

R E S O L U T I O N

OF THE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Of File #63-53

ROBERT THOMPSON

W H E R E A S ROBERT THOMPSON, of 713 Plainfield Avenue, Berkeley Heights, N. J. has appealed to the Board of Adjustment of the Township of Berkeley Heights, for permission to build an extension to an existing service station, to make changes and repairs to the existing building and to use said service station in a manner previously performed as a non-conforming use within the R-20A Residential Zone, and

W H E R E A S the Board, after carefully considering the evidence presented by the appellant and of the adjoining property owners and the general public, has made the following factual findings:

1. Mr. Thompson was represented at the public hearing by Mr. J. R. Coviello, attorney who represented and spoke for the applicant, and Mr. Thompson through his attorney stated that he would grant 2 feet of right-of-way along Emerson Lane and 5 feet of right-of-way along Plainfield Avenue to the Township to meet the existing road widths as they are at the present, and
2. the hours of operation of the present service station and said hours would remain the same for the continuation under the addition change would be 8 a.m. to 7 p.m. prevailing time and closed on holidays.
3. The property as existing is a matter of some one hundred odd feet along Emerson Lane on the northerly side and approximately 135 feet along Plainfield Avenue on the easterly side with 175 feet on the westerly property line and 157 feet along the southerly property line,
4. there exists on the premises, a one story masonry building with a side addition of one story masonry store with a frame shed to the rear or west of the store, both store and masonry building (garage) being joined by a common wall. In the front of said building there being a gasoline pump island approximately 12 feet to the east of the building and some 15 feet in from the northerly property line or road edge line.
5. There appeared at the hearing a Mr. R. Crosby of 4 Jane Lane, who asked questions concerning the curbing along Emerson Lane and the walkway possibility along said road. Rev. R. Sheldon, of

the Church located at the present in the Hamilton Terrace School but in the future, to be built at the corner of Plainfield and Mountain Avenue, questioned the plans for immediate walkways in the area.

6. The Board brought the matter to the Planning Board's attention and consulted with them regarding the building as to its architecture, as to its capabilities and size and received an affirmative answer regarding the use of the new building and its design and possibilities.

W H E R E A S the relief requested by the appellant can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and the Zoning Ordinance of the Township of Berkeley Heights for the following reasons:

~~The applicant is at present operating a retail gasoline business and a garage attached thereto and as a non-conforming use which existed prior to the enactment of the present Zoning Ordinance.~~

2. The station as it exists today is not in keeping with the area, is in bad repair and in general, in need of up-grading, which the applicant with the new plans and specifications presented to the Board as part of the exhibits plans to do and maintain in a manner very much in keeping with the neighborhood. The architect will be of the colonial type, the building design meets the planner's approval and all aspects of the application lend toward up-grading or improvement of the subject premises.

3. At the adjourned meeting with the applicant, his wife and his attorney, there was mutual agreement between the Board and himself as to the general aspect of the area for improvement.

4. A situation of unusual circumstance exists in that in order to improve the area and the subject premises in particular the applicant must needs appear before the Zoning Board of Adjustment for an exception to improve or alter a non-conforming building and/or use. The applicant is attempting to up-grade and improve and the Board feels that in this matter the applicant could continue the non-conforming use but for the sake of the Township and the public in general the improvements noted are all for the betterment.

NOW, THEREFORE, BE IT RESOLVED BY the Board of Adjustment of the Township of Berkeley Heights, in the County of Union and the State of New Jersey, in meeting assembled, that pursuant to the foregoing findings of fact and conclusions of law, the application be granted subject to the following terms and conditions:

1. The building shall be architecturally as per Exhibit 'B'

submitted with the application, namely, that plan known as proposed alteration and addition to Hilltop Service Station, Harry A. Maslow, AIA, and showing a colonial style, three garage bay building with three dormers on the roof of said building. The building to be of brick venier, being 73 feet in length by 35 feet in width.

2. The building shall be situate upon the subject premises in a manner as shown on the same Exhibit "B."

3. The existing pump island shall be moved in a southerly direction so as the final placement shall be not less than 20 feet from Emerson Lane right-of-way line and not less than 20 feet from the Plainfield Avenue right-of-way line.

4. The entire area northeast of the building shall be betuminus paved form the southeasterly property line, northwesterly to the Emerson property line, from Plainfield Avenue to the building proper.

