

RESOLUTION #2019-004

**RESOLUTION OF THE BOARD OF ADJUSTMENT
OF THE BOROUGH OF HAWTHORNE
(the "BOARD")**

In the matter of:

**Vish Dev Star, LLC (the "Applicant")
415 Wagaraw Road;
20 Lincoln Ave.;
24 Lincoln Ave.;
Block 19, Lots 5, 17, 18, 19, 20 & 21
Hawthorne, New Jersey (the "Property" or the "Premises")**

WHEREAS, Applicant has submitted a certain application to the Board dated February 26, 2019 for Use Variance, Bulk Variance, Waivers and Preliminary and Final Major Site Plan Approval (the "Application"); and

WHEREAS, Applicant appeared before the Board on April 15, 2019 and June 17, 2019; and

WHEREAS, the Board concludes that the requisite legal public notice was provided by Applicant; and

WHEREAS, the Board further concludes that it has jurisdiction to consider the application; and

WHEREAS, Applicant submitted the following in support of its application:

1. Borough of Hawthorne Zoning Board of Adjustment Application for Variance, dated February 26, 2019;
2. Borough of Hawthorne Application For Site Plan Review and Development Plan, dated February 26, 2019;
3. Site Plan (7 sheets) entitled, "Preliminary Site Plan for Vish Dev Star, LLC, Lot 17, Block 19 – 26 Lincoln Ave., Lot 18, Block 19 – 30 Lincoln Ave., Lots 5, 19,

20 and 21, Block 19 – 415 Wagaraw Road, Borough of Hawthorne, N.J., County of Passaic,” prepared by Rigg Associates, P.A., dated February 4, 2019, revised May 31, 2019 and consisting of the following sheet:

<u>Sheet No.</u>	<u>Description</u>
1 of 7	Area Map
2 of 7	Demolition Plan
3 of 7	Site Layout
4 of 7	Grading
5 of 7	Landscape & Lighting Plan
6 of 7	Soil Erosion & Sediment Control Plan
7 of 7	Details;

4. Topographic Survey (1 sheet) entitled, “Topographic Survey, Prepared For Vish Dev Star, LLC, Borough of Hawthorne, N.J., County of Passaic,” prepared by Rigg Associates, P.A., dated June 6, 2018, revised December 26, 2018;

5. Architectural Plan (4 sheets) entitled “Proposed Store For: Vish Dev Star, LLC, Lincoln and Wagaraw, Hawthorne, N.J.” prepared by Edward A. Easse, Architect, Planner, dated June 21, 2018, last revised May 8, 2019, and consisting of the following sheets:

<u>Sheet No.</u>	<u>Description</u>
A-01	Proposed Front and Lincoln Avenue Elevations
A-02	Proposed Rear and Left Side Elevation
A-03	Proposed Floor Plan
B-04	Proposed Canopy Plan and Elevation;

6. Drainage Report prepared by Rigg Associates, P.A., dated February 14, 2014;

7. Traffic Assessment Report prepared by Sam Schwartz Transportation Consultants, dated February 21, 2019 and response to review letter dated May 31, 2019;

8. Borough of Hawthorne Checklist for Required Submissions to the Zoning Board of Adjustment, dated February 26, 2019;

9. Letter of Response from Bruce D. Rigg, P.E., P.L.S. to Boswell Engineering, dated June 6, 2019;

10. Letter of Response from Bruce D. Rigg, P.E., P.L.S. to County of Passaic Department of Planning and Economic Development, dated June 6, 2019; and

WHEREAS, Applicant has made application to the Board for permission to relocate and expand an existing convenience store and expand a fuel dispensing use by increasing the number of pump islands, along with an expanded overhead canopy; and

WHEREAS, the Applicant proposes the following improvements:

1. A new gasoline service station with six (6) pump islands;
2. Kiosk;
3. Canopy structure (3,119 s.f.);
4. One (1) story retail building (4,148 s.f.);
5. Parking lot improvements;
6. Fuel storage tanks;
7. Drainage improvements;
8. Site lighting;
9. Landscaping; and
10. Refuse area; and

WHEREAS, the Applicant has requested the following variances associated with the retail use:

1. Minimum Parking Space Area: Section 540-132B required a minimum parking space area of 200 s.f. (10' x 20')

The proposed parking space area is 162 s.f. (9' x 18').

2. Maximum Permitted Sign Height: Section 540-137A permits a maximum sign height of two (2') feet.

The proposed building mounted sign is six (6') feet in height; and

WHEREAS, the Applicant has requested the following variances associated with the gasoline service station:

1. Use Variance: Section 540-103 does not include gasoline service stations as a permitted use in the B-1 Zone.

The Applicant proposes changes and improvements to the existing non-conforming use.

