Zoning Board of Appeals
of the Village/Town of Mount Kisco
- -X

In the Matter of the Application of

Case No.: ZBA 21-23

Eugene Gilyard
- X

1. **Location of Property:** **Property ID**: 69.80-5-13
87(89) Maple Avenue

2. **Description of Request**:

The applicant is owner of a parcel which has both a pre-existing nonconforming commercial use in one structure and a pre-existing nonconforming three-family residential use in another structure, improperly being used as a four-family house. The underlying zone permits one and two-family houses. The applicant proposes to change the use of a prior legal non-conforming personal service use to food-retail use (delicatessen).

Pursuant to §110-34 D of the Village Zoning Code: "said nonconforming use shall not be changed to another nonconforming use without approval by the Zoning Board of Appeals, and then only to a use which, in the opinion of the Board of Appeals, is of the same or of a less restrictive nature."[1] The Application proposes to change the use of a prior legal non-conforming personal service use to food-retail use, therefore necessitating an opinion of the Zoning Board of Appeals that the proposed use is of the "same or more restrictive nature" under the Village Zoning Code.

3. **Zoning of Property:**

RT-6 – One- and Two-Family Residence District

4. **Variance(s) Requested:**

None.

5. **Dates of Public Hearings:** January 18, 2021
Date of Action: February 8, 2021

[1] There is an obvious typographical error in the printed Code. The clear intent and the context of the Code provision is that the phrase "less restrictive" should be "more restrictive".

6. Comments Received at the Public Hearing.

None.

7. Documents Submitted with the Application:

- Denial Letter from Peter J. Miley, Building Inspector, dated 10/14/2021
- Zoning Board of Appeals Application, dated 12/09/2021
- Letter from Eugene Gilyard, dated 12/09/2021
- Letter from Charles Martabano, Esq., dated 12/9/2021
- Letter from Charles Martabano, Esq., dated 12/10/2021
- Copy of Appearance Ticket, dated 07/15/2017
- Copy of Map of properties within 300 Feet
- Full list of names for mailing
- Affidavit of Mailing, dated 01/07/2022
- Affidavit of Publication from The Journal News, dated 01/03/2022
- Affidavit of Posting, dated 01/11/2022
- Copy of Deed
- Copies of Site Plan prepared by PCK Architecture, PC, dated 04/01/2019
- Fees Paid

8. SEQRA Determination:

The subject application constitutes Unlisted Action in that it does not meet or exceed a threshold contained in the Type I list in section 617.4 and is not contained in the Type II list. An Unlisted Action requires a determination of significance: The proposed use approval will not alter the essential character of the neighborhood by simply changing the prior legal non-conforming personal service use to food-retail use. As such, this Board, hereby finds that the action will have no significant adverse impacts on the environment, no EIS is necessary and a Negative Declaration should be and is hereby adopted. If it is subsequently determined that another agency approval is needed, uncoordinated review shall occur.

9. Decision: Conditionally Approved

10. Basis for Decision of ZBA:

Under the enumerated criteria set forth in the Zoning Code and based upon a review of the entire record, including testimony, submissions, maps, records and all other documentary proof, the ZBA has determined that the proposed new use is of an equal or less impactful nature and more compatible with the neighborhood and community character. Specifically, the Board determines that the change of use from personal service use to food-retail use of delicatessen

does not increase the degree of nonconformity, as refrigeration and cooking facilities, together with storage is less non-compliant or the new use is of the same or a more restrictive nature.

11. <u>Conditions of Approvals</u>.

1) This approval is solely for the application reviewed and considered by the Zoning Board.
2) This is not a variance, does not create a conforming use, and shall not run with the land, but merely allows the food retail use to be substituted as a pre-existing nonconforming use for the personal service use.
3) There shall be no restaurant use, but only food retail use (delicatessen).
4) Nothing herein shall be deemed to prevent the future application of the Village Code provisions, including in particular Section 110-34.
5) No utilization of the space may be initiated until an inspection by the Building Department of the balance of the property has occurred confirming that the residential structure on the same site has been properly restored to a pre-existing nonconforming three (3) family house.
6) There shall be no use or occupancy of the second story of the commercial structure.
7) If approvals are required of any other Village board, such conditions of any such approval shall be deemed incorporated herein by reference.