5. Shrubbery shall be planted along the Emerson Lane side form the building proper southwesterly in line with the building to either the southwesterly property line or a fence the owner shall be shall put there. This shrubbery shall be of low spreading yew type and shall be done in accordance with the ordinance covering and governing fences at corner property or edge of driveways. It shall be up to the owners discretion as to the particular type of shrubbery other than the Board's specifications as to yew type, but at no time shall be shrubbery become a safety hazard for either pedestrian or car along Emerson Lane.

6. Hours of operation of the service station shall be from 8:00 a.m. until 7:00 p.m., prevailing time, and closed holidays, with the exception, that the owner may keep the repair section open until 9:00 p.m. for emergency reasons. Illumination lights of external nature shall be governed by the operating hours of the station, namely lights shall not be on later than 7:00 p.m. or as noted above, 9:00 p.m. for emergency reasons.

7. The applicant shall deed an amount of frontage along Plainfield Avenue necessary to continue the curb line of said avenue in a manner similar to that of adjacent property owners and shall also deed an amount of frontage along Emerson Lane necessary to continue the curbing line as existing in from of adjacent properties Emerson Lane.

8. There shall be no cars parked on that area of the premises between the building and the Emerson Lane property line.

9. Construction on the above proposed addition and

renovation of the subject service station, shall be commenced within six months of the date April 1, 1964 and shall be completed within one year from said date.

RESOLVED by motion made by Mr. Rubinand seconded by Mr. Daniels and carried 4 to 0, with the following roll call:

Those in favor: Messrs: Reese, Daniels, Rubin and Braun.

Those opposed: None.

Mr. Lees not haveing been present at the public hearing of this application did not vote.



Robert H. Braun, Secretary

RHB/edb

BOARD OF ADJUSTMENT

TOWNSHIP OF BERKELEY HEIGHTS

Case No. 4-99

RESOLUTION

WHEREAS, S & R AUTO CARE has applied to the Board of Adjustment of the Township of Berkeley Heights ~~for a use variance under N.J.S.A. 40:55D-70d, a bulk variance for lot coverage under N.J.S.A. 40:55D-70c, and site plan approval for a gasoline service station~~ which is located at 713 Plainfield Avenue on property designated as Lot 33 in Block 3102 on the Municipal Tax Map, which premises is located in the R-20 Zone, and

WHEREAS, the application was presented by attorney Charles I. Auffant, Esq.; architect and planner James Peter Kokkalis; and Scott W. Isley who is the owner of S & R Auto Care, and

WHEREAS, a number of adjoining and neighboring property owners appeared at the meetings on March 25, 1999, April 22, 1999, and May 13, 1999, and asked questions and presented testimony, and

WHEREAS, S & R Auto Service acquired the gasoline station business approximately two years ago, with the fee ownership being held by Robert Thompson, who leased the property to Getty Petroleum Marketing, Inc., and

~~WHEREAS S & R Auto Service repaved its parking lot and added paved surface in back of the service station, and~~

WHEREAS, the applicant was cited by the zoning officer for increasing lot coverage to 87.6% while the ordinance limits lot coverage to 25% in the R-20 Zone, and

WHEREAS, the Board of Adjustment takes judicial notice that the existing service station is a prior non-conforming use within the R-20 Zone, and

WHEREAS, the Board of Adjustment takes further judicial notice of the application which was made in December of 1963 by Robert Thompson, who was the property owner and operator of the service station, to expand his station, and

WHEREAS, that application was approved and a memorialization resolution was adopted which contained a number of conditions, and

WHEREAS, Mr. Isley testified that he was unaware of the variance which was granted for the site when he acquired the business and when he had the paved area expanded, and

WHEREAS, neighboring property owner Ms. Karen Damato noted that the site was small for a service station, and

WHEREAS, Scott Isley testified at the March 25, 1999 public hearing that he improved the site by removing a number of dumpsters of garbage from the property, including bottles and cans, replacing broken glass in the building, and painting the inside of the service station, and

WHEREAS, Ms. Isley added security lights, and
WHEREAS, the neighbors were in general agreement
that Mr. Isley had improved the appearance of the site, and
WHEREAS, some adjoining neighbors were concerned
with the drainage impact from the new pavement, and

WHEREAS, ~~Township~~ Engineer Vincent DeNave, p.e. in
a report to the Board of Adjustment dated March 24, 1999
stated in pertinent part:

"The drainage patterns do not
appear to have changed. The majority of
the drainage works its way towards
Plainfield Avenue and south to an inlet
on the southwest side of Plainfield."