2. Gasoline Station Permitted Locations: Section 540-151 does not permit the erection or alteration of a gasoline station in the B-1 Zone.

The Applicant proposes to improve an existing gasoline station in the B-1 Zone.

3. Maximum Permitted Sign Area: Section 540-139C(4) permits a maximum permitted sign area of 30 s.f. per side or 60 s.f. in aggregate area if both sides present the same sign information.

The proposed free-standing sign exceeds an area of 30 s.f. per side. The Applicant proposes a three (3) sided sign with areas of 71.70 s.f., 50.86 s.f. and 50.86 s.f.

4. Minimum Front Yard Setback, Canopy (Building): The canopy meets the definition of a building. Section 540-152D(1) (gas stations) states that buildings should have a minimum front yard setback of 45 feet.

The canopy is proposed to be setback 21 feet from the Wagaraw Road right-of-way.

5. Maximum Building Height: Section 540-152E permits a maximum building height of one story/15 feet.

The Applicant proposes a canopy height of 17.6 feet and a building height of 21.5 feet. It should be noted that the existing canopy height is 18.0 feet.

6. Maximum Building Ratio: Section 540-152F permits a maximum building ratio of 5%.

The Applicant has requested a variance for the canopy which has a ratio of 9.5%. It should be noted that ratio for the retail store is 12.6%. The combined building ratio for the site is 22.1%.

7. Minimum Distance to Any Public Playground or Athletic Field: Section 540-152I(6) requires a minimum radius of 1,000 feet, measured directly from the property line, between a gasoline station and any public playground or athletic field.

The Applicant has indicated that the property is located approximately 60 feet from an existing gasoline filling station.

8. Minimum Distance to Any Existing Motor Vehicle Service Station or Gasoline Filling Station: Section 540-152I(7) requires a minimum radius of 1,000 feet, measured directly from the property line, between a gasoline station and any motor vehicle service station or gasoline filling station.

The Applicant has indicated that the property is located approximately 60 feet from an existing gasoline filling station.

9. Entrance and Exit Driveway Widths: Section 540-153.A requires entrance and exit driveways to have unrestricted widths of not less than 15 feet nor more than 24 feet.

Existing and proposed driveway widths along Wagaraw Road exceed 24 feet. The Applicant proposes driveway widths of 32 and 41 feet.

10. Minimum Distance of an Underground Fuel Tank to Any Lot Line Other Than a Street Line: Section 540-153C requires a minimum distance of 25 feet from an underground fuel tank to any lot line other than a street side.

The Applicant proposes distances of eight (8') feet and 20 feet between underground fuel tanks and lot lines.

11. Minimum Side Yard, Retail Building: Section 540-152H (gas stations) requires a minimum side yard setback of 20 feet to be provided. It should be noted that the required side yard setback as per the B-1 Zoning Requirements is 10 feet (one side) and 15 (combined).

The retail building is proposed to be setback 10 feet from the north property line.

WHEREAS, the Applicant is requesting the following waivers:

1. Topographic information Within 200 Feet: Checklist Item C(5) requires topography within 200 feet to be provided.

The Applicant proposes to not provide.

2. Location of Structures and Uses, With Setbacks, Within 200 Feet: Checklist Item C(7) requires setback of all structures within 200 feet to be provided.

The Applicant proposes to not provide.

NOW THEREFORE, after due consideration the Zoning Board of Adjustment of the Borough of Hawthorne makes the following findings of fact and conclusions, based upon the evidence presented at its public hearing and the findings enumerated herein:

A. FINDINGS

1. Applicant's Principal, Rakesh Maik, testified that Applicant acquired the Premises in 2003 and has operated it as a gas station with a small convenience store since that time. This proposal seeks to demolish the existing convenience store and build a new store which will include 6-8 seats for dining. The Board notes the convenience store is a permitted use. In order to do so, Applicant acquired two adjacent properties, thus enlarging the size of the Premises. Operating hours are from 5'o clock A.M. until Midnight. There are no outdoor sales of goods other than gasoline or diesel fuel.

This proposal would double the size of the convenience store, as relocated. The loading dock for the new convenience store is located to provide maximized access and safety. Likewise, the proposed dumpster area is located so as not to be in conflict with on site vehicular and pedestrian movements. Trash pick ups are likely three times a week. Applicant also requests a pylon sign, with a height of 14 feet 8 inches, as better shown and described on Exhibit A-2, which is incorporated herein.

2. Bruce Rigg was accepted as an expert Civil Engineer. He described existing conditions which include a convenience store and a pump island with canopy. The Property is located in the B-1 zone and the gas station is a non-permitted, pre-exisiting or "grandfathered" use.