12. <u>Vote:</u> BY ORDER OF THE BOARD OF APPEALS

Motion to approve by:

Seconded by:

Vote: Mr. Spector:
Mr. Hoyt:
Mr. Weise:
Mr. Alfano:
Ms. Broth:
Chair Boxer:

RESOLUTION EXECUTED: February ____, 2022
Mount Kisco, New York

ZONING BOARD OF APPEALS
Village/Town of Mount Kisco

By:_____
HAROLD BOXER, CHAIRMAN

CHARLES V. MARTABANO
Attorney at Law

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January 26, 2022

VIA MAIL DELIVERY
Chairman Harold Boxer and
Members of the Zoning Board of Appeals
Village of Mt. Kisco
104 Main Street
Mt. Kisco, New York 10549

Re: Application of Giardina Living Trust
Premises Known as 79 North Moger Avenue, Mount Kisco, New York
Section 69.73 Block 3 Lot 5

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

At the conclusion of the meeting of the ZBA held on January 18, 2022, I was requested to provide supplemental information to your Board relative to the additional interpretive argument that I put forth on behalf of the Applicant at the time of the public hearing, which did not appear in my prior written submission on behalf of the Applicant. I also believe, based on statements made by members of your Board, that your ability to follow the presentation that I made on behalf of the Applicant was hampered by the fact that your ZBA file apparently did not contain the Applicant's original submission documents. This was no doubt attributable to the fact that the application was originally scheduled for the November meeting of the ZBA but was adjourned. I am also aware that the Building Department was/is affected by staff shortages. Accordingly, for your ease of review, in addition to submitting this letter with respect to the salient issue raised at the public hearing, I felt it appropriate to include, as attachments to this letter, the Applicant's Statements of Principal Points submitted in support of the application (hereinafter, "Applicant's Statement") and my Strict Construction Memorandum dated October 26, 2021 reviewing decisional law on the issue of strict construction of zoning regulations/codes against the drafter (in this case the Village of Mount Kisco) and in favor of the property owner (in this case,, the Applicant). This will hereinafter be referred to as the "Strict Construction Memorandum". I hope this aggregation of documents in one PDF file proves to be convenient for you.

As set forth in the application to your Board and the public notice, this is an application to legalize a pre-existing efficiency apartment, which such application was phrased and sought relief in the alternative, seeking either an interpretation from your Board to the effect that the sections cited by the Building Inspector in his Denial Letter of September 23, 2021 (hereinafter "Denial Letter", copy attached) did not apply to this application or, in the alternative, seeking a variance from those sections cited by the Building Inspector in his Denial Letter. In the Applicant's Statement of the principal points upon which the Applicant's appeal is based, arguments were raised in connection with each of the three Code section relied upon by the Building Inspector in his Denial Letter. However, as pertains to the Building Inspector's reliance upon §110-12 (3) (g), at the public hearing I raised an additional interpretive argument as to why this section did not apply to this application.

As can be seen from the original submission, as the Applicant was requesting relief in the alternative, including interpretive relief, I felt it appropriate to submit the Strict Construction Memorandum so as to set forth the consistent line of decisional law mandating the strict construction of zoning regulations. You are respectfully referred to my attached Strict Construction Memorandum in which I reviewed many of the cases decided by the Court of Appeals and the Appellate Division for the Second Department on the issue of how zoning codes are mandated to be construed. Rather than to repeat the multitude of citations set forth in my Strict Construction Memorandum, I will simply restate in brief summary form what all of these cases consistently hold and that is that zoning regulations, being in derogation of a property owner's rights at common law, are to be strictly construed against the drafter and in favor of the property owner with any ambiguity in the zoning regulations to be construed/interpreted in favor of the property owner. Again, please refer to the Strict Construction Memorandum for confirmation of the holdings of this consistent line of decisions.

With the foregoing in mind, I respectfully point out that §110-12 (3) (g) as set forth in the Denial Letter is the last subsection of §110-12 (3) which defines the accessory uses, buildings and structures permissible in the RM-10 Moderate-Density Multifamily District. The subsection in issue states in its entirety as follows:

> *Other customary accessory uses, buildings or structures*, subject to the applicable provisions of Article V hereof, such as playhouses, greenhouses, cabanas, trash containers, outdoor air conditioners and the like, provided that said uses and buildings or structures are incidental to the principal use and further provided that *said uses shall not include any activity conducted as a business or as a separate residence.*
>
> (Emphasis added)

