want to renew the lease because they were selling the station so the use of the convenience store stopped at that point.

Ms. Freidrichsen said she thought there were two permits at issue. She believed some sort of permit was obtained from the town for the removal of the diesel tank and that was the first spill back in 2009. Then there was a second application for a permit from the town that was

denied in December 2012. Mr. Olson said that was for the mechanical permit that Mr. Dunn testified was for replacement of a piece of pipe that was in the ground. That was required after the building inspector issued the Stop Work Order. As Mr. Dunn testified, no one believed a building permit was necessary to replace a piece of pipe. It turned out a mechanical permit was required.

Ms. Freidrichsen continued that initially there was an issue with the diesel tank that was removed. She asked Mr. Olson if it had ever been replaced. Mr. Olson said no. Secondarily there were issues with the gas dispensing system. Mr. Olson said contamination was then discovered in April 2011. That is what they were dealing with from then on. Ms. Freidrichsen asked if that answered the question. Mr. Bisceglia said yes.

Mr. Christenson asked what it was exactly they were determining. Mr. Bisceglia said they need to determine if it is a casualty. Mr. Christenson said he thought they were determining the decision of the building inspector. Mr. Bisceglia said that they want a clarification as to what a casualty is. Mr. Olson said the town's building inspector's denial stated that Section 240-29E does not apply to this situation. They are contending that this underground contamination is a casualty. He has provided one case in which it was determined that an underground contamination was a casualty. Mr. Christenson asked the reason for the Stop Work Order. Mr. Olson said they were out there replacing a pipe in the ground and the building inspector issued a Stop Work. Mr. Dunn said he approached the town in September to obtain a permit and asked for a site meeting with the building inspector in order to determine if a building permit was required. He was unable to get any cooperation to have someone take a look at the site so they proceeded with the work because of the time constraint. They started the work and they were immediately shut down. The application for the permit was then sent in and then they were denied.

Mr. Bisceglia said in the matter of a casualty from the spill in 2010, was it necessary to close the station or could they have operated with that in place? Mr. Robert Spiegel said in 2010 they were dealing with the tank removal which was an older tank that the DEC asked to be removed by Consent Order. Mr. Bisceglia asked was it necessary to close the station and the convenience store. Mr. Spiegel said it was not necessary to close the station. When they removed that tank, that was when the contamination was discovered and they had to do a Phase I and subsequently a Phase II by order of the DEC. The Phase II had to do with the whole surrounding area of the canopy which required the station to be closed. Mr. Bisceglia asked what was the date that that occurred. Mr. Olson said that would have run from April 2011 through the report of July of 2011 when Mr. Dunn submitted that to the DEC which then got a response in March of 2012 as to the further work that was required. Mr. Bisceglia said then, that from December 2010 to that point the station was closed. Mr. Olson said there was no operation other than remediation. Mr. Bisceglia said, but it didn't have to be closed. Mr. Spiegel said the tenant left and they had the station up for sale.

Mr. Olson made reference to records of the Town of LaGrange that stated that on September 16th, during that period of time Bohler Engineering had been investigating a site plan application for the sale. It was on September 16th that they withdrew the application. This was in connection with marketing the station and during that period of time they did not operate because they were going through this process with the prospective purchaser.

Mr. Bisceglia asked how long would this work to take care of the storage tank and the issue with the DEC have to take to be completed. Mr. Dunn said there is never a time line. It is very hard to judge, based on site conditions. In addition to the remediation there was a whole phase of other activities going on because there was a Phase I performed at the same time that outlined additional environmental work that had to be done such as investigations, septic tanks, hydraulic lifts, inside and outside the building. In addition to the excavation and the removal there were also groundwater impacts. Therefore, it is very hard to give a specific time line.

Mr. Bisceglia asked if they were under a clock to perform the work under a certain amount of time so they don't lose their nonconforming use. Ms. Freidrichsen said there are two provisions under the nonconforming use statute that are at issue here. One, the applicant is not contesting. First, if a nonconforming use is discontinued for twelve months then the right to re-start is lost and the applicant is not contesting that there have not been operating at the site since December 2010 which was a determination that the building inspector made. Secondarily, there is a provision that provides that if there is a fire or other casualty a building permit for restoration work needs to be obtained within a year from it and that the work needs to be completed within 24 months. There are other provisions that if the work is 75% or 80% completed the Town Board can grant some additional time. The issue is a little different for the board as there is no variance requested, this is an interpretation of the code. The building inspector made the first interpretation concluding that the casualty provision does not apply in this case, and the applicant is appealing that on the grounds that it does. Mr. Olson has provided some case law that Ms. Freidrichsen needed to take a look at. Depending on whether this incident is a casualty under the code, then the next question is whether or not, depending on what the date of it was, a permit was obtained and the work completed. There has been some discussion regarding whether a permit may or may not have been needed, but it does sound like it was the building inspector's determination that this last piece of work regarding a pipe repair did need a mechanical permit. Ms. Freidrichsen said it is a combination of legal questions, the interpretation of the term "casualty", as well as factual questions, whether or not the 24 month provision has been complied with.