AND WHEREAS, Mr. DeNave made recommendations with
respect to the drainage of the site, and

WHEREAS, the Board of Adjustment is guided by the
opinion of the Township Engineer with respect to drainage,
and

WHEREAS, at the March 25, 1999 meeting Mr. Isley
agreed not to keep unregistered vehicles on the site, but at
the May 13, 1999 meeting sought permission to keep a
personal unregistered vehicle at the station, and

~~WHEREAS, at the March 25, 1999 meeting neighbors~~
~~complained about the service station lights shining on their~~
~~properties, and~~

WHEREAS, neighbors were also concerned with access
from behind the service station onto Emerson Lane, a
residential street with substantially less traffic than
Plainfield Avenue, and

WHEREAS, prior to the meeting on April 22, 1999 the applicant installed a 20'x3' planter box in back of the building, blocking access from the rear of the service station to Emerson Lane, and

WHEREAS, the applicant had the exterior lights shielded in order to preclude the lights from shining on neighboring properties, and

WHEREAS, Mr. Isley agreed that the tires in back of the site would be kept in a rack and buffered from the adjoining properties and Plainfield Avenue, and

WHEREAS, there were complaints from neighbors about non-compliance with conditions in the 1964 resolution, and

WHEREAS, the applicants counsel, Charles I. Auffant, Esq. stated that the applicant would comply with the conditions in the prior resolution or alternatively seek modifications from the conditions, and

WHEREAS, the applicant requires a use variance under N.J.S.A. 40:55D-70d as it is expanding a business use within the R-20 residential zone where gasoline service stations are not permitted, and

WHEREAS, the applicant requires a bulk variance under N.J.S.A. 40:55D-70c in order to increase lot coverage to 87.6% while the maximum permitted in the R-20 Zone is 25%, and

WHEREAS, the Board of Adjustment finds that the service station can be better maintained with the

additional paved area rather than to keep the area with compacted dirt, which turns to mud in times of heavy rain, and

WHEREAS, based on the photographs which were presented to the Board, it finds that there is sufficient vegetation in the rear of the station to provide a buffer to the residential neighbors, and

WHEREAS, the paving will not cause any increase in the service station business, and

WHEREAS, the Board of Adjustment finds that the requested bulk variance for the excessive lot coverage and the use variance for the expansion of the paved area can be granted by advancing the following purpose of the Municipal Land Use Law under N.J.S.A. 40:55D-2i by promoting a desirable visual environment, and

WHEREAS, with respect to the bulk variance which can be granted under N.J.S.A. 40:55D-70c(2), the benefits from the requested deviation substantially outweigh any detriments, and

WHEREAS, the requested "c" and "d" variances can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zone ordinance of the Township of Berkeley Heights, and

WHEREAS, the Board of Adjustment notes that the conditions of the 1964 resolution are in full force and effect and the applicant is expected to comply with same or

~~alternatively~~ seek relief from the conditions of the ~~resolution.~~

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Berkeley Heights on this 13th day of May, 1999 that the application of S & R AUTO CARE for a use variance under N.J.S.A. 40:55D-70d, a bulk variance under N.J.S.A. 40:55D-70c, and site plan be approved in accordance with a plan titled: "Project: S & R AUTO REPAIR INC., 713 Plainfield Avenue, Berkeley Heights, New Jersey" prepared by James S. Peter Kokkalis dated February 1, 1999, subject, however, to the following conditions:

1. The applicant shall maintain the planter box which was noted in the factual findings in this resolution and shall continue to keep the exterior lights shielded so as to preclude lights from shining on neighboring properties.

2. A single unregistered vehicle owned by the gas station owner for his personal use and not for resale may be kept at the station. No other unregistered vehicles may be kept at the site.

3. The applicant shall return to the Board of Adjustment at its meeting on May 13, 1999 with a plan for the tires to be stored within a rack with vegetation around the rack (permanently maintained) to buffer the neighboring property owners and the general public from the view of the tires. The applicant shall also present a plan for the landscaping of the site adjoining Emerson Lane pursuant to

the 1964 resolution. The failure of the applicant to return to the Board of Adjustment on May 13, 1999 with the aforesaid plans shall negate the within approval unless the applicant is excused by the Board from reappearing on May 13, 1999 and the meeting is adjourned to another date.

4. With the exception of the aforementioned tires, all storage shall be indoors.

5. If the applicant has not complied with the Township Engineer's recommendation with respect to drainage, it shall do so. The recommendation is as follows:

"Mr. Isley pipes the rear gutters to a small stone pit, 4'x4', that should be installed at the rear landscaped area. This will compensate for any additional pavement."

The aforesaid shall be performed to the approval of the Township Engineer.

