



(845) 298-2000

(845) 298-2842

info@sdglaw.com

sdglaw.com

MAIN OFFICE

1136 Route 9

Wappingers Falls

New York 12590

Poughkeepsie Journal Building

85 Civic Center Plaza, Suite 100

Poughkeepsie, NY 12601

By appointment only

Kingston Office

303 Clinton Avenue

Kingston, NY 12401

By appointment only

Please direct all inquiries  
to the Main Office

September 20, 2023

Kenneth M. Stenger  
Stephen E. Diamond\*  
Jessica J. Glass  
Karen E. Hagstrom  
Ian C. Lindars  
A.J. Luele  
Albert P. Roberts  
PARTNER EMERITUS

Mary Kate Ephraim  
Jad Haddad

OF COUNSEL  
Joan F. Garrett\*\*

PARALEGALS  
Elizabeth Amicucci  
Jennifer Arno  
Ailana Brown  
Jillian Medina  
Sandra A. Oakley  
Alison Secor

CLOSING COORDINATORS

Maria L. Jones  
Sandra A. Turner

\*ALSO ADMITTED IN FL & MA

\*\*ALSO ADMITTED IN CT

***Via email and overnight mail:***

Thomas F. Wood, Esq.  
20 Christine Court  
Stormville, NY 12582  
[tfwesq@aol.com](mailto:tfwesq@aol.com)

Chairman Galotti and  
Members of the Zoning Board of Appeals  
of the Town of Wappinger  
20 Middlebush Road  
Wappingers Falls, NY 12590  
[bogunti@townofwappingerny.gov](mailto:bogunti@townofwappingerny.gov)

***Re: Gasland Project, Intersection of Route 9D New Hamburg Road  
and Old Hopewell Road, Town of Wappinger***

Dear Chairman Galotti and Mr. Wood:

By this correspondence, 2337 Route 9D, an Applicant before you and Petitioner in certain Article 78 proceedings described herein, seeks to present issues in advance of the hearing on the remand ordered by the Hon. Michael G. Hayes. At that hearing, the Court has ordered the ZBA to engage in fact finding to determine whether Gasland's proposed convenience store meets the limits of the Town of Wappinger Zoning Code as an accessory use to a gasoline filling station.

**The history of the proceedings**

On August 26, 2021, a special proceeding commenced under Index No. 2021-53698, to appeal the special use permit and site plan approved by the Planning Board in connection with Gasland's proposal to build a gasoline filling station with eight fueling stations, a 3,630 square foot convenience store, three one-bedroom apartments, and 32 parking spaces. The approval was made while the questions raised in this matter remained open.

While that matter was pending, the ZBA was requested to interpret the definition of "gasoline filling station" at Code § 240-5, with emphasis on the clause, "sale of convenience items, including but not limited to snacks and beverages," and make a determination if the 3,630 square-foot convenience store fit within it.

That Code definition provides in relevant part:

An area of land, including structures thereon or a building or part thereof, other than a repair garage, that is used for the sale of motor fuels dispensed from pumps and motor vehicle accessories and supplies. **Permitted accessory uses may include ... the retail sale of convenience items, including but not limited to snacks and beverages, provided such accessory uses are located indoors.**

A public hearing was held on April 26, 2022. At that hearing, Gasland gave certain evidence. Among other things, Gasland represented:

1. “The trend over recent years has been for gas station convenience stores to be larger than in years past ... The size of Gas Land’s proposed convenience store is a customary accessory use to a principal gas station, comparable with other Gas Land locations and accessory convenience stores operated by many other gasoline filling stations,” see Exhibit A; and
2. That Gasland intends for its store to be a general store for the community, not limited to sales of “convenience items” for the convenience of the purchasers of gasoline, see <https://www.youtube.com/watch?v=51MooTi5UuQ&list=PLcCjg2q5NlgkciILKVhTsjnwyp65fGoOM&index=38>, time stamp 1:36:40.

Further, during the court proceedings, Gasland presented sworn testimony that it anticipated that the retail operation would earn revenues of **\$30,000 per month**—as much as the gasoline operation, the primary use. See Exhibit B, ¶ 25. The projection was based upon Gasland’s other stores.

By decision filed on June 29, 2022, the ZBA ruled that, among other things:

**a. Code § 240-52: Items sold in the Gasoline Filling Station**

1. Because the Code definition of a “Gasoline Filling Station” (Code § 240-5) uses the language “including, but not limited to” in referencing items that can be sold, this allows “flexibility pertaining to the items to be sold” and the Code is not limiting in this respect; and
2. “the aspects of the Project pertaining to gasoline filling and the disputed ‘convenience store’ meet the definition of ‘Gasoline Filling Station’ as defined in Code § 240-5.”

A copy of this determination is annexed as Exhibit C. The Petitioners appealed this determination in the proceeding filed under Index No. 2022-52502.

### **Construction at the site**

The parties stipulated on February 16, 2023, that Gasland could commence construction at its own risk while the Court was deciding the petitions. A copy of the stipulation is annexed as Exhibit D.

The stipulation was clear that there was no concession by the Plaintiffs that Gasland would prevail in the lawsuits:

At the conference had before you on February 14, 2023, Mr. Ward-Willis offered that **his client was willing to proceed with construction activity at the site at its own risk**, if the Petitioner-Plaintiffs were to withdraw the TRO application.

By this letter, I advise the Court, and Mr. Ward-Willis, that the Petitioner-Plaintiffs have decided to settle this issue by acceptance of Mr. Ward-Willis' offer.

It is clear that construction at the site plays no role in the determination of the matters currently before the ZBA in this proceeding. The decision to undertake that work, while this issue remained unresolved, was taken entirely at the risk of Gasland.

### **The Court's remand to the ZBA**

On August 9, 2023, the Court entered a 32-page decision and order. Among other things, the Court ruled that the ZBA had not made a sufficient record and findings necessary for judicial review of whether Gasland's proposed retail use met the statutory limitation of sales to "convenience items." *See* Exhibit E, pp. 21-22.

The Court ruled that the previous determination failed to set forth any facts on which the ZBA based its determination that the Code does not place any limits on the type of goods that may be sold by a gasoline filling station, or for its determination that the proposed accessory use met the statutory criteria for the retail sale of convenience items. *See* Exhibit [ ], p. 22.

The Court also held that the ZBA's determination to exclude the cooler from its analysis of the scope and impact of the convenience store use was in error, because the cooler space is clearly a convenience store use. *See* Exhibit [ ], p. 26.

On remand, the ZBA is required to revisit its determination that the Code's "convenience items" language does not place any limits on the type of goods that may be sold at a gasoline filling station. In doing so, the ZBA must consider and analyze the size of the store, 3,630 square feet; the fact that it proposes 22 parking spaces more than required for the use of the development's tenants and gas pump operations; and the fact that the store's projected revenues, as an accessory use, was projected to be on par with the gas station to which it is a subordinate use! *See* Exhibit [ ], p. 25, 26.

The ZBA may not consider Gasland's practices at its other locations, or Gasland's characterization of current trends in the convenience store industry. Rather, the ZBA must interpret the language and meaning of the Code, and give meaning and effect to every word of the Code. *See* Exhibit [ ], p. 26-27; 24.

At the public hearing on this matter, Mr. Nesheiwat stated that Gasland's goal is to sell everything that their customers might want so as to avoid shopping on Route 9—a commercial thoroughfare that includes supermarkets, Wal-Mart and the Poughkeepsie Galleria—and that Gasland intended for its store to be the “neighborhood store.”

In commenting on the ZBA's approach to its decision, Judge Hayes observed that, “[F]lexibility has its limits, and the retail sale of convenience items as an accessory use must have its limits as well.” *See* Exhibit [ ], p. 24.


Clearly, Gasland's self-description of its intended use does not fit within Judge Hayes' “limit.” In order to come within that limit, Gasland will have to describe a far less ambitious use than the one it originally proposed. In doing so, it will also have to describe a physical structure to house that use that is far smaller than the structure originally proposed to do so, as approved by the Planning Board.

The impact of the Court's decision will effect the three apartments approved by the Planning Board to be built over the footprint of the convenience store. If Gasland demonstrates a smaller footprint for the permitted use, then there will be a corresponding alteration to the number and/or layout of the apartments.

These determinations may have the result of requiring the Planning Board to reconsider its approval. That, however, is not a concern before your Board. All the ZBA has to do, while employing the guidance provided by the Court, is determine if the retail use approved by the Planning Board is a permitted accessory use to a gas station at this location.

Very truly yours,

STENGER, DIAMOND & GLASS, LLP



KENNETH M. STENGER, ESQ.

[kstenger@sdglaw.com](mailto:kstenger@sdglaw.com)

KMS/klg

Cc, by email only: Nicholas Ward-Willis, Esq.  
Michael V. Caruso, Esq.  
Michael J. Cunningham, Esq.

# EXHIBIT A

May 13, 2021

VIA EMAIL [BOGUNTI@TOWNOFWAPPINGERNY.GOV]

Chairman Galotti and  
Members of the Zoning Board of Appeals  
of the Town of Wappinger  
20 Middlebush Road  
Wappingers Falls, NY 12590

**NICHOLAS M. WARD-WILLIS**

Principal Member  
nward-willis@kblaw.com  
Also Admitted in CT

Re: Response to Appeal of Decision from Barbara Roberti,  
Director of Planning & Municipal Codes, dated June 20, 2021

Dear Chairman Galotti and Members of the Zoning Board of Appeals:

At the conclusion of the April 26, 2022, meeting of the Zoning Board of Appeals (the “ZBA”), the parties were offered the opportunity to make any final submission responding to arguments advanced at the ZBA hearing. The Applicants’ counsel argued, that Gas Land Petroleum, Inc. (“Gas Land”) was required to obtain a use variance to operate a “grocery store” on the premises. Counsel’s statements were woefully inaccurate and misleading. For the reasons set forth herein, Gas Land’s approved development of a gasoline filling station with an accessory convenience store and upper level apartments, is permitted in the Town of Wappinger, pursuant to site plan and special use permit approval, which Gas Land received on July 21, 2021.

## **I. Applicants Lack Standing**

We continue to argue that the Applicants do not have standing to file this appeal with the ZBA. Town Law § 267-A(4) permits the ZBA to hear appeals taken by “any person aggrieved” by, among other things, the zoning administrator’s decisions. This phrase has been consistently interpreted to mean a person who has sustained special damage, different in kind and degree from the community generally. *Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals*, 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep’t 2015). The Applicants have failed to demonstrate that they have suffered any special damages as a result of the Zoning Administrator’s determination that is unrelated to business competition, or generalized community opposition.

In order to file an appeal with the ZBA, an applicant must demonstrate (1) an “injury in fact” resulting from a challenged determination or action, which is different in kind

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and degree from that experienced by the public at large, and not merely speculative allegations of potential harm, and (2) an interest that is “arguably within the zone of interest to be protected by the statute.” *Long Island Pine Barrens Society, Inc. v. Town Bd. of Town of East Hampton*, 293 A.D.2d 616, 617 (2d Dep’t 2002); see *Dairyalea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975). Generalized economic concerns are not within the zone of interests protected by New York State Town Law or a local zoning ordinance and are insufficient to confer standing. See, *Matter of Widewaters Rte. 11 Potsdam Co. LLC v. Town of Potsdam*, 51 A.D.3d 1292 (3d Dept 2008) (Town Law § 274-b claim); *Matter of Tappan Cleaners v. Zoning Bd of the Vil of Irvington*, 57 A.D.3d 683 (2d Dept 2008) (zoning claim); *Riverhead PGC, LLC v. Town of Riverhead*, 73 A.D.3d 931 (2d Dept 2010) (zoning claim). The Applicants have failed to convey any damages related to particular impacts such as impacts from traffic, noise, air quality or water quality. The Applicants only raise concerns about community character and aesthetics, however these concerns do not result in injuries to the Applicants that are different in kind and degree from that experienced by the public at large.

