The City of New York

DEPARTMENT OF BUILDINGS

EXECUTIVE OFFICES
60 HUDSON STREET, NEW YORK, NY 10013

CHARLES M. SMITH, Jr., R.A., Commissioner

CORNELIUS F. DENNIS, P.E.
Deputy Commissioner
312-8120

DATE: August 12, 1988

TO: Borough Superintendents

FROM: Deputy Commissioner Cornelius F. Dennis, P.E.

SUBJECT: Denial of a Board of Standards & Appeals Appeal
Accessory Use
Automotive Service Station
Retail Store

Enclosed is a copy of a recent finding by the Board of Standards & Appeals which will help us in applying the New York City Zoning Resolution.

cc: Commissioner Smith
Deputy Commissioer O'Brien
General Counsel Foy
Assistant Commissioner Berger
Assistant Commissioner Pocci
Executive Engineer Polsky
Dir. of Intergovernmental Relations Norman
Administrative Chief Inspector McLoughlin
Chairman Bennett-BSA
File

REGULAR MEETING

TUESDAY MORNING, AUGUST 9, 1988, AT 10 A.M.

Present: Chairman Bennett, Vice-Chairperson Bockman, Commissioner Irrera, Commissioner Tamm, Commissioner Lawrie, and Commissioner O'Keefe.

The minutes of the regular meetings of the Board held on Tuesday morning and afternoon, July 12, 1988, were approved as printed in the Bulletin of July 21, 1988, Volume 73, Number 29.

748-85-A

APPLICANT—The City of New York Board of Standards and Appeals.

OWNER OF PREMISES—Jessica Lehecka Realty Corporation.

SUBJECT—For rehearing, upon remand from the New York State Court of Appeals, to consider whether the applicant's proposed retail store qualifies as an "accessory use" as defined in Z.R. §12-10—appeal for interpretation of Z.R. §12-10, whether a retail store is an "accessory use" to an auto service station; and appeal for modification of Section 27-4081(b)2 of the Administrative Code for self-service motor fuel dispensing; previously denied.

PREMISES AFFECTED—35-04 Bell Boulevard, southwest corner of 35th Avenue, Block 6169, Lot 6, Bayside, Borough of Queens.

APPEARANCES—

For Applicant: James E. Vassalotti and Geraldine M. Boylan.

For Administration: James V. Derosa, Department of Buildings.

ACTION OF BOARD—Application reopened upon remand from the New York State Court of Appeals, to consider whether the applicant's proposed retail store qualifies as an "accessory use" as defined in Z.R. §12-10.

THE VOTE TO ADOPT RESOLUTION—

Affirmative: Chairman Bennett, Vice-Chairperson Bockman, Commissioner Irrera, Commissioner Lawrie and Commissioner O'Keefe 5

Negative: 0

Absent: Commissioner Tamm 1

THE RESOLUTION—

WHEREAS, prior to 1961, there were over 1,000 previously existing automotive service stations in all districts, many permitted by the Board as "use exceptions" pursuant to Section 7 of the pre-1961 Zoning Resolution; and

WHEREAS, the 1961 Zoning Resolution (Z.R.) permitted automotive service stations as-of-right as Use Group 16 uses in commercial C8 and manufacturing districts and with special permits in C2, C4, C6 and C7 districts; and

WHEREAS, Z.R. §73-21 authorizes the Board to grant a special permit for an automotive service station in a C2, C4, C6 or C7 district whose longer dimension is 375' or more, provided that the site is a certain minimum size and other findings geared toward minimizing traffic congestion and protecting adjoining residential zoning lots can be made; and

WHEREAS, the premises underlying the instant appeal consists of a 98' × 100' site fronting on 35th Avenue and Bell Boulevard, Borough of Queens, located in a residential R-4 zoning district with a C2-2 commercial overlay, immediately adjacent to an R-2 zoning district; and

WHEREAS, the residential R-2 area immediately adjacent to the site is developed in a conforming manner; and

WHEREAS, in 1956 when the district was zoned for retail use, the Board granted a use district exception under Section 7 of the pre-1961 Zoning Resolution to permit the use of the site as an automobile service station; and

WHEREAS, the Board in 1971 and 1981 granted ten (10) year extensions of terms to permit continuation of the automotive service station through 1991 and conditioned such approval on traffic congestion being minimized at the site; and

WHEREAS, the existing site contains two (2) gasoline service pumps; and

WHEREAS, the owner of the site applied to the Department of Buildings to construct a new building on the site under N.B. Application #669/85; and

WHEREAS, the application proposes the construction of four self-service gasoline pumps capable of servicing eight (8) cars at anytime, a 1,039 square foot retail store, and parking for three cars; and

WHEREAS, the Department of Buildings objected, in relevant part, to the location of the proposed retail store on the same zoning lot with an automotive service station, on the grounds that it is contrary to Z.R. §12-10; and

WHEREAS, the Board affirmed the Buildings Department under BSA Resolution Cal. No. 748-85-A, dated February 4, 1986, and determined that the plain language of the Zoning Resolution's §12-10 definition of automotive service station does not permit as-of-right the operation of a convenience store as an accessory use to an automotive service station; and