Mr. Bisceglia asked for the record what the code says about casualty.

Ms. Freidrichsen read the language of the code:
"If any nonconforming building or structure or any building or structure containing a nonconforming use shall be damaged or destroyed by fire or other casualty, such building or structure, except nonconforming signs, may be restored and any such nonconforming use resumed to the extent that such building, structure or use existed at the time of the casualty, provided that a building permit for such restoration is obtained within a period of one year from such casualty and is diligently prosecuted to completion. In the event of failure to start such restoration within 24 months from the date of casualty, the right under this subsection to restoration of such building or other structure and the right to resume any such nonconforming use shall be lost and terminated."

Ms. Lane said when they are talking about casualty, do they mean structure. Ms. Freidrichsen said the structures on the property referred initially to the diesel tank and then there was contamination on the property. She did not know of any mention of a building being lost or destroyed. Mr. Olson referred again to the interpretation he had provided to counsel that he

had found regarding casualty and whether underground contamination can be considered casualty. Ms. Freidrichsen said there are particular terms used in the code, e.g. building and structure, fire or other casualty, building permit, restoration, these are the terms the board are being asked to take a look at and really make a determination as to whether or not the building inspector's decision of October 1 was the correct one. Ms. Swanson said there could even be a question as to whether a tank meets the definition of structure in our code. Mr. Olson said, as addressed in the supplement, under our code definition the tank would qualify as a structure.

Ms. Swanson asked if the original leak was discovered in 2009. Mr. Olson said the original tank issue was not a leak. Mr. Dunn said the State mandated in a Consent Order that one particular single wall fibreglass tank be removed because it was out of compliance. Ms. Swanson asked when that got addressed. Mr. Olson said that was addressed in 2011 which was when the contamination was found in another area. Ms. Freidrichsen asked why was there a DEC spill number in 2009. Mr. Dunn said in 2009 there was another incident at the island. The 2009 spill number was probably housekeeping but it had nothing to do with the diesel tank, it was removed just because it was out of compliance. Therefore the DEC mandated that tank come out and the other two tanks be left. That tank was removed, no contamination was found, which was Phase I. Phase II followed immediately for possible real estate transaction. During Phase II contaminated soils and ground waters were found. Ms. Lane asked about October 2009. Mr. Dunn said he was not familiar with that spill. He said it might have been the island but it had nothing to do with the tank. Ms. Lane said, so nothing was done at that time, in 2009. Mr. Olson said no, and the station was in operation at that time. In December 2010 they acknowledge that no more operations were on the site. Ms. Swanson asked what date in December. Mr. Olson said they no longer have those records as they went down the Ramapo River.

There being no further questions from the board members, Mr. Bisceglia made a motion to open the public hearing. Mr. Christenson seconded and the motion carried unanimously.

Richard Cantor, Esq. of the firm of Teahan & Constantino said he would like to speak in opposition to the application and after he finished there are three other presenters who would supplement his presentation. At this point Mr. Cantor was sworn in by Mr. Christenson.

Mr. Cantor asked the board to affirm the October 1, 2012 determination of Building Inspector McLaughlin. The application by the applicant refers to 3 casualties, the third of which was the loss of the Spiegel facility in Tuxedo. While listening to Mr. Spiegel speak, one can have much sympathy for the situation but the events in Tuxedo are irrelevant to the events before the board this evening. Mr. Cantor said the board members' questions went to the heart of the matter. Mr. Cantor said this facility closed some time prior to December 2010. The building inspector had said in December 2011 that some time prior to December 2010 the operations had ceased, therefore it was closed for more than one year. Among the questions asked was why did they stop pumping gas and selling from the convenience store. The answer received was that they were trying to sell the property and the tenant left. Mr. Cantor said the answer really is that the owners made a business decision to close. There was nothing at any point in time that prevented the continued operation of this facility and even if there was an hour or day or week where, because of remediation physical efforts, entry was blocked, there was absolutely nothing that caused them to be closed for more than one year.