In addition, not a single Applicant is located within the zone of interest to be protected by the statute. The Applicants are all located outside the radius of properties required to receive notice of the public hearing. Lack of entitlement to statutory written notice of a public hearing pursuant to the provisions of the Zoning Code “...is an indication that petitioner does not fall under the umbrella of ‘close proximity.’” *Port Jefferson Civic Association v. The Planning Board of The Incorporated Village of Port Jefferson et al*, Index No. 99-17655, Short Form Order, p. 3 (Sup. Ct. Suffolk Co. June 6, 2000) (Cohalan, J.), *aff’d* 286 A.D.2d 503 (2d Dept 2001), see also *Sun-Brite Car Wash, Inc. v. Bd of Zoning and Appeals of the Town of North Hempstead*, 69 N.Y.2d 406, 413-14 (1987) (entitlement to mandatory public notice gives rise to a presumption of standing). The Town of Wappinger Code requires written public notice to property owners within 100 feet of the Property. Town of Wappinger Code §§ 217-12.H (subdivision), 240-43.C (special permit), 240-87.A (site plan). As shown in the chart below, each Applicant is outside the 100-foot radius that would have entitled them to receive public notice of Gas Land’s application which is an indication that they are not in “close proximity” to the subject property for standing purposes.

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<b>Applicant</b>	<b>Address</b>	<b>Distance Property</b>	<b>Distance Structure</b>
2337 RT 9D, LLC <sup>1</sup>	2337 Route 9D, Hughsonville, NY	217 ft (.04 miles)	309 ft. (.06 miles)
Wappingers Properties, LLC;	2558 South Ave., Wappingers Falls, NY <sup>2</sup>	4,288 ft. (.81 miles)	4,557 ft. (.86 miles)
Marcy Wagman	50 Old Troy Road, Wappingers Falls, NY	4,484 ft. (.85 miles)	4,790 ft. (.90 miles)
Ronald Evangelista	494 Route 9D, Hughsonville, NY	784 ft. (.15 miles)	820 ft. (.15 miles)
Franca Petrillo	10 Apple Lane, Wappingers Falls, NY	226 ft. (.04 miles)	420 ft. (.08 miles)

Moreover, the Gas Land's property does not share a common boundary line with any Applicant's property. Therefore, Applicants have failed to demonstrate that they are persons aggrieved. The Applicants lack standing to file this application with the ZBA.

The Applicants previously stated that Gas Land is barred from raising any standing objections concerning the Applicants 2337 RT 9D, LLC and Wappingers Properties,

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<sup>1</sup> Applicants Wappingers Properties, LLC and 2337 RT 9D, LLC's proximity is measured from their respective businesses.

<sup>2</sup> This Applicant owns property in the Village of Wappingers Falls. Town Zoning does not apply to this Applicant or its property.

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LLC<sup>3</sup>. The Applicants argued that “in her June 20 memorandum, [Ms. Roberti] confirmed that their standing has been ‘clarified,’ and proceed to render the interpretation.” Notwithstanding this argument, Applicants’ counsel spent a significant time arguing that the Applicants have standing at the April 26 public hearing.

The ZBA was required to conduct a public hearing on the application for a request of interpretation to satisfy due process requirements. However, the public hearing is not proof that the Applicants have standing. The Applicants are required to demonstrate standing as part of their application materials and public hearing presentation. At this time, the Applicant’s have failed to establish standing.

## **II. Gas Land’s approved accessory retail store will sell convenience items as permitted.**

In the Applicants’ presentation to the ZBA, their counsel emphasized that the Town Code only allows construction of a convenience store selling convenience items, limited to snacks and beverages, as an accessory use to a gasoline filling station. First and foremost, the Town’s definition of gasoline filling station in Town Code § 240-5 states: “Permitted accessory uses may include facilities for lubricating, washing or other minor servicing of motor vehicles and/or the retail sale of convenience items, **including but not limited to snacks and beverages**, provided such accessory uses are located indoors.” Clearly, the Town Code does not limit the retail store building to the sale of only snacks and beverages. The phrase “including but not limited to” means that the definition is applicable to examples cited and other uncited examples, which are similar and have a compatible match to the intent of the definition.

The Town Code does not define the term “convenience items,” however based on conventional definitions of such phrase, convenience items are goods bought frequently and quickly with minimum involvement. Typically, convenience items include newspapers, magazines, grocery items, and toiletries<sup>4</sup>. The Applicants provided images to the ZBA to highlight the types of goods sold in other Gas Land facilities which are similar in size to the facility approved in the Town of Wappinger. All the goods identified by the Applicants’ counsel are convenience items. Such items are similarly sold in many gas stations across the country. Gas Land’s approved accessory retail store will be focused on selling only quick purchase items such as

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<sup>3</sup> Reply Memorandum of Law in Support of Appeal, dated November 16, 2021, page 4.

<sup>4</sup> See <https://www.britannica.com/topic/convenience-good>, (“Soaps and newspapers are considered convenience goods, as are common staples like ketchup or pasta.”); <https://www.marketingtutor.net/convenience-products-definition-types-examples/>

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snacks, beverages and household everyday goods for which a use variance is not required.

**III. The Town Code does not distinguish between grocery stores, general stores and convenience stores. An applicant cannot obtain a use variance to specifically construct and operate a “grocery store” because it is not regulated differently from a retail convenience store.**

The Applicant’s description of the proposed accessory use as a “grocery store” or a general store” is a red herring.

The terms “grocery store” or “general store” are not defined, or even mentioned, in the Town Code. A grocery store, general store, and convenience store are regulated in exactly the same manner in the Town of Wappinger – as a retail store. Pursuant to the Schedule of Use Regulations, Chapter 240, Attachment 2, grocery stores, general stores, and convenience stores are permitted in certain nonresidential zoning districts in the Town as “stores and shops for the conduct of retail business.”

Where a convenience store is regulated in the same manner as a grocery store, the Town cannot find that a retail store requires a use variance to be used specifically as a “grocery store.” Whether the retail store is termed a convenience store, grocery store or general store, such stores are all part of the same use classification. Nonetheless, as described in Point II above, the retail store for the sale of convenience items approved as part of Gas Land’s special permit application is not a “grocery store” and falls squarely within the type of accessory convenience store which is customary and incidental to a gasoline filling station.

**IV. The Town Code does not set forth a gross floor area limit for accessory buildings.**

The Applicant’s emphasis on the size of the retail store as 3,630 square feet is an attempt to exaggerate Gas Land’s proposal. The retail store contains the following areas:

- 60 square feet is for a restroom;
- 125 square feet is used for utility rooms;
- 330 square feet will be used for coolers;
- 340 square feet for the kitchen;
- 40 square feet for the deli cooler;
- 250 square feet was lost to stairway access to the upstairs apartments;

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- 2400 square feet is dedicated to be used for checkout counter and retail space; and
- The remaining 85 square feet is used for office space, miscellaneous utility rooms and architectural features.

Gas Land is only using 2,400 feet as retail space. The trend over recent years has been for gas station convenience stores to be larger than in years past when they were originally created by converting a service bay to a store. The size of Gas Land's proposed convenience store is a customary accessory use to a principal gas station, comparable with other Gas Land locations and accessory convenience stores operated by many other gasoline filling stations.<sup>5</sup>

Despite what the Applicants want the ZBA to believe, there is no express gross floor area limitation for accessory buildings. The size of the overall structure is limited based on the bulk regulations set forth in the Town Code in the Schedule of Dimensional Regulations and the additional limitations set forth in Town Code §§ 240-52 and 240-81.7. Gas Land complied with the Town's dimensional requirements for every aspect of its use, including the approved gasoline filling station, retail store and residential apartments. Gas Land required no variances to obtain its approval. The Town Code permits a retail business as an accessory use for the proposed gasoline filling station, even if such retail store is similar in size to the Hughsonville Mart.<sup>6</sup> There is no gross floor area limitation for an accessory retail store in the Town Code.

## V. CONCLUSION

Gas Land received the required site plan, subdivision and special use permit approvals to construct a gasoline filling station and a 3,630 square foot accessory convenience store, with three (3) one-bedroom apartments located above on the single floor in a single 7,260 square foot mixed use building. Gas Land specifically applied for and obtained a special use permit to operate a gasoline filling station

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<sup>5</sup> A typical gas station convenience store is **2,800 square feet**.

[https://www.fulcrum.com/conveniencestore\\_appraisal/](https://www.fulcrum.com/conveniencestore_appraisal/). The average size of a Stewart's Shop store is **1,000-2,500 square feet**. <https://www.cspdailynews.com/top-202-convenience-stores-2016/stewarts-shops>. The average store size of a Cumberland Farms' store is **2,500-4,000 square feet**. <https://www.cspdailynews.com/top-202-convenience-stores-2016/cumberland-farms#:~:text=Average%20Store%20Size%3A,ft.&text=Out%20front%2C%20a%20clean%2C%20impressive%20inside%20of%20the%20store>. The average size of a WAWA store is **4,000 square feet**. <https://www.cspdailynews.com/top-202-convenience-stores-2016/wawa>. The average size of a Speedway store is **2,500-4,000 square feet**. <https://www.cspdailynews.com/top-202-convenience-stores-2016/speedway>

<sup>6</sup> Hughsonville Mart is 2,400 square feet in size.

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pursuant to Town Code § 240-52 and a mixed-use pursuant to Town Code § 240-81.7.<sup>7</sup>

Mr. Stenger and his colleagues are throwing every issue at the ZBA just to see what sticks. Their arguments are not based on a proper and fair evaluation and application of the Town Code to the matter at hand. The ZBA must find that the retail store is permitted as a valid accessory use to the gasoline filling station for the sale of convenience items and, as such, no use variance is required.

Based on the record before it, the ZBA must adopt a final determination upholding the Zoning Administrator's determination that Gas Land's proposed use is allowed by special use permit in the HM District. The Zoning Administrator's conclusions are supported by an analysis of the terms and provisions of the Zoning Code. A different interpretation from the ZBA would be contrary to law and arbitrary and capricious.

Very truly yours,

*Nicholas Ward-Willis*

Nicholas M. Ward-Willis

NMW/

ecc: Tom Wood, Esq.  
Ken Stenger, Esq.

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<sup>7</sup> Notwithstanding Gas Land's receipt of a special permit for a "mixed use" pursuant to Town Code §240-81.7, it remains Gas Land's position that such special permit was not required for its proposed use. Rather, the special use permit for the gasoline filling station permitted each component of the proposed use including the accessory retail sale of convenience items (*see* definition of gasoline filling station at Town Code § 240-5) and the upper-level residential apartments (*see* Town Code §240-52.C). Accordingly, the ZBA could make the determination that the mixed-use special permit was not required, nor is Gas Land required to demonstrate compliance with the "definition" of "mixed use" as set forth in the Schedule of Use Regulations, Chapter 240, Attachment 2, which would dispense with many of the Applicants' arguments on appeal.

# EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X

In the Matter of the Application of

WAPPINGERS PROPERTIES, LLC, 2337 RT 9D, LLC,  
MARCY WAGMAN, FRANCA PETRILLO, and  
RONALD EVANGELISTA,

Petitioners/Plaintiffs,

-against-

TOWN OF WAPPINGERS PLANNING  
BOARD and GAS LAND PETROLEUM, INC.,

Respondents/Defendants.

For a Judgment Pursuant to New York CPLR  
§ 7803(3)

-----X

**AFFIDAVIT IN  
OPPOSITION TO ORDER  
TO SHOW CAUSE**

Index No. 2021-53698

Assigned to:  
Hon. Christie D'Alessio, J.S.C.

STATE OF NEW YORK                    )  
  )ss.:  
COUNTY OF ULSTER                    )

**ZEIDAN NESHEIWAT**, being duly sworn, deposes and says:

1. I am a Vice President of Gas Land Petroleum, Inc. (“Gas Land”), a Respondent/Defendant in the above-captioned hybrid proceeding. I submit this Affidavit in opposition to the Order to Show Cause filed by Petitioners/Plaintiffs, Wappingers Properties, LLC, 2337 RT 9D, LLC, Marcy Wagman, Franca Petrillo, and Ronald Evangelista (collectively, “Petitioners”), seeking a temporary restraining order and preliminary injunctive relief. Unless otherwise stated, I have personal knowledge of the facts set forth below.

**A. Background**

2. Gas Land is a family-owned business that supplies petroleum products to gasoline filling stations. The matter before the Court involves the redevelopment of five (5)

adjoining properties that Gas Land acquired in the Town of Wappingers for use as a gasoline filling station, convenience store, and residential apartments (the “Project”). The Project’s history insofar as Gas Land’s acquisition of these properties and filing of development applications may be summarized as follows.

3. On or about December 20, 2019, Gas Land filed: (i) a site plan application to develop a gasoline fueling station with four (4) pumps, with eight (8) fueling positions, and a 2,700 square foot convenience store, with two one-bedroom apartments and 21 associated parking spaces; (ii) a special permit application for a gasoline filling station pursuant to Town Code § 240-52, and a mixed use pursuant to Town Code §§ 240-52(C) and 240-81.7; and (iii) a subdivision application to consolidate four (4) lots into one lot consisting of 1.24 acres.

4. On December 20, 2020, Gas Land closed on the purchase of the property located at 123-125 New Hamburg Road (Tax Parcel 6157-01-040637).

5. In March 2021, Gas Land submitted revised applications for site development plan, special permit and subdivision approvals to consolidate a total of five (5) tax parcels and install a gasoline fueling station with four (4) fuel pumps and eight (8) fueling stations and construct a 2,400 square foot convenience store and 1,500 square foot liquor store, with four (4) one-bedroom apartments located above in a single 7,860 square foot building, and construct 32 parking spaces on 1.79 acres.

6. On April 8, 2021, Gas Land closed on the purchase of the real properties located at 2361 Route 9D (Tax Parcel 6157-01-048643); 2363 Route 9D (Tax Parcel 6157-01-057642); and 2365 Route 9D (Tax Parcel 6157-01-059643).

7. On April 9, 2021, Gas Land closed on the purchase of the property located at 2357 Route 9D (Tax Parcel 6157-01-057654). I will hereinafter refer to these properties collectively as the “Gas Land’s Properties.”

**B. Gas Land Has Satisfied All Conditions,  
Obtained All Necessary Permits, and Is  
Ready, Willing, and Able to Commence  
Construction**

8. Prior to receiving authorization to commence construction of the Project, Gas Land was required satisfy numerous conditions and obtain approvals and permits from various different agencies, including subdivision approval, site plan approval, a special use permit, a highway work permit, as well as certificates of inspection for the structures to be demolished.

9. As summarized below, Gas Land has obtained each and every approval necessary to commence construction of the Project.

10. On or about July 19, 2021, the Planning Board concluded its SEQRA review and adopted a Negative Declaration in connection with the Project. The Planning Board also adopted resolutions granting Preliminary and Final Subdivision Plat approval for the merger of the Gas Land Properties into one lot, along with site development and special permit approvals for the development of the 1.79 acre consolidated lot with a gasoline filling station, a 3,630 square foot convenience store, and three (3) one-bedroom apartments.

11. On or about July 1, 2022, Gas Land obtained a Highway Work Permit from the Dutchess County Department of Public Works for the Project.

12. Following the issuance of these approvals, Gas Land immediately began preparing to commence construction on the Project.

13. On July 12, 2022, Gas Lan entered into an agreement with American Petroleum to complete an installation of a new gasoline station on the Gas Land Properties. As stated in the October 26, 2022, letter from American Petroleum Vice President, Jim Dollaway, the “[e]quipment has been ordered and currently sitting and waiting for delivery to complete the installation.” A true copy of this letter is annexed hereto as Exhibit “A.”

14. In or around October 2022, Gas Land contacted the electric and gas companies to have the services turned off in preparation for demolition and construction.

15. In or around October 2022, Gas Land had the structures located on the Project site, which are proposed to be demolished, inspected for asbestos.

16. In addition, Gas Land obtained quotes from and contracted with various vendors with respect to the construction work to be performed both on site and on the adjacent highway.<sup>1</sup> Such vendors were prepared to commence work once the demolition and building permits were obtained.

17. On October 17, 2022, this Court issued a temporary restraining order (the “TRO”), preventing Gas Land from continuing work on the Project.

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<sup>1</sup> As discussed in the Affidavit of Philip Greal, Ph.D., P.E., Gas Land is in the process of dedicating a portion of its property to the State Department of Transportation, and has agreed to sponsor the construction of certain roadway, sidewalk, and traffic signal improvements.

18. But for the issuance of the TRO, Gas Land would have commenced work on the Project. Indeed, Town of Wappingers Director of Strategic Planning and Municipal Codes, Barbra Roberti, issued a Memorandum stating she was prepared to issue demolition and building permits for the Project, but could not do so in light of the TRO. A true copy of this Memorandum is annexed hereto as Exhibit "B."

19. In order to obtain these approvals, Gas Land was required to engage a number of consultants, including professional engineers and a registered architect, who conducted the requisite analyses, developed the necessary documents and reports, and submitted these materials to the relevant agencies at the Town, County, and State level for independent review.

**C. Gas Land Has, And Will Continue To,  
Sustain Damages as a Result of the  
Delay of Construction**

20. Gas Land has already sustained significant cost escalations as a result of the TRO, and continued construction delays will increase the amount of damages that Gas Land will incur. The longer Gas Land is enjoined from commencing construction, the more construction costs will rise, especially once the peak spring and summer months approach.

21. Specifically, as set forth below, all of the contractors provided price quotes, which are only valid for a limited period of time. As a result of the TRO, Gas Land was unable to lock in the quoted prices, and has subsequently received updated, increased price quotes.

22. The following reflects the vendors that were prepared to commence construction, all of which issued initial quotes that have expired and subsequent, increased quotes:

- Gas Land contracted with B&K Excavation, Inc. (“B&K”), for the performance of construction on both the Project site and the adjacent highway. On August 4, 2022, B&K sent Gas Land an initial quote, totaling \$1,576,879.85 for the Project site work and \$728,367.00 for the highway work, which was good for ninety (90) days. On October 21, 2022, B&K issued a second quote, totaling \$1,766,105.00 for the Project site work and \$815,771.00. **Overall, the price for B&K’s services increased by \$276,629.15.<sup>2</sup>**
- Gas Land contracted with Titan Construction (“Titan”), for concrete services in connection with the Project. On September 6, 2022, Titan sent Gas Land an initial quote, totaling \$37,730.00. On October 22, 2022, Titan sent Gas Land a second quote, \$43,120.00. **Overall, the price for Titan’s services increased by \$5,390.00.<sup>3</sup>**
- Gas Land contracted with Deder Construction (“Deder”) for framing services in connection with the Project. On October 1, 2022, Deder sent Gas Land an initial quote, totaling \$50,735.00. On October 20, 2022,

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<sup>2</sup> A true copy of the August 2022 and October 2022 quotes from B&K are annexed hereto as Exhibit “C.”

<sup>3</sup> A true copy of the September 2022 and October 2022 quotes from Titan are annexed hereto as Exhibit “D.”

Deder issued a second quote, totaling \$59,735.00. **Overall, the price for Deder's services increased by \$9,000.00.<sup>4</sup>**

- Gas Land contracted with West By Construction, Inc. ("West By") for roofing, siding and stone veneer services in connection with the Project.

On September 2, 2022, West By sent Gas Land an initial quote, totaling \$71,460.00. On October 25, 2022, West By issued a second quote, totaling \$79,500.00. **Overall, the price for West Buy's services increased by \$8,040.00.<sup>5</sup>**

- Gas Land contracted with LPH Plumbing & Heating, Inc. ("LPH") for plumbing services in connection with the Project. On August 5, 2022, LPH sent Gas Land an initial quote, totaling \$64,200.00. On October 24, 2022, LPH issued a second quote, totaling \$73,900.00. **Overall, the price of LPH's services increased by \$9,700.00.<sup>6</sup>**

- Gas Land contracted with Martin Reyes for electrical services in connection with the Project. On September 15, 2022, Martin Reyes sent Gas Land an initial quote, totaling \$110,000.00. On October 24, 2022,

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<sup>4</sup> A true copy of the October 1, 2022 and October 20, 2022 quote from Deder are attached hereto as Exhibit "E."

<sup>5</sup> A true copy of the September 2022 and October 2022 quote from West By are attached hereto as Exhibit "F."

<sup>6</sup> A true copy of the August 2022 and October 2022 quote from LPH are attached hereto as Exhibit "G."

Martin Reyes issued a second quote, totaling \$126,250.00. **Overall, the price of Martin Reyes's services increased by \$16,250.00.<sup>7</sup>**

- Gas Land contracted with A&R Refrigeration System, Inc. ("A&R") for walk in cooler and HVAC installation in connection with the Project.

On September 2, 2022, A&R sent Gas Land an initial quote, totaling \$195,500.00. On October 23, 2022, A&R issued a second quote, totaling \$218,000.00. **Overall, the price of A&R's services increased by \$22,500.00.<sup>8</sup>**

- Gas Land contracted with American Petroleum for the materials and installation of the petroleum bulk storage system in connection with the Project. **The October 26, 2022 letter from American Petroleum sets forth a variety of price increases for material storage and installation delays, totaling \$112,247.50. See Ex. A.**

23. The construction cost damages set forth, *supra*, ¶¶ 30(a)–(h) are a direct result of the TRO and will only increase if the preliminary injunction is granted.

24. Each day the Project is delayed is another day the Gas Land's proposed gas service station, liquor store, convenience store, and residential properties could have been open.

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<sup>7</sup> A true copy of the September 2022 and October 2022 quote from Martin Reyes are attached hereto as Exhibit "H."

<sup>8</sup> A true copy of the October 2022 quote from A&R are attached hereto as Exhibit "I."

25. Based on Gas Land's other similar operations, I project that monthly profits generated from the Project will be in excess of \$66,600.00 per month. Specifically, the gasoline filling station is projected to generate at least \$30,000.00 in revenue per month; the convenience store is projected to generate at least \$30,000.00 in revenue per month; and the residential units are projected to generate at least \$6,600.00 per month.

26. The aforementioned estimates were developed based on two separates sets of accountings for two gas stations owned by Gas Land in the Town of Wappingers. One set of accountings were prepared by Gas Land's staff accountant, and the second set was prepared by an independent accounting firm, D'Arcangelo & Co., LLP.