WHEREAS, under Cal. No. 748-85-A, the Board determined that as-of-right permitted accessory uses at service stations include only those specifically enumerated in the Z.R. §12-10 definition of the term "automotive service station," as well as other automobile related uses; and

WHEREAS, in *Matter of Exxon v. Board of Standards and Appeals*, 70 NY2d 614 (1988), the court affirmed the reversal of the Board's decision and remanded the matter to the Board for a factual determination, under the Zoning Resolution's general definition of "accessory use," whether a convenience store, as accessory to a service station, "[i]s a use which is clearly incidental to, and customarily found in connection with, such principal use"; and

WHEREAS, Z.R. §12-10 defines an accessory use as follows:

a. Is a *use* conducted on the same *zoning lot* as the principal *use* to which it is related (whether located within the same or an *accessory building or other structure*, or an *accessory use* of land),...

b. Is a *use* which is clearly incidental to, and customarily found in connection with, such principal *use*; and

c. Is either in the same ownership as such principal *use*, or is operated and maintained as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers or vistors of the principal use [;]

and

WHEREAS, Z.R. §12-10 defines "automotive service station" as:

... a *building* or other structure or a tract of land used exclusively for the storage and sale of gasoline or other motor fuels and for any *uses accessory* thereto.

The sale of lubricants, accessories, or supplies, the lubrication of motor vehicles, the minor adjustment or repair of motor vehicles with hand tools only, or the occasional washing of motor vehicles are permitted *accessory uses*.

A *public parking lot* or *public parking garage* is not a permitted accessory use; and

WHEREAS, on remand, Exxon presented evidence as to the changing nature of automotive service stations across the country and submitted market information based on the retail gasoline outlets of major petroleum companies; and

WHEREAS, there was evidence that a major portion of funds devoted by major oil companies to renovations and new construction are being used to build new gas stations with convenience stores as part of a marketing program developed by them; and

WHEREAS, market analysis evidence presented, on behalf of the appellant, showed that the total number of retail gasoline service stations *without* convenience foods throughout the country far exceeded the number with such facilities; and

WHEREAS, there was additional evidence that while the combination of gasoline stations and retail stores reflects a

growing trend, nationally and statewide, the combination of uses is not commonplace; and

WHEREAS, while further evidence demonstrated that combination gasoline stations and convenience stores yielded significantly higher monthly volumes "permitting small businessmen to operate gasoline outlets in order to offset declining motor fuel profit margins with more profitable convenient store sales," and, additionally, according to the New York State Petroleum Council, "in New York State, virtually all the major oil companies have developed programs to include convenience stores at their gasoline stations to provide dealers with supplemental revenue to offset the seasonality of gasoline sales;" nevertheless, these considerations are profit motivated and they do not support an interpretation that convenience stores are clearly incidental to and customarily found in connection with automotive service stations; and

WHEREAS, in examining this site pursuant to the Court's remand for a factual determination as to whether a convenience store is an accessory use to an automotive service station under the general definition of accessory uses, the Board considered all of the evidence in the record, the market information submitted by Exxon, and such factors as the size of the subject lot, the nature of the primary use, permitted uses on adjacent lots, and the potential detriment of this use to the neighborhood; and

WHEREAS, the Board finds that a retail convenience store is inherently different from and wholly unrelated to the sale of gasoline; and

WHEREAS, the term "incidental" when used to define an accessory use must conceptually include a reasonable relationship with the primary use; and

WHEREAS, the fact that a proposed use is subordinate in size or revenues to the primary use does not support a determination by the Board that a retail store is accessory to an automotive service station; and

WHEREAS, permitting a use as incidental which is not attendant or concomitant would permit any use as accessory no matter how unrelated to the primary use; and

WHEREAS, were the Board to interpret the ordinance as permitting a convenience store as an as-of-right accessory use to an automotive service station such use could be added despite its lack of compatibility with the surrounding area and despite its impact on the conforming development of immediately adjacent property; and

WHEREAS, therefore, a determination that service stations can, as-of-right, add convenience stores would undercut appropriate land use planning controls and procedures; and

WHEREAS, furthermore, automobiles parked either on the lot or at the dispensers, while the drivers patronize the convenience store or wait to pay for their gasoline, has the potential to create hazardous and congested traffic conditions especially on small service station lots such as the instant location; and

WHEREAS the instant site is small and the addition of a convenience store presents the potential for impairing circulation on this site leading to congestion or blockage by cars parking on the site; and

WHEREAS, the Board has determined that a retail store as proposed on this site is not an accessory use to an automotive service station under Z.R. §12-10; and

WHEREAS, the economic data submitted into the record regarding the need of such retail stores to sustain the economic viability of gasoline stations addresses business related needs; it does not address land use concerns and, therefore, is irrelevant; and

WHEREAS, finally the fact that certain service stations inadvertently may have been permitted to add convenience stores, in the absence of any objection issued by the Department of Buildings, should not estop the Board from presently adhering to a legally correct interpretation and correcting any prior erroneous interpretation.

Resolved, that upon remand by the New York Court of Appeals, the Board determines that a convenience store on this site is not an accessory use to an automotive service station under the general definition of accessory uses contained in Z.R. §12-10.

Adopted by the Board of Standards and Appeals, August 9, 1988.