6. Except where inconsistent with the within variance, ~~all the conditions of the 1964 resolution are in full force and effect.~~ Conditions 6, 7 and 8 are reiterated herein.

6. ~~Hours of operation of the service station shall be from 8:00 a.m. until 7:00 p.m., prevailing time, and closed holidays, with the exception, that the owner may keep the repair section open until 9 p.m. for emergency reasons.~~ Illuminating lights of external nature shall be governed by the operating hours of the station, namely, said lights shall be not be on later than 7:00 p.m. or as noted, 9:00 p.m. for emergency reasons.

7. The applicant shall deed an amount of frontage along Plainfield Avenue necessary to continue the curb

line of said avenue in a manner similar to that of adjacent property owners and shall also deed an amount of frontage along Emerson Lane necessary to continue the curbing line as existing in front of adjacent properties on Emerson Lane. (The applicant is to provide proof that it has dedicated said property. In the event that proof is not forthcoming, a dedication shall be made).

8. There shall be no cars parked on that area of the premises between the building and the Emerson Lane property line.

7. A letter from the owner of the subject property permitting the present application for variances and site plan to be filed.


Roll Call Vote 4-0

Those in Favor: Messrs. Kent, Merlo, Ferrara and Mrs. Adar

Those Opposed: None

The foregoing is a true copy of a resolution adopted by the Board of Adjustment of the Township of Berkeley Heights at its meeting on May 13, 1999, as copied from the minutes of said meeting.

The within resolution memorializes a motion which was adopted by the Board of Adjustment of the Township of Berkeley Heights on April 22, 1999.


SARAH R. MUELLER, SECRETARY
BOARD OF ADJUSTMENT
TOWNSHIP OF BERKELEY HEIGHTS
STATE OF NEW JERSEY

BOARD OF ADJUSTMENT
TOWNSHIP OF BERKELEY HEIGHTS

Case No. 4-99

RESOLUTION

WHEREAS, S & R AUTO CARE has applied to the Board of Adjustment of the Township of Berkeley Heights for a ~~variance~~ variance under N.J.S.A. 40:55D-70d, a bulk variance for lot coverage under N.J.S.A. 40:55D-70c, and site plan approval for a gasoline service station which is located at 713 Plainfield Avenue on property designated as Lot 33 in Block 3102 on the Municipal Tax Map, which premises is located in the R-20 Zone, and

WHEREAS, said application was approved on April 22, 1999 and a memorialization resolution was adopted on May 13, 1999, and

WHEREAS, the aforesaid approval required the applicant to return to the May 13, 1999 Board of Adjustment meeting with the following information:

- A plan for a rack to enclose the tires with vegetation around the rack to buffer the neighboring property owners and the general public from the view of the tires.

- A plan for the landscaping of the site adjoining Emerson Lane pursuant to the 1964 resolution.

AND, WHEREAS, the applicant returned to the Board

of Adjustment at the May 13, 1999 meeting with the required information, and

WHEREAS, introduced into evidence were A-6A and 6B which showed the proposed location of the tire corral, which would also enclose the dumpster, and

WHEREAS, Exhibit A-7 is a two-page sketch of the corral, and

WHEREAS, prior to the May 13, 1999 meeting the applicant had installed 3 planter boxes, 3 ft. wide and 5 ft. long, and two large planters along the Emerson Lane side of the property, and planted flowers and shrubs within the planter boxes and planters, and

WHEREAS, neighboring property owner Ms. Karen Damato felt the planter boxes were attractive.

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Berkeley Heights on this 27th day of May, 1999 that S & R Auto Care has satisfied the conditions in the May 13, 1999 memorialization resolution with respect to the tire corral and the landscaping of the site adjoining Emerson Lane, which required it to return to the Board of Adjustment; subject; however, to the following conditions:

1. The conditions in the May 13, 1999 memorialization resolution.

2. The tire corral shall be constructed as shown on the Exhibits. The corral shall be 5 ft. high with two

gates which shall be kept closed except when access is required. Tires within the corral shall not be piled more than 5 ft. high.

3. The tire corral shall be constructed within 90 days of the adoption of the within resolution.

4. The three planter boxes and the two planters shall be permanently maintained. The vegetation shall be watered. Dead or diseased flowers and shrubs shall be replaced with comparable flowers and shrubs.

5. The applicant shall submit a new plan to show the clearance from the service station to Emerson Lane. Mrs. Damato testified that the clearance appeared to be 12 ft. to 14 ft. rather than the 10 ft. shown on the plan.