27. If necessary, should the Court decide to grant preliminary injunctive relief (which I respectfully submit it should not), Gas Land is prepared to introduce evidence and sworn testimony with respect to the damages that should be bonded by the Petitioners in this case.

28. Additionally, Gas Land is experiencing damages in the form of lost rental income from the four (4) residential units that were vacated on the Gas Land Properties in light of the planned construction. Such tenants were paying rent as follows: (1) \$2,300.00 per month; (2) \$1,800.00 per month (3) \$1,400.00 per month; and (4) \$1,200.00 per month.

29. In anticipation of the commencement of construction, in or about September and October 2022, Gas Land asked such tenants to vacate the residential units.

30. Lastly, Gas Land is experiencing damages in the form of property and school tax payments because it is paying these taxes without being able to utilize the Gas Land

Properties. Our town and county property taxes for the Gas Land's Properties for the year 2022 total \$8,474.79. Gas Land's school taxes for the Gas Land Properties for the 2022-2023 fiscal year total \$19,785.45. True copies of these property tax bills are collectively annexed hereto as Exhibit "J".

31. Of course, no amount of money will offset the false accusations that Petitioners have made against Gas Land, and their efforts to incite other members of the community to do the same, in the process of opposing the Project. The effect of this could be lasting.

32. Based on the foregoing, in the event that the Court grants preliminary injunctive relief (and again, I respectfully submit it should not) Gas Land requests that Petitioners be directed to post bond (1) in a lump sum amount of 459,756.65, as a result of the delay in commencing construction, which should be reevaluated periodically, and (2) in a monthly amount of \$75,000.00, as a result of lost profits, lost rental income, and carrying costs associated with the delay of construction.

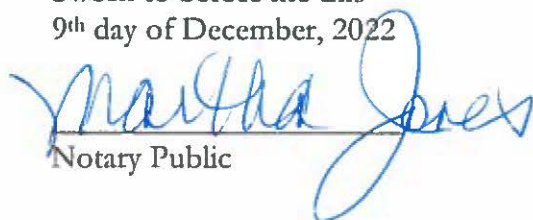
33. At that time, Gas Land would respectfully request an opportunity to present additional and updated evidence to the Court, subject to entry of a confidentiality order, with respect to its lost profits and damages.

WHEREFORE, I respectfully submit that Petitioners' Order to Show Cause should be denied in all respects, and Gas Land should be awarded such other and further relief as the Court deems just and proper.



ZEIDAN NESHEIWAT

Sworn to before me this  
9<sup>th</sup> day of December, 2022

  
Notary Public

Martha Jones  
Notary Public, State of New York  
Reg. No. 01JO6377003  
Qualified in Ulster County  
Commission Expires 06/25/2026

**CERTIFICATE OF WORD COUNT**

Index No. 2021-53698

Case Name: In the Matter of the Application of WAPPINGERS PROPERTIES, LLC,  
2337 RT 9D, LLC, MARCY WAGMAN, FRANCA PETRILLO, AND  
RONALD EVANGELISTA v. TOWN OF WAPPINGERS PLANNING  
BOARD and GASLAND PETROLEUM, INC.,

Document Title: AFFIDAVIT IN OPPOSITION TO ORDER TO SHOW CAUSE

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Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, I certify that the accompanying Memorandum of Law in Support of Respondent Gas Land Petroleum Inc.'s Motion to Dismiss, which was prepared using Garamond 13-point typeface, contains 2,284 words, excluding the parts of the document that are exempted by rule 202.8-b(b). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare this document.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: White Plains, New York  
December 9, 2022

**KEANE & BEANE, P.C.**

By: /s/ Nicholas M. Ward-Willis  
Nicholas M. Ward-Willis  
Attorneys for Respondent  
*Gas Land Petroleum, Inc.*  
445 Hamilton Avenue, 15<sup>th</sup> Floor  
White Plains, New York 10601  
(914) 946-4777

# EXHIBIT C

**TOWN OF WAPPINGER**  
**ZONING BOARD OF APPEALS**

APPEAL NUMBER: 21-7740

APPLICANTS: Ronald M. Evangelista; Rafiq Ahmed on behalf of 2337 Route 9D, LLC; Frank Passari, on behalf of Wappingers Properties, LLC; Franca Petrillo, and Marcy L. Wagman (the "Applicants")

NAME OF PROJECT: Interpretation request for the following Town Code provisions: Section 240-52(C), 240-21(D), 240-15, and Non-Residential Schedule Definition of "Mixed Uses"

LOCATION: 2357, 2361, 2363, 2365 N.Y.S. Route 9D and 123-125 New Hamburg Road (the "Property")

TAX MAP NUMBER: 6157-01-048643, 057642, 057654, 059643, 040637

ZONING DISTRICT: Hamlet Mixed Use District (HM)

Resolution offered by Zoning Board Member Peter Galotta

**WHEREAS**, the Town of Wappinger Planning Board granted approval to Gas Land Petroleum, Inc. ("Gas Land") for preliminary and final subdivision plat approval, Site Development Plan Approval, Special Permit approvals, and a Negative Declaration pursuant to the State Environmental Quality Review Act ("SEQRA") for the development of a 1.79 -acre site with a gasoline filling station; 3,630 square foot convenience store and three (3) one-bedroom apartments in one 7,260 square foot mixed use building; thirty-two (32) parking spaces; and other site improvements such as new septic infrastructure, new water infrastructure, and road and sidewalk improvements (the "Project") at its meeting held on July 19, 2021; and

**WHEREAS**, the Planning Board determined that the Project complied with all applicable special permit standards in Section 240-44 of the Town Code; Section 240-52 of the Town Code for gasoline filling stations; and Section 240-81.7 of the Town Code for mixed uses; and

**WHEREAS**, the attorneys for the Applicants in this present matter before the ZBA, Stenger, Diamond & Glass, LLP (the "Stenger Law Firm") represented the same Applicants in the proceeding before the Planning Board opposing the Project; and

**WHEREAS**, after the approval, the Stenger Law Firm commenced an Article 78 proceeding against the Town of Wappinger seeking to overturn the Planning Board's approval; and

**WHEREAS**, while the Project was in the Planning Board process, the Stenger Law Firm sent a letter dated December 7, 2020 to the Town of Wappinger Planning Board advising the Board of its opinion that the Project required a use variance in order to proceed; and

**WHEREAS**, the Stenger Law Firm submitted a letter dated April 30, 2021 to Barbara Roberti, Director of Planning & Municipal Codes, “formally request[ing] an interpretation of the Town’s Zoning Code with respect to [the enumerated matters in the letter]”; and

**WHEREAS**, as part of its representation of the Applicants in the present matter, the Stenger Law Firm submitted a letter dated June 1, 2021 to Thomas F. Wood, Esq., who is advising the Zoning Board of Appeals in the present matter due to a recusal by the ZBA’s attorney, James Horan, Esq.; and

**WHEREAS**, the June 1<sup>st</sup> Letter to Wood stated, in part, that “[t]he Planning Board cannot address the application before it until the substantive issues required by the request for the interpretations has been resolved”; and

**WHEREAS**, the Stenger Law Firm also submitted a letter dated June 1, 2021 to the Chairman for the Town of Wappinger Planning Board, Bruce Flowers, alerting the Planning Board Chairman that “this firm has filed a request with the Town of Wappinger Zoning Administrator to provide to it an interpretation of two portions of the Town’s Zoning Code which are implicated by this application”; and

**WHEREAS**, Barbara Roberti, Director of Planning & Municipal Codes, issued a Memorandum dated June 30, 2021 which concluded:

The proposed use is allowed by Special Permit in the HM District (240-52). The same Special Permit allows dwelling units above commercial ground floor uses. Section 240-21.D of the Town of Wappinger Zoning Law allows the Planning Board to grant the exception to the required front yard. No variance is required to the rear yard as the building is more than 50 feet away from the rear yard.

The application referred to me as the Zoning Administrator on January 9, 2020, was allowed to proceed since it was in compliance with the Town Code should the Special Use Permit be granted by the Planning Board.

**WHEREAS**, the Director of Planning & Municipal Codes was the proper Town employee to issue this Memorandum pursuant to Section 240-106 of the Town Code; and

**WHEREAS**, on August 25, 2021, the Stenger Law Firm submitted the present appeal to the ZBA for an interpretation of the following Town Code provisions: Section 240-52(C), 240-21(D), 240-15, and the Non-Residential Schedule Definition of “Mixed Uses”; and

**WHEREAS**, pursuant to a package with a cover letter dated November 1, 2021 and received by the Town on November 3, 2021, the Stenger Law Firm submitted a Memorandum of Law and accompanying documents arguing that Ms. Roberti’s interpretation was erroneous; and

**WHEREAS**, pursuant to letter dated November 1, 2021, attorneys for Gas Land (“Keane & Beane”) argued that the Applicants did not have standing, the request by the Applicants for an interpretation from the ZBA was moot, and in the alternative, the conclusions in Ms. Roberti’s Memorandum should be upheld as they are supported by the Town Code; and

**WHEREAS**, the ZBA held a public hearing at its April 26, 2022 Meeting (the “Public Hearing”) after having this matter on for discussion at the ZBA’s September 28, 2021 and November 23, 2021 Meetings; and

**WHEREAS**, at the Public Hearing, the Stenger Law Firm opined that Gas Land needed a use variance since, as it argued, Gas Land would be operating a grocery store at the Property; and

**WHEREAS**, Keane & Beane provided counterarguments to the Stenger Law Firm’s arguments at the Public Hearing; and

**WHEREAS**, Keane & Beane provided a response letter dated May 13, 2022<sup>1</sup>; and

**WHEREAS**, the Stenger Law Firm submitted a letter to the ZBA dated May 18, 2022 in response to a submittal from Keane & Beane dated May 13, 2022; and

**WHEREAS**, the ZBA has the power to review interpretations of the Director of Planning and Municipal Codes pursuant to Section 267-b(1) and 267-a(4) of the New York State Town Law and Section 240-107(B)(2)(a) of the Town Code; and

**WHEREAS**, the Zoning Board of Appeals met in Executive Session on May 24, 2022 with its counsel to further review the file and deliberate; and

**WHEREAS**, this interpretation is a Type II action under the State Environmental Quality Review Act (“SEQRA”) pursuant to 6 NYCRR 617.5(c)(37), with no further review pursuant to SEQRA required at this time;

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<sup>1</sup> The letter lists the date as 2021, although it was written in 2022.

**NOW, THEREFORE, BE IT RESOLVED** that the Decision and Order of the Zoning Board of Appeals is as follows:

**1. 240-52**

**a. Items Sold in The Gasoline Filling Station**

“Gasoline Filling Station” is defined in Section 240-5 of the Town Code as:

An area of land, including structures thereon or a building or part thereof, other than a repair garage, that is used for the sale of motor fuels dispensed from pumps and motor vehicle accessories and supplies. Permitted accessory uses may include facilities for lubricating, washing or other minor servicing of motor vehicles and/or the retail sale of convenience items, including but not limited to snacks and beverages, provided such accessory uses are located indoors. The rental of motor vehicles is also a permitted accessory use. The conduct of motor vehicle body work, major structural repair or painting by any means are not permitted accessory uses.

The Stenger Law Firm has argued on behalf of the Applicants that the items to be sold are more akin to that of a grocery store. Section 240-5 specifically uses the language “including but not limited to” in order to allow flexibility pertaining to the items to be sold.