As noted above, this subsection describes "other customary accessory uses, buildings or structures". The modifier "other" clearly indicates that this subsection is intended to be confined to the specific accessory uses, buildings or structures defined in the specific subsection in issue

and is indicative of the intent to differentiate these uses from the accessory uses, buildings or structures previously described by the section. This is, in fact, confirmed by the statutory text of §110-12 (3) which, in subsection (a) describes the permitted accessory use of "private garages" *without any reference to any prohibition against said accessory building including an activity such as a separate residence*. Notwithstanding statements made at the public hearing referring to the structure as a "barn" (by reference to a survey), the Denial Letter confirms that the structure was/is a four car garage. I would hope that the Board would agree that where, as here, the statutory provisions clearly and unequivocally differentiate between a private garage as described by §110-12 (3) (a) and the other customary accessory buildings or structures specifically referenced in §110-12 (3) (g), prohibiting the residential (or business) use of the accessory buildings or structures referenced in §110-12 (3) (g) only, it is clear that the prohibition cannot be applied to the structure in issue which is governed by §110-12 (3) (a).

Accordingly, utilizing the doctrine of strict construction of zoning codes in favor of the property owner and against the municipality, it is respectfully submitted that the subsection relied upon by the Building Inspector in the Denial Letter (§110-12 (3) (g)) to assert that the apartment cannot be located above the garage, while being applicable to such other accessory structures as playhouses, greenhouses, cabanas or similar accessory structures, has no applicability whatsoever to a private garage such as described in §110-12 (3) (a). Had the drafters of the Code intended such a result, the Code would have so specified.

I look forward to appearing before your Board on February 9, 2022 to answer any other questions that you may have.

Yours very truly,

Charles V. Martabano

cc: Giardina Living Trust

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October 26, 2021

VIA HAND DELIVERY
Chairman Harold Boxer and
Members of the Zoning Board of Appeals
Village of Mt. Kisco
104 Main Street
Mt. Kisco, New York 10549

Re: Application of Giardina Living Trust
Premises Known as 79 North Moger Avenue, Mount Kisco, New York
Section 69.73 Block 3 Lot 5

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

As referenced in the Owner's Statement in support of their request for interpretations or, in the alternative, for a variance of the sections cited in the Denial Letter issued by the Building Inspector and referenced in the public notice, I wanted to provide to your Board some of the caselaw regarding the interpretation of zoning codes. This is of particular import with respect to the owner's application as your Board is being requested to interpret the Building Inspector's application of regulations to structures which have been in existence since approximately 1870 and uses which have been in existence for many decades predating the existing regulations.

As I am certain that all of you are aware, decisional law of the State of New York is such as to require that zoning codes or regulations be construed strictly against the drafter (the municipality) and in favor of the property owner with any ambiguity to be resolved in favor of the property owner. The leading case on the proper manner of interpretation of zoning codes was decided by the Court of Appeals in *Allen v. Adami* 39 N.Y.2d 275 (1976). In that case, the municipality sought to "read into the zoning code" a condition which did not exist in the actual verbiage of the applicable code. In striking down the interpretation urged by the municipality and affirmatively stating that had the municipality desired to impose such a condition, it could easily have done so, the Court of Appeals held:

> Since zoning regulations are in derogation of the common law, ***they must be strictly construed against the municipality which has enacted and seeks to enforce them.*** (Citations omitted) ***Any ambiguity in the language used in such regulations must be resolved in favor of the property owner.*** (Citation omitted.)
>
> (Emphasis added)

This case therefore stands for the proposition that zoning regulations must be interpreted and applied as drafted, and cannot be "extended" or "expanded" to apply to situations not contemplated by the language of the regulation as strictly construed, which we believe to be particularly important with respect to the current application.

Subsequent to the issuance of the Court's decision in *Allen v. Adami*, *supra*, the Court of Appeals consistently adhered to the principle of strict construction of zoning codes. For example, in *FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111 (1985), the Court stated:

> Zoning laws are to be given a strict construction because they are in derogation of common-law rights (*citations omitted*).

Similarly, in *City of New York v. Les Hommes*, 94 N.Y.2d 267 (1999), the Court of Appeals held:

> The cases guiding our analysis in this area require that we show a healthy respect for the plain language employed and that it be construed in favor of the property owner and against the municipality which adopted and seeks to enforce it (citations omitted).

For decades, Courts have consistently adhered to the holding of *Allen v. Adami*. The Appellate Division for the Second Department has been particularly active in this respect and clearly and consistently adheres to the doctrine of strict construction of zoning codes against a municipality with ambiguity resolution in favor of the property owner. For example, in *Sposato v. Zoning Bd. Of Appeals of Village of Pelham*, 287 A.D.2d 639 (2nd Dept, 2001) the Appellate Division stated:

> Zoning Codes, being in derogation of the common law, must be strictly construed against the enacting municipality (citation omitted). Ambiguities in a zoning ordinance must be resolved in favor of the property owner (Citation omitted).