Roll Call Vote 7-0

Those in Favor: Messrs. Kent, Merlo, Miller, Kriegsman, Ferrara and Mrs. ell
and Mrs. Adar

Those Opposed: None

The foregoing is a true copy of a resolution adopted by the Board of Adjustment of the Township of Berkeley Heights at its meeting on May 27, 1999, as copied from the minutes of said meeting.

The within resolution memorializes a motion which was adopted by the Board of Adjustment of the Township of Berkeley Heights on May 27, 1999.


SARAH R. MUELLER, SECRETARY
BOARD OF ADJUSTMENT
TOWNSHIP OF BERKELEY HEIGHTS
STATE OF NEW JERSEY

*Abandonment of Prior Nonconforming
vehicle repair business*

BOARD OF ADJUSTMENT
TOWNSHIP OF BERKELEY HEIGHTS

Case No. 7-11

RESOLUTION

WHEREAS, ANGAD FUEL, LLC has applied to the Board of Adjustment of the Township of Berkeley Heights for a determination under N.J.S.A. 40:55D-68 ~~that the repair of vehicles is a valid prior nonconforming use at the gasoline station~~ which is located at 713 Plainfield Avenue on property designated as Lot 33, Block 3102 on the Berkeley Heights Tax Map, which premises is located in the R-20A Zone, and

WHEREAS, the R-20~~X~~ Zone is a residential zone in which commercial uses including gasoline stations are not permitted uses, and

WHEREAS, information on the gasoline station was presented by former Zoning Officer Ray Sullivan, and

WHEREAS, the application was presented by attorney Robert Sullivan, Esq., on behalf of the applicant, Mukhtiar Singh, the owner of Angad Fuel, LLC, a subtenant of the property, and Frances Thompson, the owner of the subject property, at the June 23, 2011 Board of Adjustment meeting, and

WHEREAS, the Board, after considering the evidence presented by the applicant, Ray Sullivan, and neighboring property owners, has made the following factual findings:

A. The Subject Property.

1. The subject property is located at the intersection of Plainfield Avenue and Emerson Lane.

2. Located on the site is a service station with a vacant repair area, ~~three~~ ^{two} gasoline pumps, a deteriorating pavement, an inoperable telephone booth, empty planters, and overgrown vegetation in back of the property.

3. A table in the drawing submitted with the application shows the following nonconformities:

<u>ITEM</u>	<u>REQUIRED</u>	<u>EXISTING</u>
Min. Lot Area	20,000	15,844
Lot Depth	150'	136' (Average)
Front Yard	50'	34.63'
Rear Yard	40'	31'
Max. Lot Coverage	25%	87.6%
Building Coverage	15%	16.1%
Other Coverage	10%	71.5%

4. The drawing shows the property has about 122 feet of frontage on Plainfield Avenue and about 100 feet of frontage along Emerson Lane.

5. The site is surrounded by single family residences in all directions to a distance of hundreds of feet.

B. Prior Nonconforming Status.

6. N.J.S.A. 40:55D-68 states in pertinent part:

“Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”

7. Prior nonconforming uses are disfavored.

“Because nonconforming uses are inconsistent with the objectives of uniform zoning, the courts have required that consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice.” Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 315 (1980).

See also Berkeley Square v. Zoning Bd., 410 N.J. Super 255, 266 (App. Div. 2009).

8. The Berkeley Heights Zoning Ordinance provides:

“Section 8.i.2 Abandonment

It shall be prima facie evidence that a nonconforming use has been abandoned when there has been a cessation of the exercise of such nonconforming use for a period of one (1) year commencing from the date of such cessation; and any subsequent use of such land shall conform to the regulations specified by this Ordinance for the district in which such land is located.”

9. A zoning ordinance cannot establish a specific period of nonuse which constitutes abandonment of a prior nonconforming use. State v. Accera, 36 N.J. Super 420 (App. Div. 1955), S & S v. Zoning Bd. for Stratford, 373 N.J. Super 603, 622 (App. Div. 2004). The ordinance may be considered a *factor* in determining abandonment. Berkeley Square, supra, 410 N.J. Super at p. 268. The Berkeley Heights ordinance considers the one year nonuse as *prima facie evidence* of abandonment, which is rebuttable, rather than a definitive determination of abandonment.