This Board is not persuaded by the Applicants’ argument that the type of goods sold are limited by the Town Code. Furthermore, the approved square footage of 3,630 square feet also includes restrooms, a cashier area, coolers, etc. thus reducing the size of the area available for products.

The ZBA determines that the aspects of the Project pertaining to gasoline filling and the disputed “convenience store” meet the definition of “Gasoline Filling Station” as defined in the Section 240-5 of the Town Code. Therefore, the Planning Board was able to hear the application for a Gasoline Filling Station pursuant to Section 240-52 of the Town Code.

**b. Apartments**

Section 240-52(C) of the Town Code states: “Use of a building for any residence or sleeping quarters shall not be permitted, except that in the Hamlet Mixed Use District, dwelling units which are separate from the gas station use may be permitted above the commercial ground floor use in the principal gas station building.”

As the Property is located in the Hamlet Mixed Use District and was approved for three accessory apartments, the ZBA determines that the Applicant was able to legally apply for three residential units above the commercial space.

## **2. 240-21(D)**

Section 240-21(D) states as follows:

Exception for existing alignment of buildings. If, on one side of the street within 150 feet of any lot, there is pronounced uniformity of alignments of the depths of front yards greater or less than the required minimum depths specified in the Schedule of Dimensional Regulations for Residential Districts, a front yard shall be required in connection with any new building which shall conform as nearly as practicable with those existing on adjacent lots.

The ZBA does not find that this provision preempted the Applicants from applying to the Planning Board, and does not believe it has the legal right to opine on the alignment of the buildings in the matter before the Planning Board.

## **3. 240-15**

Section 240-15 States as follows:

This chapter shall not be deemed to affect in any manner whatsoever any easements, covenants or other agreements between parties; provided, however, that where this chapter imposes a greater or lesser restriction upon the use of buildings or land or upon the erection, construction, establishment, movement, alteration or enlargement of buildings than is imposed by other local laws, rules, regulations, licenses, certificates or other authorizations or by easements, covenant or agreements, the more restrictive requirement shall prevail.

This provision is interpreted to mean that when two or more provisions contradict each other, the stricter interpretation shall apply. Out of the provisions that the Applicants have requested interpretations for, the ZBA does not find any contradictions.

## **4. Non-Residential Schedule Definition of “Mixed Uses”**

The Non-Residential Schedule (240 Attachment 2) Definition of Mixed Uses is as follows:

Mixed use, which is a grouping of attached or detached structures, containing a mix of residential dwelling units and one or more of the following commercial uses: retail stores and shops, personal service businesses, professional or business offices and banks (§ 240-81.7)

In the present matter, there are proposed residential units in one structure located above a convenience store. The store included on the Project meets the definition of the word

“retail” as defined by the Merriam-Webster dictionary, which is “to sell in small quantities directly to the ultimate consume”.<sup>2</sup> There does not seem to be a dispute that goods will be sold directly to the ultimate consumers as part of the Project. Thus, the Project meets the definition of Mixed Uses as found in the Non-Residential Schedule.

### Conclusion

Based on all of these factors, the ZBA upholds the Memorandum dated June 30, 2021 written by Barbara Roberti.

**BE IT FURTHER RESOLVED**, that within five (5) business days of the adoption of this Resolution, the Chair or other duly authorized member of the Zoning Board shall cause a copy of the Resolution to be filed with the Town Clerk and a copy sent to the Applicant/Owner.

Resolution Seconded by Zoning Board Member Shailesh Shah

The votes were as follows:

Board Member Shailesh Shah	<u>AYE</u>
Board Member David Barr	<u>AYE</u>
Board Member John Lorenzini	<u>N/A</u>
Vice Chairman Tom DellaCorte	<u>AYE</u>
Chairman Peter Galotti	<u>AYE</u>

---

<sup>2</sup> <https://www.merriam-webster.com/dictionary/retail>

**CERTIFICATION**

I, BEATRICE OGUNTI, the duly qualified and acting Clerk for the Town of Wappinger Zoning Board, Dutchess County, New York, do hereby certify that attached hereto is a true and correct copy of an extract from the minutes of a regular meeting of the Zoning Board of the Town of Wappinger, held on the 28<sup>th</sup> day of June, 2022, and that the resolution set forth herein is a true and correct copy of the resolution of the Zoning Board of said Town adopted at said meeting.

I FURTHER CERTIFY that, pursuant to Section 103 of the Public Officers Law (Open Meetings Law), said meeting was open to the general public.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Town, this 28<sup>th</sup> day of June, 2022.

  
BEATRICE OGUNTI  
ZONING BOARD CLERK

# EXHIBIT D

**RECEIVED**

FEB 16 2023

**HON. MICHAEL G. HAYES**

(845) 298-2000  
 (845) 298-2842  
 info@sdglaw.com  
 sdglaw.com

February 16, 2023

MAIN OFFICE

1136 Route 9  
 Wappingers Falls  
 New York 12590

Poughkeepsie Journal Building  
 85 Civic Center Plaza, Suite 100  
 Poughkeepsie, NY 12601

By appointment only

Kingston Office

303 Clinton Avenue  
 Kingston, NY 12401

By appointment only

Please direct all inquiries  
 to the Main Office

Kenneth M. Stenger  
 Stephen E. Diamond\*  
 Jessica J. Glass  
 Karen E. Hagstrom  
 Ian C. Lindars  
 A.J. Iuele  
 Albert P. Roberts  
 PARTNER EMERITUS

**VIA NYSCEF**

Chambers of Hon. Michael G. Hayes  
 Dutchess County Supreme Court  
 10 Market Street  
 Poughkeepsie, New York 12601

ATTN: Eric Conroy

Mary Kate Ephraim  
 Jad Haddad

**Re: Index No. 2021-53698**  
**Wappingers Properties, LLC et al v. Town of Wappinger Planning Board**  
**et al ("Planning Board Matter")**

OF COUNSEL  
 Joan F. Garrett\*\*

**Index No. 2022-52502**  
**Ronald M. Evangelista et al v. Town of Wappinger Zoning Board of**  
**Appeals et al ("ZBA Matter")**

PARALEGALS  
 Elizabeth Amicucci  
 Jennifer Arno  
 Ailana Brown  
 Tammy Johnson  
 Jillian Medina  
 Alison Secor

Dear Mr. Conroy:

At the conference had before you on February 14, 2023, Mr. Ward-Willis offered that his client was willing to proceed with construction activity at the site at its own risk, if the Petitioner-Plaintiffs were to withdraw the TRO application.

CLOSING COORDINATORS  
 Maria L. Jones  
 Sandra A. Turner

By this letter, I advise the Court, and Mr. Ward-Willis, that the Petitioner-Plaintiffs have decided to settle this issue by acceptance of Mr. Ward-Willis' offer. The TRO application is withdrawn, thereby removing any basis for a hearing on an undertaking.

\*ALSO ADMITTED IN FL & MA  
 \*\*ALSO ADMITTED IN CT

In settling this matter, the Petitioner-Plaintiffs are not waiving any argument presently before the Court in the proceedings consolidated by the Court's Order dated October 17, 2022.

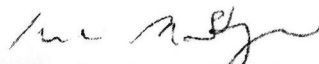
Absent any objection from the parties copied to this correspondence, I would ask the Court to "So Order" this letter in final resolution of this issue.

\* The temporary restraining order contained within the October 17, 2022 order to show cause is vacated and that portion of the order to show cause seeking such relief is withdrawn by agreement of the parties.  
 Dated Poughkeepsie, New York  
 February 16, 2023

**HON. MICHAEL G. HAYES, A.J.S.C.**

Very truly yours,

STENGER, DIAMOND & GLASS, LLP



KENNETH M. STENGER, ESQ.

[kstenger@sdglaw.com](mailto:kstenger@sdglaw.com)

KMS/klg

cc: Nicholas Ward-Willis, Esq.  
Michael Caruso, Esq.  
John Shaban, Esq.

SO ORDERED

---

Hon. Michael G. Hayes, JSC

# EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF DUTCHESS

-----X  
 In the Matter of the Application of

WAPPINGERS PROPERTIES, LLC, 2337  
 RT 9D, LLC, MARCY WAGMAN, FRANCA  
 PETRILLO, and RONALD EVANGELISTA,

**DECISION AND ORDER**

Petitioners/Plaintiffs,

Index No. 2021/53698

-against-

TOWN OF WAPPINGER PLANNING BOARD  
 and GAS LAND PETROLEUM, INC.,

Respondents/Defendants.

-----X  
 -----X  
 In the Matter of the Application of

RONALD M. EVANGELISTA, FRANCA  
 PETRILLO, and 2337 ROUTE 9D, LLC,

Petitioners,

Index No. 2022/52502

-against-

TOWN OF WAPPINGER ZONING BOARD OF  
 APPEALS and GAS LAND PETROLEUM, INC.,

Respondents.

-----X  
**HON. MICHAEL G. HAYES, Acting Supreme Court Justice**

The Court read and considered the following documents upon  
 these petitions:

**PAPERS NUMBERED**

Notice of Petition.....	1
Petition.....	2
Exhibits.....	3
Memorandum of Law.....	4
Answer.....	5
Memorandum of Law.....	6

Memorandum of Law.....	6
Reply Affirmation.....	7
Exhibits.....	8
Amended Verified Petition and Complaint	9
Exhibits.....	10
Affidavit.....	11
Exhibit.....	12
Affidavit.....	13
Exhibits.....	14
Affidavit.....	15
Exhibit.....	16
Memorandum of Law.....	17
Answer.....	18
Affidavit.....	19
Affidavit.....	20
Affidavit.....	21
Affirmation.....	22
Answer.....	23
Affirmation.....	24
Exhibits.....	25
Affidavit.....	26
Exhibits.....	27
Affidavit.....	28
Exhibit.....	29
Affidavit.....	30
Exhibit.....	31
Memorandum of Law.....	32
Memorandum of Law in Reply.....	33
Affirmation.....	34
Exhibits.....	35
Affirmation.....	36
Exhibits.....	37
Affidavit.....	38
Exhibit.....	39
Affirmation.....	40

Petitioners commenced a hybrid action and special proceeding under Index No. 2021/53698 seeking *certiorari*, pursuant to CPLR §7803(3), and a declaratory judgment, pursuant to CPLR §3001 (the 2021 Proceeding).

The 2021 Proceeding was commenced by filing of the verified petition and complaint on August 26, 2021. An amended verified

The amended pleadings seek a judgment vacating a negative declaration under the New York State Environmental Quality Review Act ("SEQRA") adopted by the Town of Wappinger Planning Board on July 19, 2021. The amended pleadings also seek vacatur of certain resolutions filed with the Town Clerk on July 28, 2021. These resolutions granted site plan and subdivision approval for respondent Gas Land Petroleum, Inc. ("Gas Land") to develop a 1.79 acre site. The proposed site contains four (4) gasoline pumps, with eight (8) fueling stations, plus a Three Thousand Six Hundred Thirty (3,630) square foot convenience store with three (3) one bedroom apartments located on the building's second floor. Finally, the 2021 Proceeding also requests a declaratory judgment voiding and annulling the Town of Wappinger Zoning Ordinance §240-52(C) as incomprehensibly vague and ambiguous.

On October 17, 2022, petitioners obtained a temporary restraining order in the 2021 Proceeding. That TRO enjoined Gas Land from commencing demolition, site development work and construction of the mixed-use gasoline filling station. That TRO also enjoined the Town of Wappinger and its Building Inspector from issuing demolition permits<sup>1</sup>.