The proposal seeks to demolish four buildings and construct a new convenience store in the same general area.

Based on the revised Site Plan dated May 31, 2019, the proposed convenience store has a dimension of 68 feet by 61 feet (or 4,148 sq. ft.), a 25 foot rear yard setback, a 10 foot side yard (north side) setback and a 46.1 foot front yard setback. 21 parking spaces are required

and 29 are proposed, resulting in surplus parking. Handicap parking spaces are ideally located. Exclusive right turns in and out are proposed on Lincoln Avenue access points. Also, six dual pumps (12 pumping stations) are proposed. The proposed pump station canopy is 53 feet x 59 feet, with 21 foot and 15 foot setbacks to the rights of way. The proposed canopy is 17.6 feet tall. The parking field is well designed, safe and efficient. It provides sufficient space and capacity to allow tanker trucks and other trucks to property navigate throughout the Premises.

The Applicant also proposes to install and operate an emergency generator, as needed. Applicant stipulates it will meet all legal requirements, relating to noise emissions, and agrees to perform any testing during midday hours (setting the generator on a timer to do so). Furthermore, the Applicant agrees, in coordination with the Board Engineer, to provide additional striping in the parking lot in the location of the proposed Vacuum and Air Pump stations.

3. Louis Luglio was sworn and accepted as an expert in the field of traffic engineering. He provided a traffic analysis which includes traffic counts taken in February, 2019. The counts demonstrated that this proposal will not result in failing levels of service. He also described the circulation features on site as well as the access points on both Lincoln Ave. and Wagaraw Road. He opined that the current proposal, inclusive of no turning restrictions on Wagaraw Road, was safe and efficient.

There was significant dialogue between Mr. Luglio and the Board relating to whether the Wagaraw Road access driveways should have turning restrictions. The Board agrees that Wagaraw Road is a County road and the ultimate determination regarding the turning restriction(s) is exclusively within the County of Passaic's jurisdiction.

4. Edward Easse was sworn and accepted as an expert in the field of architecture and planning. He testified that there has been a gas station at the subject premises since the late 1960's/early 1970's. A fuel station canopy was erected in in the mid 1990's. The service component of the service station changed to retail entirely within the service structure building. The existing retail component is small and crowded. The newly acquired parcels are much more adequate and feasible for the convenience store, a permitted use. In essence, the additional land acquired by the Applicant provides for a roomier layout, resulting in much better on-site circulation and safety.

He further stated there are multiple compatible uses in the vicinity. He also testified that the proposed buffer for the convenience store is more than adequate.

In sum, he concluded that due to the long history of use of the Premises as a gasoline station with a convenience store that: there are no substantial detriments to the public good; there are no substantial deviations from the Hawthorne Zone Plan; and that the Property is particularly well suited for this proposal.

B. FINDINGS AND CONCLUSIONS

The Board adopts all of the testimony described above as its findings of facts. The Board concludes that this proposal, while expanding the degree of the non-conforming use, is a better alternative than leaving the Premises in its current state. The additional Property upon which the permitted convenience store will be located is of proper size and capacity. The location and orientation of the gasoline service area, along with the proposed canopy, ingress/egress layout and signage is superior to existing conditions and promotes among other things open air, space and light, and a better, more desirable visual environment, two of the purposes of the Municipal Land Use Law.

The Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-70d(1), requires the Applicant to prove the positive criteria of “special reasons” in order to obtain a use variance for a use or structure otherwise not permitted in the zoning district. In *Burbridge v. Mine Hill Tp.*, 117 N.J. 376, 386-387 (1990), the Court instructed that the term “special reasons” takes its definition from the purposes of zoning listed in the MLUL, N.J.S.A. 40:55D-2. The specific use variance requested in this case, a Use Variance to modify the existing service station use, carries out several purposes of zoning, such as promoting a desirable visual environment through creative development techniques, good civic design and arrangements and providing adequate light, air and open space. N.J.S.A. 40:55D-2(c) and (i).

The MLUL, N.J.S.A. 40:55D-70, also requires that the Applicant prove the negative criteria that the variance can be granted without substantial detriment to the public good and that it will not substantially impair the intent and the purpose of the zoning plan and ordinances. The Board finds that the use variance for the modified service station use can be granted without substantial detriment to the public good. The proposed plan is a superior plan over the existing conditions, providing better more efficient on-site circulation and safety. Further, the Board finds the grant of the use variance will not substantially impair the intent of the zone plan and zoning ordinance. The reasons supporting the positive criteria, without repeating them, also support this prong of negative criteria.