C. The Prior Nonconforming Use.

10. Robert Thompson acquired the subject property in 1957.

~~In 1963 Robert Thompson applied in case 63-53 to this Board for relatively minor modifications to the gasoline station. The Board in its memorialization resolution determined:~~

~~"The applicant is at present operating a retail gasoline business and garage attached thereto as a nonconforming use which existed prior to the enactment of the present Zoning Ordinance."~~

12. On March 19, 1970 Robert H. Thompson and Frances Thompson, his wife, leased the subject property to Getty Oil Company for a 10 year period from May 1, 1970 to April 30, 1980. The following was typed into numbered paragraph 4 of the lease and initialed by the parties:

"Providing any such use of the premises shall, in no way, affect an abandonment of the service station use or ffect (*sic*) the right to operate."

The Lease was marked A-3 for identification.

13. Robert Thompson died in 1974. Frances Thompson acquired the property upon her husband's demise.

14. No lease or extension was provided to the Board for the period from April 30, 1980 through April 30, 2007.

15. On December 6, 2006 the Lease was extended from May 2007 to April 30, 2012 under the same terms and conditions with the exception of the monthly rent. The extension was marked A-4.

16. S & R Auto Care applied to this Board in 1999 in Case 4-99 to legitimize the additional paving and increased nonconforming lot coverage that had already taken place on the property.

17. The application was bifurcated. The variances were approved on April 22, 1999 and a memorialization resolution was adopted on May 13, 1999. The resolution noted:

"WHEREAS, S & R Auto Service acquired the gasoline station business approximately two years ago, with the fee ownership being held by Robert Thompson, who leased the property to Getty Petroleum Marketing, Inc., and

* * * * *

WHEREAS, the Board of Adjustment takes judicial notice that the existing service station is a prior nonconforming use within the R-20 Zone, and"

18. Condition 6 in the May 13, 1999 resolution required compliance with all conditions in the 1964 resolution, where not inconsistent with the 1999 approval. Condition 5 in the 1964 approval required:

"5. Shrubbery shall be planted along the Emerson Lane side form *[sic]* the building proper southwesterly in line with the building to either the southwesterly property line or a fence the owner states he shall put there. This shrubbery shall be of low spreading yew type and shall be done in accordance with the ordinance covering and governing fences at corner property or edge of driveways. It shall be up to the owners discretion as to the particular type of shrubbery other than the Board's specifications as to yew type, but at no time shall be shrubbery become a safety hazard for either pedestrian or car along Emerson Lane."

19. The site plan was approved and a resolution was adopted on May 27, 1999. That resolution noted in pertinent part:

"WHEREAS, the aforesaid approval required the applicant to return to the May 13, 1999 Board of Adjustment meeting with the following information:

- A plan for a rack to enclose the tires with vegetation around the rack to buffer the neighboring property owners and the general public from the view of the tires.
- A plan for the landscaping of the site adjoining Emerson Lane pursuant to the 1964 resolution.

AND, WHEREAS, the applicant returned to the Board of Adjustment at the May 13, 1999 meeting with the required information, and

* * *

WHEREAS, prior to the May 13, 1999 meeting the applicant had installed 3 planter boxes, 3 ft. wide and 5 ft. long, and two large planters along the Emerson Lane side of the property, and planted flowers and shrubs within the planter boxes and planters, and

* * *

* * * subject; however, to the following conditions:

1. The conditions in the May 13, 1999 memorialization resolution.

* * *

4. The three planter boxes and the two planters shall be permanently maintained. The vegetation shall be watered. Dead or diseased flowers and shrubs shall be replaced with comparable flowers and shrubs."

D. Abandonment of Prior Nonconforming

20. Katherine Williams moved into her home at 695 Plainfield Avenue, Berkeley Heights, across Emerson Lane from the gasoline station, in September of 2005. She testified that the station sold gasoline, but has not repaired vehicles since she moved into her home. Other neighbors made similar statements. The Board finds Ms. Williams to be a highly credible witness, and finds that the service of vehicles had terminated by September 2005.

21. Former Zoning Officer Ray Sullivan in a letter dated August 10, 2007 ruled that auto repairs were no longer a permitted use. That letter was marked A-1. On January 8, 2010 Mr. Sullivan reiterated his ruling that the repair of vehicles had been abandoned. That letter was marked A-2.

22. Ray Sullivan left the Zoning Officer's position in 2010. At that time the gas station was dormant and no activity took place. There had been no sale of gasoline products for almost 365 days. The paving was deteriorating. There was an old inoperable phone booth on the property. Trucks parked on the property and sold furniture and other items, contrary to the zoning ordinance. There were outstanding construction permits and violations that had not been satisfied.