On July 28, 2022, petitioners commenced a second hybrid proceeding under Index No. 2022-52502 challenging a determination of the Town of Wappinger Zoning Board of Appeals (the 2022

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<sup>1</sup> By letter dated February 16, 2023, the parties entered into a stipulation to vacate the TRO, and thereby eliminated any need for a hearing on the issue of an appropriate undertaking. That same day, the Court "so-ordered" the letter and the TRO was vacated.

Proceeding). The ZBA decision, filed June 29, 2022, affirmed the determination of Town of Wappinger Zoning Administrator Barbara Roberti, which found that the proposed mixed use of the building was allowed by special permit and did not require a use variance.

### **2021 Proceeding Background**

The amended pleadings allege that on or about December 20, 2019, Gas Land filed an application for site plan approval with the Planning Board. This application was amended on or about March 23, 2020. The application sought approval to develop a project on the corner of County Route 28 and New York State Route 9D, with an address of 123-125 New Hamburg Road and 2357, 2361-2365 New York State Route 9D.

The amended pleadings state that the project is more than Seven Thousand square feet in size. It requires combining five (5) lots and razing multiple structures. In connection with the application, Gas Land submitted a full environmental assessment form ("EAF") on or about January 9, 2020. While the application was pending, the form was revised a number of times.

The amended pleadings allege that on November 13, 2019, the Town of Wappinger purported to amend its zoning code to permit the development of apartments and gas stations in a single mixed-use development located in the Hamlet Mixed Use District. This 2019 amendment was filed with the New York State Secretary of State on December 4, 2019. Petitioners allege that, without this

amendment, the mixed use project proposed by Gas Land would be illegal under the prior statute.

Petitioners maintain that the Planning Board's presentation of the application to the public has a long history of confusion. Petitioners state that the confusion served to underinform the public, at best, or mislead it at worst.

The Planning Board scheduled a public hearing for October 5, 2020. On October 1, 2020, petitioners' counsel attempted to access materials on the Town website identified as "Agenda Files" to prepare for the hearing, but the provided hyperlink was not valid. Petitioners state that they do not know how long the public was denied access to the documents, or whether the hyperlink ceased working prior to the publication of the notice for the public hearing. By correspondence dated October 2, 2020, petitioners' counsel advised the Planning Board that the online version of the traffic study was unavailable. Counsel requested an adjournment of the public hearing, which request was denied. Instead, the Planning Board opened the hearing on October 5, 2020, and continued it to November 2, 2020. Petitioners assert that Gas Land submitted additional materials for the Planning Board's consideration during this period. On November 2, 2020, the hearing was resumed, and was further continued to May 3, 2021.

On December 7, 2020, counsel for the petitioners wrote a letter addressing the Planning Board chairman and its members. Petitioners sought adjournment of the Planning Board hearing and

a referral to Town Zoning Administrator Barbara Roberti for interpretation of the newly amended Town Code. Specifically, the letter states that "In the instant application, the dwelling units are not 'separate from the gas station use' as required by Code §240-52(C)...To the extent...that housing is proposed over the accessory use to the gasoline filling station, it is not permitted by this statute." The Planning Board declined to make that referral.

On May 3, 2021, the Planning Board closed the public hearing and allowed written submissions within thirty (30) days. Gas Land filed submissions dated May 17, 2021. Petitioners maintain that these submissions contain substantial new information pertaining to the design and functionality of Gas Land's proposal that were not subject to public review and comment. Petitioners further contend that these submissions were first discussed at the June 7, 2021 Planning Board meeting, after public comment was closed.

On June 15, 2021, petitioners' consultant Nelson Pope Voorhis, LLC ("NPV") submitted an updated report to the Planning Board based upon his review of the new submissions by Gas Land. Petitioners maintain that on July 13, 2021, they discovered that the updated report had not been reviewed by the Planning Board, but was placed in a separate file because it arrived after the thirty-day deadline set by the Planning Board at its May 3, 2021 hearing.

Ultimately, petitioners concede that the Planning Board accepted the June 15, 2021 NPV submission. However, petitioners contend that the substantive issues raised in the submission required a re-opening of the public hearing. Petitioners contend that the Planning Board cut off further public review of these submissions and instead proceeded to approve the application.

On July 19, 2021, the Planning Board approved a notice of determination of non-significance under SEQRA, an amended site plan, two (2) special use permits and a lot-line consolidation. On July 27, 2021, the Planning Board chairman also executed a resolution of preliminary and final subdivision plat approvals for the project. On the same day, the chairman also executed a resolution of the site development plan and special permit approvals of the project. Both of these resolutions were then entered by the Town Clerk on July 28, 2021.

Petitioners allege that the project warrants a positive declaration under SEQRA. Petitioners maintain that a positive declaration is required because the proposed development would destroy the neighborhood's historic character. Petitioners further contend that a positive declaration is required as the application does not discuss how the project purports to satisfy the specific architectural and historical review standards contained in Code §240-35.

The verified petition and complaint allege eleven causes of action. The first cause of action alleges that the Planning

Board failed to identify and evaluate the potential significant adverse environmental impacts of the project, i.e. the Planning Board failed to take a "hard look" under SEQRA. The second cause of action alleges that the Planning Board did not identify all relevant areas of environmental concern, failed to examine all relevant areas of environmental concern and supplied no explanation underlying its determination not to require additional project EAFs. Therefore, petitioners conclude that the Planning Board's SEQRA findings in the negative declaration were arbitrary, capricious and irrational. The third cause of action alleges that the Planning Board's summary conclusion that the project would not generate significant environmental impact and therefore did not require an environmental impact statement or further review is not grounded in fact or based upon a comprehensive analysis. Petitioners maintain that the SEQRA process was not complete upon adoption of the negative declaration rendering it unlawful. The fourth cause of action states that the Planning Board acted in an arbitrary and capricious manner in adopting the negative declaration without a complete final environmental assessment form. The petitioners' fifth cause of action states that the Planning Board's final action in adopting the site plan resolutions did not take into account an assessment of the project's attendant environmental impacts. Therefore, it was unlawful and arbitrary and capricious. The petitioners' sixth cause of action alleges that

the Planning Board's findings were irrational, and that there are no factual or legal bases to support its findings that: (a) the project is an unlisted action under SEQRA; (b) the project will not generate significant adverse environmental impact; (c) the project required no further scoping or preparation of an environmental impact statement; and, (d) the project warranted approval with the conditions set forth in the site plan resolution. The seventh cause of action alleges that the Planning Board engaged in improper segmentation. Petitioners maintain that by limiting its review of the project in a manner that excluded consideration of the 2019 amendments to the code and the broader impacts to the community, the Planning Board created a single developmental project divided among two different zoning districts. The petitioners' eighth cause of action seeks a declaratory judgment declaring their rights in relation to the validity and enforceability of the negative declaration and zoning amendment at issue. The ninth cause of action also seeks a declaratory judgment alleging that the Planning Board engaged in unlawful spot zoning. Petitioners maintain that applying the 2019 zoning amendments to the project and the execution of the site plan resolution constitute unlawful spot zoning in that such re-zoning was not for the general welfare of the community, but for the benefit of an individual land owner. The tenth cause of action alleges that the Planning Board violated the open meetings law. Petitioners contend that

the application and agenda items were not made public in advance of the meeting and public hearings before the Planning Board. Additionally, petitioners state that the Planning Board allowed Gas Land to file new material long after submission deadlines. The eleventh cause of action alleges that the Planning Board's acts and/or omissions in failing to properly notice and conduct meetings and hearings and failing to disseminate project submissions in advance of meetings have unlawfully violated the due process rights of the petitioners as provided by the United State and New York State Constitutions.

### **2022 Proceeding Background**

On April 30, 2021, counsel for petitioner 2337 Rt. 9D, LLC requested that Barbara Roberti, Zoning Administrator, provide a determination of the Town's zoning code with respect to the following:

- a. Is a gasoline station use an accepted or prohibited use within the Town's definition of permissible mixed uses available in non-residential zoning districts?
- b. Did the Town's adoption of an amendment to Code §240-52(C) effect an amendment of the Town's Zoning Code's definition of a "mixed use"?
- c. How may a residential unit be located separate from the gas station use when it is located above the commercial ground floor when that commercial enterprise is inextricably part of that gas station use?
- d. Must Gasland receive a use variance from the Town of Wappinger Zoning Board of Appeals before it may conduct its gasoline business, as presented in its application?

In that same April 30 letter, counsel for the petitioners quoted §240-52(C) and stated:

There is a literal conflict in that sentence. One part of the sentence states that dwelling units must be separate from the gas station. Yet, the same sentence says that dwelling units may be located above the commercial ground floor use in the principal gas station building...How may a residential unit be located separate from the gas station use when it is located above the commercial ground floor when that commercial enterprise is inextricably part of that gas station use?

On June 30, 2021, Ms. Roberti replied:

The proposed use is allowed by Special Permit in the HM District (240-52). The same Special Permit allows dwelling units above commercial ground floor uses. Section 240-21.D of the Town of Wappinger Zoning Law allows the Planning Board to grant the exception to the required front yard. No variance is required to the rear yard as the building is more than 50 feet away from the rear yard.

The application referred to me as the Zoning Administrator on January 9, 2020, was allowed to proceed since it was in compliance with the Town Code should the Special Use Permit be granted by the Planning Board.

On August 25, 2021, the petitioners filed an appeal of this determination to the Zoning Board of Appeals ("ZBA"). On April 26, 2022, the ZBA held a public hearing on this appeal.

At its June 28, 2022 meeting, the ZBA read its draft decision on appeal into the record, which read, in part: "As the Property is located in the Hamlet Mixed Use District and was approved for three accessory apartments, the ZBA determines that the Applicant was able to legally apply for three residential units above the commercial space."

The ZBA then voted to affirm Ms. Roberti's determination. The affirmance was filed with the Town Clerk on June 29, 2022.

The petition alleges six causes of action. The first cause of action states that there is no Code-based authority to allow "dwelling units" that are "separate from a gas station use" to be permissible "above the commercial ground floor use" in a "principal gas station building." Similarly, the petitioners maintain that the Code does not authorize residential uses as "accessory" to a "gasoline filling station." Petitioners also maintain that the permitted accessory uses listed in §240-5's definition of "gasoline filling station" only permit the retail sale of "convenience items," and that this limited retail sales use does not require a 3,630 square foot commercial space. Petitioners state that Gas Land represented at the proceeding before the ZBA that it planned to use the gas station building for retail and food preparation operations that vastly exceed the plainly stated limits on this "convenience items" accessory use. Petitioners state that Gas Land proposed a retail and food preparation use beyond the limited accessory use allowed by Code, and that these expanded accessory uses cannot be reconciled with the limited "convenience items" retail use under the applicable "Mixed Use" regulations. Petitioners also maintain that Ms. Roberti and the ZBA failed to analyze whether the types of foods sold in the proposed store were "convenience items", how twenty-two parking spaces were needed to support accessory use and whether the 2019 code amendment was being applied in a manner that conforms to the comprehensive plan's express plan for development. Petitioners contend that a use variance is required

for the project, and that the ZBA's findings, deliberation and decision are arbitrary, capricious and irrational.