It was a simple business decision of the owner. The question was asked as to how long does it take to remediate this and other presenters will address that but far larger contaminations of gas stations are typically remediated in 2, 3 or 4 months. He suspected that the representative of American Petroleum who ducked the question when the board asked how long it would take to remediate, knows that this kind of remediation can take place from start to finish within 4 months.

Mr. Cantor continued that as a first procedural point the town law directs that the building inspector provide the board with the record of all of the papers constituting the record and he suspected from the questions asked that the building inspector did not provide the board with the full building inspector's records including building permits, applications for building permits and correspondence and he urged that the board hold the hearing open and that they obtain the full record from the building inspector and review it.

A beginning point for their interpretation is the case law in New York State going up to the NY Court of Appeals which is the highest court in New York State which describes the public policy of zoning in New York State. It's called an overriding public policy that says that nonconforming uses are detrimental to the zoning scheme and that the public policy is to reasonably restrict such nonconforming uses and to eventually eliminate them which is exactly what the LaGrange nonconforming use does – it restricts them and eventually eliminates them such as when they cease to operate for a period of more than one year. Mr. Cantor felt that the board's interpretation should be made in the context of the case law. Mr. Mr. Cantor continued that Mr. Olson acknowledged that there was an earlier determination by the Building Inspector issued December 28, 2011 saying that the nonconforming use had been discontinued for over one year. That was never challenged or appealed within the 60 day period. It has not even been challenged now, so as of December 2011 this nonconforming use was done. It is too late now to be challenged and is not being challenged. The next point is the effort by the applicant to try to convince the town and the board that the wearing out and aging of gas station facilities which result in leaks and disrepair constitute a casualty. The term "casualty" is not defined in the town's code. Other sources have to be looked at. The language is fire or other casualty. That suggests to him that it means floods, earthquakes, storms, it does not refer to the omissions of the owner in failing to keep the facility up-to-date and in good repair. In the nature of the physical earth that shifts and freezes and warms, underground facilities leak and break after a period of time and they have to be updated or replaced. That is not a casualty. Somehow this applicant is trying to convince the board that the applicant's failure to keep the station up-to-date in compliance and to repair and replace as required constitutes a casualty. Mr. Cantor noted that Chapter 240-29 has separate subdivisions for casualty, subdivision E and repair, which is subdivision J. so that the statutory structure itself distinguishes between casualty and repair.

Mr. Cantor continued by saying that if he was to hypothesize that this repair was a casualty, and he strongly asserts that it is not, even then this application should be rejected. The provision that Ms. Freidrichsen read says that the code, in order to implement the casualty language which extends the period to 2 years requires a building permit for restoration within one year of the casualty. The first of the two casualties was in 2009 by the applicant's own words. With a diligent prosecution of the work, once you get a building permit within one year and completion within 24 months, the penalty if you don't do that is that you lose your right. Even if it was a casualty, this applicant did not do what would be required to preserve

the right under the casualty provisions. A further point is that 240-29 F. prohibits the alteration of a building or structure devoted to a nonconforming use. The work that was required is an alteration and the term “alteration” is defined in the Town’s zoning code to mean a change to an existing structure which alters appearance, use or functionality. Clearly the replacement of lines and tanks alters functionality and clearly it is an alteration as defined in our code, and it is clearly prohibited as a nonconforming use. The next point goes back to the public policy that nonconforming uses are detrimental to zoning. This property is in the TC-B zone which prohibits gas stations. If you look at the Town’s design standards of the TC-B district the continuation of the nonconforming use violates every provision in the town code under the Town Center design standards. Examples of what is required under those standards are creating the traditional mainstream area, buildings brought up to sidewalks and street edge, mixture of commercial and residential uses, promotion of pedestrian access, minimizing visual impact of the automobile. Mr. Cantor’s conclusion is that this appeal should be denied and Mr. McLaughlin’s determination should be upheld which will confirm that this property cannot be again used for the nonconforming gas station and convenience store. Mr. Cantor said one of the board members asked the applicant why he closed the store. The answer had nothing to do with pipes and tanks. The answer was that they chose to. Mr. Cantor again urged the board to keep the public hearing open and obtain the full record from the Building Inspector and that they then return to consider the matter.

Mr. Cantor introduced the next presenter: Jon Adams, Esq. of Corbally, Gartland & Rappleyea.

Mr. Adams was sworn in by Mr. Christenson.