23. The present application has been filed by Mukhtiar Singh, a principal in the applicant corporation. Since May of 2009 he has leased the premises from Getty Realty. Mr. Singh sought a ruling from this Board that the repair of vehicles was a valid prior nonconforming use. The Board analyzed the application under N.J.S.A. 40:55D-68, but would have come to the same conclusion if the application were considered as an appeal from the Zoning Officer's determination under N.J.S.A. 40:55D-70a. The only difference is that the appeal would have been barred by the 20 day appeal period under N.J.S.A. 40:55D-72, as Mr. Sullivan's June 8, 2010 letter to Mr. Singh (possibly the applicant's brother) with a copy to Attorney Sullivan, is dated January 8, 2010 while the present application was filed on April 21, 2011. Mr. Singh testified that the lifts and compressor were in working condition.

AND, WHEREAS, based on the foregoing, this Board concludes:

- A. Robert Thompson purchased the subject property in 1957.
- B. This Board ruled in 1964 in an application filed by Robert Thompson that the sale of gasoline and the servicing of vehicles were prior nonconforming uses on the subject property, which was then in the R-20 Zone.

C. In 1970 Robert Thompson and Frances Thompson leased the subject property to Getty Oil Company. The lease provided that Getty would not abandon the service station use.

D. Robert Thompson died in 1974, and Frances Thompson assumed ownership of the property.

E. As a major petroleum company, Getty had the ability to continue the prior nonconforming repair use. Getty failed to perpetuate this use.

F. The repair of vehicles ceased on September of 2005.

G. Periodically the gasoline station has been closed, including most of 2009.

H. The service area in the gasoline station has been vacant since 2005. There have been outstanding construction permits and violations which have not been cured. The paving is deteriorating. There is an inoperable phone booth on the site. There is scrub growth behind the service station. Furniture has been sold from the back of trucks, contrary to the zoning requirements. There is no landscaping which was required by this Board. The planter boxes are fallow. There have been outstanding construction permits and violations.

I. Mr. Singh testified that the lifts and compressors are in working order. The Board finds that the lifts and compressors have not been removed as it would be more expensive to remove these items than to leave them in place.

J. Former Zoning Officer Ray Sullivan sent letters on August 10, 2007 that the vehicle repair business has been abandoned. That ruling has

not been challenged until the filing of the present application on April 21, 2011, or some three years and eight months later.

K. Abandonment of a prior nonconforming use consists of the discontinuance of the use and the owner's intent regarding abandonment. Berkeley Square, supra, 410 N.J. Super at pp. 268-269. In the instant matter, the repair of vehicles has not taken place on the subject property for six years, the site is deteriorating, the Zoning Officer's August 10, 2007 ruling on abandonment has not been appealed for three years and eight months, and the sale of furniture from trucks and Section 8.1.2 of the Zoning Ordinance all show abandonment.

L. The Court in Berkeley Square, supra, 410 N.J. Super at p. 269

noted the burden of proof with respect to the issue of abandonment:

"[8,9] We adhere to the rule, expressed in *S & S*, that the property owner has the ultimate burden with respect to the issue of abandonment as well as the existence of a nonconforming use. However, we emphasize that while the applicant has the ultimate burden of proof the objector must initially come forward with sufficient evidence of temporal or physical abandonment to require the property owner to sustain its ultimate burden on the same issue. Stated differently, there is a qualitative difference in terms of the nature of the proofs necessary to demonstrate the temporal or physical aspects of the abandonment claim and the subject of intent. As a result, while leaving the overall burden of abandonment on the owner, we have endeavored to harmonize the constitutional protections involved with the statutory policy embodied in *N.J.S.A. 40:55D-68*."

Clearly, the applicant has not met this burden. There is culpability on the part of Getty, but that does not obviate the abandonment.

M. Attorney Robert Sullivan contends that the sale of gasoline and the servicing of vehicles are inseparable and one cannot be abandoned while

the other remains. This Board notes that present Zoning Officer Tom Bocko has permitted the sale of gasoline at the site as a prior nonconforming use, hence, the Board does not have to rule on this use. The Board notes with approval the comment of Harvey Moskowitz and Carl Lindblum in their book The Latest Illustrated Book of Development Definitions, new expanded edition published by the Center of Urban Policy Research at Rutgers University in defining automobile service station:

“Comment: The name ‘automobile service station’ is probably a misnomer as more and more stations convert to fuel sales only and no longer undertake vehicle repairs.”

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Berkeley Heights on this 8th day of September 2011 that the application of ANGAD FUEL, LLC for an interpretation under N.J.S.A. 40:55D-68 that the service of vehicle at the subject property as a prior nonconforming use is denied. The Board finds that the nonconforming vehicle repair business has been abandoned.