The second cause of action alleges that the ZBA's findings created non-existent code provisions and failed to consider clear code contradictions. The third cause of action alleges that the ZBA's actions of engaging in code interpretation exceeded its limited authority. The fourth cause of action alleges that the ZBA decision utterly destroys the historic nature of the area causing significant economic injury to the petitioners. The fifth cause of action alleges that the ZBA has selectively and unlawfully interpreted and enforced the code in favor of Gas Land, which petitioners maintain is a well-known and preferred special interest developer in the area, in violation of the Equal Protection Clauses of the United States Constitution and the New York State Constitution. The sixth cause of action alleges that the ZBA's action is "rubber-stamping" Ms. Roberti's determination and violates petitioners' right to procedural due process as provided in the 14<sup>th</sup> Amendment of the United States Constitution and Section 6, Article 1 of the New York State Constitution.

#### **Additional Procedural Background**

Respondents/Defendants filed a pre-answer motion to dismiss the amended petition and complaint in the 2021 Proceeding. By Decision and Order dated May 17, 2022, the Court (D'Alessio, J) granted that branch of the motion that sought to dismiss the

claims asserted by petitioners/plaintiffs Wappingers Properties, LLC and Marcy Wagman, on the grounds that they lacked standing. However, the Court denied the motion to the extent that it challenged the standing of the remaining petitioners/plaintiffs. The Court also denied the pre-answer motion in all other respects, and directed respondents/defendants to file Answers and a certified record.

The 2022 Proceeding was commenced prior to the filing of the Answers and certified record in the 2021 Proceeding. Shortly after the 2022 Proceeding was commenced, the parties moved for an Order joining these two proceedings pursuant to CPLR §602, and presented a proposed briefing schedule for the joint proceedings. As part of this motion, the parties also requested that the Court first determine the 2022 Proceeding, and stipulated that the Court would only proceed to consider and determine the 2021 Proceeding if the relief requested in the 2022 Proceeding was denied. By Decision and Order dated October 17, 2022, the Court (D'Alessio, J) granted this motion and ratified the parties' stipulation.

In January of 2023, Judge D'Alessio was assigned to Rockland County. This proceeding was then reassigned to this Court, and both proceedings were fully submitted on February 14, 2023. Consistent with the parties' stipulation and Judge D'Alessio's October 17, 2022 Decision and Order, this Court will first consider and determine the 2022 Proceeding

In relevant part, the Decision and Order of the Zoning Board of Appeals states as follows:

1. 240-52

a. Items Sold in The Gasoline Filling Station

"Gasoline Filling Station" is defined in Section 240-5 of the Town Code as:

An area of land, including structures thereon or a building or part thereof, other than a repair garage, that is used for the sale of motor fuels dispensed from pumps and motor vehicle accessories and supplies. Permitted accessory uses may include facilities for lubricating, washing or other minor servicing of motor vehicles and/or the retail sale of convenience items, including but not limited to snacks and beverages, provided such accessory uses are located indoors. The rental of motor vehicles is also a permitted accessory use. The conduct of motor vehicle body work, major structural repair or painting by any means are not permitted accessory uses.

The Stenger Law Firm has argued on behalf of the Applicants that the items to be sold are more akin to that of a grocery store. Section 240-5 specifically uses the language "including but not limited to" in order to allow flexibility pertaining to the items to be sold.

This Board is not persuaded by the Applicants' argument that the type of goods sold are limited by the Town Code. Furthermore, the approved square footage of 3,630 square feet also includes restrooms, a cashier area, coolers, etc. thus reducing the size of the area available for products.

The ZBA determines that the aspects of the Project pertaining to gasoline filling and the disputed "convenience store" meet the definition of "Gasoline Filling Station" as defined in the Section 240-5 of the Town Code. Therefore, the Planning Board was able to hear the application for a Gasoline Filling Station pursuant to Section 240-52 of the Town Code.

### Discussion

"The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them." (see *Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926 [2<sup>nd</sup> Dept 2007]). "It matters not whether, in close cases, a court would have, or should have, decided the matter differently." (*Matter of Cowan v. Kern*, 41 NY2d 591, 599 (1977)). See also *Matter of Borrok v. Town of Southampton*, 130 AD3d 1024, 1025 [2d Dept. 2015]). "A reviewing court 'may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.'" (*Matter of Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 5 NY3d 236, 241 [2005], quoting *Matter of Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead*, 98 N.Y.2d 190 [2002]).

In an article 78 proceeding to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference. Thus, judicial review is generally limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion (see *Matter of Kabro Assoc., LLC v. Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118 [2<sup>nd</sup> Dept 2012]). "However, where the issue involves pure legal interpretation of statutory terms, deference is not required." [*Matter of BBJ Associates, LLC v. Zoning Board of Appeals of Town of Kent*, 65 AD3d 154, 160 (2d Dept. 2009)].

b. Apartments

Section 240-52(C) of the Town Code states:

"Use of a building for any residence or sleeping quarters shall not be permitted, except that in the Hamlet Mixed Use District, dwelling units which are separate from the gas station use may be permitted above the commercial ground floor use in the principal gas station building."

As the Property is located in the Hamlet Mixed Use District and was approved for three accessory apartments, the ZBA determines that the Applicant was able to legally apply for three residential units above the commercial space...

3. 240-15

Section 240-15 States as follows:

This chapter shall not be deemed to affect in any manner whatsoever any easements, covenants or other agreements between parties; provided, however, that where this chapter imposes a greater or lesser restriction upon the use of buildings or land or upon the erection, construction, establishment, movement, alteration or enlargement of buildings than is imposed by other local laws, rules, regulations, licenses, certificates or other authorizations or by easements, covenant or agreements, the more restrictive requirement shall prevail.

This provision is interpreted to mean that when two or more provisions contradict each other, the stricter interpretation shall apply. Out of the provisions that the Applicants have requested interpretations for, the ZBA does not find any contradictions.

4. Non-Residential Schedule Definition of "Mixed Uses"

The Non-Residential Schedule (240 Attachment 2) Definition of Mixed Uses is as follows:

Mixed use, which is a grouping of attached or detached structures, containing a mix of residential dwelling units and one or more of the following commercial uses: retail stores

*and shops, personal service businesses, professional or business offices and banks (§ 240-81.7)*

*In the present matter, there are proposed residential units in one structure located above a convenience store. The store included on the Project meets the definition of the word "retail" as defined by the Merriam-Webster dictionary, which is 'to sell in small quantities directly to the ultimate consumer'... There does not seem to be a dispute that goods will be sold directly to the ultimate consumers as part of the Project. Thus, the Project meets the definition of Mixed Uses as found in the Non-Residential Schedule.*

#### *Conclusion*

*Based on all of these factors, the ZBA upholds the Memorandum dated June 30, 2021 written by Barbara Roberti.*

Petitioners assert that the 2019 amendment to §240-52(C) contains an internal contradiction. Petitioners contend that one part of the sentence states that the dwelling units must be separate from the gas station use, while a later part of the same sentence states that dwelling units may be located above the commercial ground floor use of the principal gas station building. Petitioners contend that the word "separate" should be interpreted by its dictionary meaning - "kept apart." Petitioners maintain that no apartments may be built in or on the principal building because those apartments would not be separate from the gasoline use.

Petitioners also assert that the Roberti decision, which was affirmed by the ZBA, determined in conclusory fashion that the proposed dwelling units are a specially permitted use under the 2019 Amendments, without addressing petitioners' claim that §240-

52 conflicts with the Schedule of Use Regulations for the HM District (240 Attachment 2). Petitioners maintain that this Schedule identifies a "mixed use" as "a grouping of attached or detached structures, containing a mix of residential dwelling units and one or more of the following commercial uses: retail stores and shops, personal service businesses, professional or business offices and banks." Petitioners state that this list does not identify "gasoline filling station" or "gasoline use" as uses that can be combined with dwelling units. Petitioners also contend that the Schedule's list of commercial uses that can be combined with residential uses is more restrictive than the provisions of §240-52(C), and that this more restrictive list controls pursuant to §240-15.

Petitioners also assert that Gas Land's proposed principal use is a gas station, and that the retail/convenience store use is only permitted as a limited accessory use. Petitioners assert that an accessory convenience store use does not fall within the definition of a permitted mixed use. Petitioners also assert that the proposed convenience store exceeds the scope of a limited accessory use.

Respondents contend that §240-5 includes the retail sales of convenience items within its statutory definition of a gasoline filling station, that the Schedule of Use Regulations allows residential units to be grouped with retail stores and shops in a HM Mixed Use District, and that §240-52(C) expressly authorizes

separate dwelling units above the commercial ground floor use of a principal gas station building. Respondents state that, when considered as a whole, the Zoning Code is clear that the mixed use development of a gasoline filling station is permitted in the HM District when the dwelling units are located on a separate floor of the principal gas station building, above the ground floor retail operations of the gasoline filling station.

Respondents state that the Town Board deliberately used the terms "gas station use" and "principal gas station building" in the 2019 amendment. Specifically, when drafting legislation permitting a combination of dwelling units and commercial uses on land containing a "gasoline filling station," Respondents maintain that the drafters used the terms "gas station use" and "principal gas station building" to provide clear and precise direction as to the permitted combination of residential and commercial uses in the HM District. Respondents contend that common sense dictates that the drafters used the terms "gas station use" and "principal gas station building" to focus on specific portions of that parcel, rather than relying on the Code's definition of a "gasoline filling station" which would encompass the entire parcel.

Respondents also state that dwelling units are permitted in a principal gas station building as long as they are constructed over the commercial ground floor use and operated as a separate permitted use. Respondents contend that using the common

understanding of the word "separate", the project dwelling units are separate from the gas pumps, are used for residential purposes separate from the gas station use, and are located on a separate floor from the commercial retail area. Respondents state that the ZBA's interpretation is supported by the plain language of the 2019 amendment, by the plain and ordinary meaning of the words utilized therein, and by common sense.

Respondents deny that Gas Land's mixed use development is barred by other Zoning Code provisions. Respondents argue that §240-81.7 establishes specific requirements that regulate mixed uses in the HM District, including density restrictions, minimal residential and commercial components, and yard requirements. Respondents also argue that the mixed use provisions contained in the Schedule of Use Regulations for the HM District must be read in conjunction with §240-81.17, which is expressly cited and incorporated by reference in the mixed use provisions of the Schedule of Use Regulations (240 Attachment 2:6). Respondents state that, when §240-81.7 and §240-52(C) are read together, it is clear that dwelling units may be constructed above the ground floor retail operations of a principal gas station building.

The Court is unable to resolve the conflicting arguments concerning the proposed convenience store use on the present state of this record. Specifically, the ZBA failed to adequately consider and determine the question of whether the proposed retail operations conform to the permitted accessory use carved

out by the "gasoline filling station" definition, which limits this accessory use to the indoor "retail sale of convenience items, including but not limited to snacks and beverages."

The ZBA correctly observed that the retail sale of convenience items is not limited to snacks and beverages. The statutory definition clearly identifies snacks and beverages as non-exclusive examples of "convenience items" that fall within the limits of this permitted accessory use. But the ZBA failed to set forth any facts upon which it based its determination that the Town Code does not place any limits on the type of goods that may be sold by a gasoline filling station, or for its determination that the Project's proposed accessory use meets the statutory criteria for the retail sale of convenience items.

By its express terms, §240-52 limits the permitted accessory retail operation to the sale of "convenience items." Petitioners assert that the Code's purposeful use of the term "convenience items" unmistakably and undeniably restricts the permitted accessory retail operations that may be conducted by a gasoline filling station. Petitioners also argue that, despite this clear statutory limitation, many of the Project's proposed retail operations go far beyond the sale of convenience items. For instance, petitioners argue that the preparation and sale of made-to-order food constitutes the operation of a food service establishment, and that these type of food service operations far exceed the retail sale of convenience items.