Regarding the C variances, Applicant must demonstrate: a) there is a “Hardship” or b) the benefits of deviation would substantially outweigh any detriment. N.J.S.A. 40:55D-70(c)(2). A third way to demonstrate satisfaction of proofs is that they are “subsumed” in the D variance. The Board concludes that all variances are so subsumed. The MLUL also requires the Applicant to prove the negative criteria, that the C variances can be granted without substantial detriment to

the public good and it will not substantially impair the intent and the purpose of the zone plan and zoning ordinance, N.J.S.A. 40:55D-70. The Board finds no detriment in granting the requested variances because this proposal represents a safer, more efficient plan over existing conditions and usage. For the same reasons set forth in support of the D variance, the Board finds the variance may be granted without substantial detriment to the public good and without substantial impairment upon the intent and purpose of the zone plan and zoning ordinance.

For all the above reasons, the Board concludes that the Applicant has met its burden under the MLUL, N.J.S.A. 40:55D-1 et seq. of proving entitlement to the requested variances, waivers and Site Plan approval.

THEREFORE, BE IT RESOLVED, that the Board determines the Applicant has met its burden of proof for the requested relief and hereby **APPROVES** such application subject to the following conditions:

C. CONDITIONS OF APPROVAL

1. These Conditions of Approval shall be binding upon the Applicant, the owner, and any successors and/or assigns of either.
2. The Applicant shall promptly pay any professional staff fees billed, in excess of the required application escrows.
3. The Applicant must obtain approvals from any and all other governmental and/or public agencies as required, whether federal, state, county or local, over which the Board has no control but which are necessary in order to finalize and/or implement the relief being granted herein, as well as any construction that may be a part of said relief. The Applicant is solely responsible for determining which governmental and/or public agencies, if any, such approvals are required of. The Applicant is further required to submit a copy to the Board's secretary of all

approvals and/or denials received from such outside agencies, with a copy thereof to the Board's Engineer.

4. Any improvement(s) to be constructed as a result of this approval shall be constructed and operated in full compliance with the Code of the Borough of Hawthorne, the Revised Statutes of the State of New Jersey and any other applicable county and/or federal law.

5. The Applicant shall certify that all taxes and assessments have been paid up to the present time.

6. The Applicant shall correct and make safe any dangerous or unsafe condition caused by the Applicant or those acting for and/or on its behalf affecting public safety or general welfare if any such condition develops.

7. The relief as granted herein is subject to the discovery of any and all deed restrictions upon the Premises which had not been known or had not been disclosed to the Board, but which would have had a materially negative impact upon the Board's decision in this matter had they been so known, or so disclosed.

8. The Applicant must maintain an escrow account with the Borough and pay the costs of all professional review and other fees required to act on the Application, pursuant to the applicable sections of the Borough's land development ordinances, zone codes and any other applicable municipal codes, and the New Jersey Municipal Land Use Law. The Applicant's escrow account must be current prior to any permits being issued, or construction or other activity commencing on the approved project.

9. The Applicant must obtain all other construction or other municipal permits required with respect to the relief as granted herein.

10. Any improvement(s) to be constructed as a result of the Board approving this application shall be constructed and operated in full compliance with the Uniform Construction Code, Code of the Borough of Hawthorne, the Revised Statutes of the State of New Jersey and any other applicable county, state and/or federal law.

11. The Applicants/owners are hereby advised that this application and plan have not been reviewed for conformance with the Americans with Disabilities Act (ADA). It is the responsibility of the Applicants/owners to conform to said legislation.

12. There shall be no outdoor storage or sale of items.

13. Applicant must receive approval of Passaic County Planning Board.

14. Borough reserves the right to require modifications and changes in the lighting for a period of six (6) months.

15. Landscaping will be irrigated.

16. Applicant will provide six (6') foot high solid vinyl fence along the west side. Will provide additional landscaping at southwest corner.

17. Testing of the generator will be during the day time hours and shall meet required noise regulations.

18. Applicant will provide security around the building.

19. Applicant will obtain all necessary NJDEP approvals.

20. Applicant will return to this Board in the event the County of Passaic approves a plan which differs from the plans approved by this Board.


BE IT FURTHER RESOLVED, that the Borough of Hawthorne is hereby directed to mail a copy of this Resolution to the Applicant and/or the Applicant's attorney and to file copies of this Resolution with the Borough Clerk, Borough Construction Official, Borough

Tax Assessor and Borough Zoning Officer and to cause notice of these determinations of the Zoning Board to be published in the official newspaper of the Borough of Hawthorne within ten (10) days of the date hereof and thereafter published accordingly to law.

The undersigned certifies that the within Resolution was adopted by the Board and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on August 19, 2019.



Raymond Hallock, Chairman



Joan Herve, Secretary

OFFERED BY: *Gallagher*
SECONDED BY: *Chamberlin*
VOTE: Ayes *4*
 Nays *1*