Roll Call Vote : 7 - 0

Those in Favor: Mr. Bussiculo, Mr. Miller, Mr. Minkoff, Mr. Siburn,
Mr. Smith, Mr. Delia, Ms. Granholm

Those Opposed: None

The foregoing is a true copy of a resolution adopted by the Board of Adjustment of the Township of Berkeley Heights at its meeting on September 8, 2011 as copied from the minutes of said meeting.

The within resolution memorializes a motion which was adopted by the Board of Adjustment of the Township of Berkeley Heights on June 23, 2011.



CONNIE VALENTI, SECRETARY
BOARD OF ADJUSTMENT
TOWNSHIP OF BERKELEY HEIGHTS
STATE OF NEW JERSEY

4

*Denial of Request for
Increased Hours of
Operation.*

BOARD OF ADJUSTMENT

TOWNSHIP OF BERKELEY HEIGHTS

Case No. 7-11

RESOLUTION

WHEREAS, ANGAD FUEL, LLC has applied to the Board of Adjustment of the Township of Berkeley Heights for permission to ~~increase the hours of operation for the gasoline station~~ which is located at 713 Plainfield Avenue on property designated as Lot 33, Block 3102 on the Berkeley Heights Tax Map, which premises is located in the R-20A Zone, and

WHEREAS, the R-20~~X~~ Zone is a residential zone in which commercial uses including gasoline stations are not permitted uses, and

WHEREAS, information on the gasoline station was presented by former Zoning Officer Ray Sullivan, and

WHEREAS, the application was presented by attorney Robert Sullivan, Esq., on behalf of the applicant, Mukhtiar Singh, the owner of Angad Fuel, LLC, a subtenant of the property, and Frances Thompson, the owner of the subject property, at the June 23, 2011 Board of Adjustment meeting, and

WHEREAS, the Board, after considering the evidence presented by the applicant, Ray Sullivan, and neighboring property owners, has made the following factual findings:

1. The site is surrounded by single family residences in all directions to a distance of hundreds of feet.
2. There are no commercial or nonresidential uses in the neighborhood.
3. In 1963 Robert Thompson applied in case 63-53 to this Board for relatively minor modifications to the gasoline station. The Board in its memorialization resolution determined:

"1. The applicant is at present operating a retail gasoline business and garage attached thereto as a nonconforming use which existed prior to the enactment of the present Zoning Ordinance."

4. Condition 6 in the resolution provided:

"Hours of operation of the service station shall be from 8:00 a.m. until 7:00 p.m., prevailing time, and closed holidays, with the exception that the owner may keep the repair section open until 9:00 p.m. for emergency reasons. Illumination lights of external nature shall be governed by the operating hours of the station, namely lights shall not be on later than 7:00 p.m or as noted above, 9:00 p.m. for emergency reasons."

5. That condition was carried over in case number 4-99 for S & R Auto Care in the variance resolution which was adopted on May 13, 1999.

6. Angad Fuel, LLC seeks to increase its hours of operation from 8:00 AM to 7:00 PM to 6:00 AM to 8:00 PM. The sole rationale provided is Mr. Singh's problem in making a living.

7. Prior nonconforming uses are disfavored.

"Because nonconforming uses are inconsistent with the objectives of uniform zoning, the courts have required that consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice." Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 315 (1980).

See also Berkeley Square v. Zoning Bd., 410 N.J. Super 255, 266 (App. Div. 2009).

8. The service station is incongruous with the attractive residential neighborhood surrounding it. The extended hours would increase traffic on residential streets and generate noise during the additional hours.

9. The criterion for the modification to a land use condition is changed circumstances or other good cause. Cohen v. Fair Lawn, 85 N.J. Super. 234, 237 (App. Div. 1964), Allied Realty v. Upper Saddle River, 221 N.J. Super 407, 413-415 (App. Div. 1987) cert. den. 110 N.J. 304 (1988).

10. The Board takes *quasi* judicial notice that since the resolution for Robert Thompson with the limitation on the hours of operation was adopted in 1964, there have been a number of attractive new homes constructed in the neighborhood. ~~The requested increase in the hours of operation is not supported by either changed circumstances or other good cause.~~

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Township of Berkeley Heights on this 8th day of September 2010 that the application of ANGAD FUEL, LLC for ~~increased hours of operation~~ be denied.

Roll Call Vote: 6 - 1

Those in Favor: Mr. Bussiculo, Mr. Miller, Mr. Siburn, Mr. Smith,
Mr. Delia, Ms. Granholm

Those Opposed: Mr. Minkoff

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