The Zoning Code does not expressly define "convenience items" or, for that matter, a "convenience store." The absence of an express definition for these terms is not a unique anomaly. The Zoning Code also does not provide definitions for other types of retail food service operations that it regulates, such as a "bakery," "delicatessen" or "refreshment stand" (see §240-5[69, 155, 182]).

For instance, the §240-5(69) definition of a "fast-food establishment" carves out a number of food-related operations from its scope, stating "A delicatessen or a restaurant selling food and beverages for consumption off the premises is not a fast-food establishment, provided that such sale as described above is not the principal business of the establishment. The conduct of a bakery or a delicatessen shall not be deemed a fast-food establishment." The §240-5(155) definition of a "restaurant" similarly carves out a number of food-related operations from its scope, including "stand-alone fast-food establishments, carry-out food service establishments, delicatessens, refreshment stands, and curb-service or drive-in type food establishments." Likewise, §240-5(182) distinguishes a "stand-alone, franchise, fast-food establishment" from other types of retail food operations, stating that "a bakery, a delicatessen, convenience store, or other store selling food and beverages whether or not a gasoline filling station shall not be deemed to be a stand-alone, franchise, fast-food establishment, but shall be considered to be the retail sale of food and beverages."

Despite these references, the terms bakery, convenience store, delicatessen and refreshment stand are not expressly defined by the Zoning Code. It thus falls to the ZBA to give effect to the intent of the Town Board that adopted the Zoning Code, both by construing the words used to give them their natural and ordinary meaning, and by construing the various parts in a manner that seeks to harmonize the whole and to avoid unnecessarily rendering any part surplusage (*see Matter of Briar Hill Lanes v Town of Ossining Zoning Bd. of Appeals*, 142 AD2d 578 [2<sup>ND</sup> Dept 1988])).

Here, the ZBA failed to adequately consider and determine whether the proposed retail operations exceeded the limited permitted accessory use - the sale of convenience items. This failure forecloses intelligent judicial review of the issues raised (*see Monroe v Bennett*, 164 AD2d 887 [2<sup>nd</sup> Dept 1990])).

On remand, this Decision and Order should not be interpreted as directing the ZBA to conduct a line-by-line, shelf-by-shelf inventory of each retail item that might be offered for sale as a convenience item. The ZBA has already determined that the "including but not limited to snacks and beverages" language was designed to allow a certain degree of flexibility pertaining to the type of convenience items that can be sold. The ZBA is free to adhere to that interpretation on remand. However, flexibility has its limits, and the retail sale of convenience items as an accessory use must have its limits as well.

Thus, on remand, the ZBA must revisit its determination that the Code's "convenience items" language does not place any limits on the type of goods that may be sold at a gasoline filling station. In particular, the ZBA must revisit its determination with respect to proposed convenience store operations that may be similar to other types of retail food service operations regulated by the Zoning Code. And to the extent that the ZBA concludes that the Project complies with the "retail sale of convenience items" limits on remand, the ZBA must provide enough information concerning that decision to permit intelligent judicial review of the factual and legal basis for that determination.

On remand, the ZBA is also directed to expand upon its prior consideration and determination of petitioners' assertion that the proposed convenience store operations exceed the scope of a limited accessory use. Petitioners allege that the proposed 3,630 square foot building is designed primarily for the convenience store retail operation, and that this accessory use impermissibly dwarfs the primary gas station retail use. Petitioners further allege that the principal gas station building is supported by 22 parking spaces, not including the 10 additional parking spaces that are reserved for gas pump operations and for tenants of the dwelling units. Petitioners allege that these 22 parking spaces are further evidence that the convenience store accessory use is neither incidental nor subordinate to the primary gas station use.

The ZBA determination merely notes that "the approved 3,630 square feet also includes restrooms, a cashier area, coolers, etc., thus reducing the size of the area available for products." The cooler space is clearly a convenience store use unrelated to the sale of motor fuel and motor vehicle accessories. Thus, it is not clear why the ZBA excludes this space from its analysis of the scope and impact of the convenience store use. This fleeting observation also fails to address petitioners' argument that the 22 parking spaces are evidence that the convenience store is neither incidental nor subordinate to the gasoline filling station use.

While the square feet and parking spaces attributable to the convenience store, standing alone, are by no means determinative, they are clearly relevant factors that must be considered and analyzed by the ZBA. The brief treatment afforded these factors does not sufficiently articulate the ZBA's reasoning, and thereby precludes an intelligent and meaningful judicial review of the ZBA's apparent determination (more implicitly suggested than expressly stated) that the convenience store is an incidental and subordinate accessory use of the property.

Finally, the ZBA is also reminded that its determination must be based upon its interpretation of the Zoning Code, and not based upon the applicant's description of its convenience store practices at other locations. Likewise, the ZBA's determination as to the meaning of the Zoning Code cannot be based upon the

applicant's characterization of current trends in the convenience store industry. Whatever those company practices or industry trends may be, the ZBA's determination must be based solely upon its interpretation of the language and meaning of the Town of Wappinger Zoning Code (*Matter of Tartan Oil Corp. v. Bohrer*, 294 AD2d 481 [2d Dept. 1998]).

Petitioners have not established that the remaining findings of the ZBA were irrational, arbitrary or capricious. Rather, with respect to petitioners' remaining challenges, in each instance the ZBA interpreted the Zoning Code in a manner that gave effect to the intent of the Town Board that adopted it, both by construing the words used in the Code to give them their natural and ordinary meaning, and by construing the various parts of the Zoning Code in a manner that seeks to harmonize the whole and to avoid unnecessarily rendering any part surplusage (*see Matter of Briar Hill Lanes v Town of Ossining Zoning Bd. of Appeals*, 142 AD2d 578 [2<sup>ND</sup> Dept 1988]).

For instance, there is no merit to petitioners' claim that §240-52(C) contains an internal contradiction. The ZBA rationally concluded that the 2019 amendment permitted the construction of dwelling units on the second floor of a principal gas station building in the HM District. These dwelling units are a separate residential use located on a separate floor of the building, as clearly contemplated by the Code. The contrary interpretation that petitioners seek to promote would render the 2019 amendment

meaningless, and was properly rejected by the ZBA as unsupported by a fair reading of the Code.

Likewise, the ZBA rationally concluded that there is no inherent contradiction between the Supplementary Special Use Permit Regulations for Gasoline Filling Stations [§240-52(C)] and the Schedule of Use Regulations for Non-Residential Districts (240 Attachment 2). §240-52(C) expressly authorizes dwelling units to be located above the commercial ground floor of a principal gas station building located in the HM District. The Schedule of Use Regulations generally authorizes the mixed use of residential dwelling units with retail stores and shops as a specially permitted use in the HM District. The ZBA afforded the terms of the Code their natural and ordinary meaning, and properly construed them in a harmonious manner, by reading them to authorize the placement of dwelling units above the commercial ground floor of a building in the HM District, where that building is used for the specially permitted retail sale of motor fuel, motor vehicle accessories and supplies, and convenience items.

Petitioners also allege that a use variance is required for the proposed convenience store because it exceeds the limited accessory use permitted by the Zoning Code. Judicial review of this allegation is foreclosed pending remand to the ZBA for an expanded determination on the following two issues: (1) does the Project comply with the Code's "retail sale of convenience items"

limitation?, and (2) is the convenience store an incidental and subordinate accessory use?

Petitioners also allege that the 2019 amendment to Zoning Code §240-52(C) is not consistent with the comprehensive plan. As a preliminary matter, the Court questions whether this argument can properly be advanced in this proceeding, since the 2019 amendment was enacted by the Town Board, and not the ZBA. To the extent that petitioners' claim may be interpreted as a challenge to the ZBA's interpretation of that amendment, they have failed to establish a clear conflict between that interpretation and the comprehensive plan. Likewise, petitioners have failed to show that the ZBA's interpretation was arbitrary, unreasonable or irrational in light of the comprehensive plan. (see *Matter of Youngewirth v Town of Ramapo Town Bd.*, 155 AD3d 755 [2<sup>nd</sup> Dept 2017]; *Infinity Consulting Group, Inc. v Town of Huntington*, 49 AD3d 813 [2<sup>nd</sup> Dept 2008]).

The third cause of action seeks judgment pursuant to CPLR §7803(2) on the grounds that the ZBA's determination was based upon flawed interpretations of the Zoning Code. Petitioners argue that these flawed interpretations were the functional equivalent of *ultra vires* legislative activity, beyond the scope of the ZBA's delegated powers.

This argument confuses *ultra vires* action with a zoning board's arbitrary and capricious exercise of its decision-making authority. (see *Natale v. Town of Ridgefield*, 170 F3d 258 [2<sup>nd</sup>

Cir. 1999])). Any relief that petitioners may be entitled to receive under Article 78 has been properly pled in the first two causes of action, which challenge these interpretations under the conventional "arbitrary and capricious" rubric. Petitioners have not made any allegations that would support a judicial determination that these interpretations, whether flawed or not, were *ultra vires* exercises of power. Indeed, interpreting the zoning law and hearing appeals from decisions of the Zoning Administrator are at the core of the ZBA's statutory powers (see *Town Law §267-b; Zoning Code §240-107*). Accordingly, the third cause of action is dismissed.

Petitioner characterizes the fourth, fifth and sixth causes of action in the hybrid pleading as plenary causes of action. These plenary actions seek declaratory relief based upon takings, selective enforcement, due process, and equal protection claims. Although only cursorily pleaded, no motion to dismiss has yet been filed with respect to those plenary actions.

"In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand." (see *Matter of Muller v Zoning Bd. of Appeals Town of Lewisboro*, 192 AD3d 805 [2<sup>nd</sup> Dept 2021] [internal citations omitted]). "The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover

damages or seeking a declaratory judgment." (*id.*) "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action." (*id.*)

Therefore, the Court is precluded from summarily disposing of the plenary causes of action at this time. For the sake of judicial economy, the Court will hold them in abeyance pending further action by the ZBA with respect to the remanded matters.

Based upon the foregoing, it is hereby

ORDERED, that the Petition's first two causes of action in the 2022 Proceeding (Index No. 2022-52502) are granted to the limited extent that this matter is remitted to the Zoning Board of Appeals for further proceedings, to specifically address and to provide an expanded determination on the following two issues: (1) does the Project comply with the Code's "retail sale of convenience items" limitation?, and (2) is the convenience store an incidental and subordinate accessory use?; and it is further

ORDERED, that the Petition's first two causes of action in the 2022 Proceeding (Index No. 2022-52502) are in all other respects denied; and it is further

ORDERED, that the Petition's third cause of action in the 2022 Proceeding (Index No. 2022-52502) is denied; and it is further

ORDERED, that the Petition's fourth, fifth and sixth cause of action in the 2022 Proceeding (Index No. 2022-52502) are held in abeyance and stayed pending further action by the Zoning Board of Appeals; and it is further

ORDERED, that pursuant to the September 9, 2022 Stipulation of the parties, ratified by the Court (D'Allesio, J.) on October 17, 2022, the 2021 Proceeding (Index No. 2021/53698) is held in abeyance and stayed pending further action by the Zoning Board of Appeals; and it is further

ORDERED, that Petitioners are directed to provide the Court with a status update letter on or before October 20, 2023.

This constitutes the Decision and Order of the Court.

Dated: August 9, 2023  
Poughkeepsie, New York

ENTER

  
HON. MICHAEL G. HAYES, A.J.S.C.