Mr. Adams provided copies of an attachment to his submission. Mr. Adams said there is a lot of confusion as to the chronology and he provided a time line to tie the whole thing together. He drew the time line primarily from material the applicant had submitted. There are some additional attachments that he wanted to briefly allude to. Concerning the Contract of Sale, it is their opinion that they closed the station as a business decision. He has attached to his submission a contract of sale as a sample of the selling efforts undertaken by the applicant starting in December 2010. The last attachment he wished to draw the board’s attention to was an excerpt from the website from the National Association of Convenience Stores. The first time there was an issue was the diesel oil tank. He said the question was how important was the sale of diesel fuel to the operation of gasoline stations. This web site gives a neutral objective standard of approximately 8% of gross sales for convenience stores would be attributable to diesel fuel. It was their belief that because of the proximity of the gas station to the parkway that is restricted primarily to passenger vehicles, that 8% is probably high. He also wanted to comment on two comments made during the course of the presentation by the applicant. If he heard the applicant correctly, he stated that the gas station closed initially to sell the property to raise the money to remove the contamination. He understands that the applicant owns approximately100 gas stations and does not need the sale to fund this particular activity which is borne out by his chronology because eventually the remediation took place without a sale.

Mr. Adams said the next speaker is Dean Sommer Esq. Attached to Mr. Adam’s letter is a curriculum vitae on Mr. Sommer.

Dean Sommer, Esq. was sworn in by Mr. Christenson.

Mr. Sommer introduced himself by saying he is an environmental attorney from Albany, New York. He started his career as an assistant attorney general in charge of environmental enforcement.

Mr. Sommer became involved when Mr. Adams asked him to look at the file and answer questions as to whether conditions on this property resulted in the Department of Environmental Conservation requiring any shut down of business activity. He reviewed the applicant's submissions to the board and he did write a memo to Mr. Adams which he was sharing with the board. Mr. Sommer said the issue is not the tanks but why did they shut down commercial activity at the site. There are two spills on the property, one was a diesel spill back in 2009. It was related to poor housekeeping. Then there was another spill in 2011 which was an equipment failure. These are maintenance issues, these are not sudden and accidental events. In light of the presentation of the applicant, the board should be careful because the consequence of what they are suggesting is that if you do a poor job of responding to contaminant conditions and you string it over years and years, then somehow that delay constitutes a casualty and nothing should be running. He cautioned the board not to create an incentive to do a poor job in cleaning up because once these contaminant conditions are discovered, it is a very mature program. Petroleum bulk storage program has been around since 1985. There are very stringent regulations, there are clean up guidelines and regulations. This is all very routine. There are thousands of spills in New York every year at stations and those stations continue to operate. Just because you have a spill doesn't mean you cannot continue to operate. When you hear the terms "due diligence" and "Phase I and Phase II", those are real estate transaction investigations that are done on properties to determine if there is a environmental issue. If that is the case then you have very fine consultants like Pat Dunn who comes in, determines the extent of contamination and removes it and that can be done very rapidly. He said there is nothing here that would indicate nor is there any evidence that the department at any time said "Don't operate", and certainly there is nothing here that would preclude the use of the convenience store. As you drive around, sometimes you might see wells or towers at gasoline stations, those are remedial actions that are routine.

Mr. Sommer continued by going to the issue of "casualty". In the Order of Consent in 2010 there is a casualty provision in that order. It is called a "force majeure" provision. This was submitted by the applicant and the force majeure provision says if respondent cannot comply with the deadline or requirement because of an act of God or war or strike, riot, catastrophe or other condition not caused by the negligence or willful misconduct of the respondent and which could not have been avoided by the respondent through the exercise of due care, respondent shall apply to the department within a reasonable time after obtaining knowledge of such fact and request an extension for modification of the deadline or requirements of the Order. If, in fact, there was something preventing a clean-up, there was already a mechanism in the agreement with the DEC. The applicant never did go to the DEC and say "we are time scheduled and we can't do this". The Department never suggested that they shut down. In fact the Department in the Order of Consent gave them plenty of time to respond to the housekeeping failure conditions. There is nothing in this record that required the discontinuance of commercial activity and in fact it is routine to continue operating.

From the discovery of the contamination in 2009 there is nothing in this record, or in the report, nor did you hear Mr. Dunn suggest that this contamination was so severe that it would take 3 years to clear up. In fact, what the record would reflect is that once he got out there they were able to clean this up very rapidly. The issue of the Department saying there was still some contamination and they would have to go back and do that, that is not uncommon but it also means someone was saving money and was not doing an extensive dig-out. What happens is that you do some clean up, you submit a report to the Department and hope that the Department will say they are done. Unfortunately, here the Department said they were not done. But this is not anything to do with the contamination, it is simply a self-created delay.

Mr. Bisceglia asked Mr. Sommer if, at that point does the time schedule change or does the 24 month time remain. Mr. Sommer said the 24 month period under our zoning code is completely separate from the opportunity to remove soil. You can go on to a site and do some soil borings and that can be done in three days and then there are different clean up approaches that can be taken. You can yank out the tank and remove the soil. After you dig it out you do exit samples on the sidewalk and if there is still contamination, there are soil clean-up standards. A decision then has to be made. You can either attempt to close it out by writing to the department saying there is still contamination there, which was the case here. If there was municipal water and sewer and no one is disposed to it, it will eventually dissipate. Or, if you don't have time, you can dig some more and have samples taken. This can all be done in a matter of weeks. If there is a very severe spill, which was not the case here, it certainly can take longer and if there is an off-site impact which we heard was the situation in Tuxedo, then that has to be investigated and can take an extended period of time. But on a surface station, it is a very defined area and what you tend to do is put in some geo probes for soil borings and take samples. You delineate the area of contamination and you remove it or treat it.

Mr. Bisceglia said if 24 months have already passed or you are at that threshold, and there is more remediation to be done, can you get an extension. Mr. Cantor said Ms. Freidrichsen had indicated that there is a provision that if you are in the process of going to the Town Board to ask for an extension of the 24 month period, then if the Town Board finds good reason, they can extend the time and the code allows for several consecutive extensions if you continue to need more time. That was something that never happened here.

Mr. Sommers said the discontinuance of commercial activity had nothing to do with the environmental conditions and there was nothing in the record to indicate that the DEC suggested that the commercial activity be shut down. Mr. Sommer added that the tanks on the site are registered till 2014.

Mr. Sommer said Gary Beck Jr. of Z3 Consultants was the next presenter.

Gary Beck Jr. was sworn in by Mr. Christenson.

Mr. Beck said he is a certified building inspector and he is also the Building/Zoning Administrator for the City of Poughkeepsie and has been for 14+ years. He said he has reviewed the documents associated with the property in question. He has also reviewed the codes of New York State including Building, Fire & Mechanical and the Town Code which

adopts Title 19 NYCRR. Mr. Beck said he had heard someone mention that evening that a building permit is not required for replacement of pipe. That is incorrect. There is a section in the Fire Code that specifically mentions repair, alterations or reconstruction of tanks and piping. A permit, not necessarily a building permit, is required. It sounds like a mechanical permit would be required in the Town of LaGrange.

Mr. Beck continued that the Title 19 NYCRR is the Building, Fire, Mechanical, Plumbing, etc. code that was adopted by the Town of LaGrange is a minimum code. Contrary to the appeal, there is nothing in the Town Code, Title 19 NYCRR, including Building, Fire & Mechanical code that would have precluded the gas station from continuing operation.

Mr. Cantor provided copies of his written statement and also copies of Mr. Sommer's advisory letter provided to Mr. Adams.

Mr. Olson said Mr. Sommers referenced the contamination was discovered in 2009. That was not the contamination they were dealing with over these two years. That was the contamination from April 2011 which was part of the Phase I, Phase II investigation. That is why they are looking at the 24 month period from December 2010 to December 2012 as dealing with the casualty. Once again, they are not disputing the fact they did not operate as the board had heard significant testimony from Mr. Spiegel as to the financial issues he was facing, simply keeping his business alive. It probably was a financial decision not to put more money into the site to operate for a small period of time when they had to go back to continue the remediation efforts. They are looking at the provisions of the casualty definition. He believed the case he had provided would say that the courts had interpreted that underground contamination can be considered a casualty and that is the interpretation they are urging from this board.

Mr. Bisceglia asked if there was anyone else who wished to speak for or against this application. There were no further comments from the public.

Mr. Bisceglia made a motion to adjourn the public hearing to February 4, 2013 in order to read and absorb the information that has been provided this evening. Mr. Christenson seconded and the motion carried unanimously. PUBLIC HEARING ADJOURNED TO FEBRUARY 4, 2013

Mr. Cantor again urged that the board to get the record from the building inspector so that it would be available when they make their considerations.

There being no further business, Mr. Bisceglia made a motion to adjourn the meeting at 9:03 p.m. Mr. Christenson seconded and the motion carried unanimously.

Respectfully submitted

Susan Quigley, Secretary