See also *Barkus v. Kern*, 160 A.D.2d 694 (2nd Dept. 1990) "(s)ince zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them and any ambiguity in the language used in such regulations must be resolved in favor of the property owner"; *KMO-361 Realty Assocs. V. Davies*, 204 A.D.2d 547 (2nd Dept, 1994) "(z)oning regulations are in derogation of the common law and must be strictly construed against the municipality. Thus, any ambiguity in the language used in zoning regulations must be resolved in favor of the property owner"; *Hogg v. Cianciulli*, 247 A.D.2d 474 (2nd Dept, 2004) "...any ambiguity in the language of the zoning ordinance must be resolved in favor of the property owner"; *Ferraris v. Zoning Bd. Of Appeals of Village of Southampton* 7 A.D.3d 710 (2nd Dept, 2004) "Any ambiguities in a zoning ordinance must be resolved in favor of the property owner"; *Town of Riverhead v. Gezari*, 63 A.D.3d 1042 (2nd Dept. 2009 "Since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them"; *Mamaroneck Beach & Yacht Club, Inc. v. Zoning Board of Appeals of Village of Mamaroneck*, 53 A.D.3d 494 (2nd Dept. 2008) " 'It is well settled that zoning codes, being in derogation of the common law, must be strictly construed against the enacting municipality and in favor of the property owner'"; *Baker v. Town of Islip Zoning Bd. Of Appeals,* 20 A.D.3d 522 (2nd Dept, 2005).

Accordingly, as we present our arguments to your Board at the public hearing to be held on November 16, 2021, we respectfully request that, in interpreting the zoning regulations which form the basis for the Denial Letter to the facts of the application before you, you apply the rule of strict construction of zoning codes in favor of the property owner and against the municipality with any ambiguity being resolved in favor of the property owner. As set forth in the Owner's Statement, we believe that the rules of strict construction as applied to the particular facts and circumstances pertaining to this unique application should result in a determination to the effect that, most particularly with respect to items 2 and 3 of the Denial Letter, no variance is necessary.

We will provide additional information and arguments at the public hearing to be held with respect to this matter and look forward to appearing before your Board

Yours very truly,

Charles V. Martabano

cc: Giardina Living Trust

Village/Town of Mount Kisco Building Department
104 Main Street
Mount Kisco, New York 10549
Ph. (914) 864-0019-fax (914) 864-1085

September 23, 2021

Anthony Giardina
P.O. Box 158
Mount Kisco, New York 10549

Re: Permit Denial Letter
79 North Moger Avenue
Mount Kisco, NY Tax ID: 69.73-3-5
Building Permit Application to convert the second –
floor storage of an existing garage into an efficiency apartment

Dear Mr. Giardina:

We received a Building Permit application to "Legalize an existing efficiency apartment located on the second floor of an accessory building." Proposed is the conversion of the second floor storage area into a 450 +/- sf efficiency apartment.

Unfortunately, we are unable to issue a Building Permit and reject this application for the following reason(s):

1. Pursuant to Chapter 110. Zoning Article III. District Regulations § 110-12. RM-10 Moderate-Density Multifamily District (G) Other customary accessory uses, buildings or structures, subject to the applicable provisions of Article V hereof, such as playhouses, greenhouses, cabanas, trash containers, outdoor air conditioners and the like, provided that said uses and buildings or structures are incidental to the principal use and further provided that said uses shall not include any activity conducted as a business or as a separate residence. A separate residence is proposed and therefore; a variance issued by the Zoning Board of Appeals from this section is required.

2. Pursuant to §110-31 Supplementary development regulations. A. Lot for every building. Except for designed multistructure developments, such as but not limited to shopping centers, office parks or multifamily or townhouse developments, not more than one principal building hereinafter erected shall be permitted on any lot in the Village of Mount Kisco. The conversion of the garage thereby creates a second principle structure and therefore; a variance issued by the Zoning Board of Appeals from this section is required.

In addition, we note the following:

3. Three parking spaces are located adjacent and south of the garage, pursuant to Chapter 110. Zoning Article IV. Off-Street Parking and Loading Regulations § 110-28. Off-

street parking. A. General parking requirements. (1) All off-street parking shall be subject to the requirements set forth in this article. D. Ingress and egress to parking areas. (2) No parking space shall be designed so as to require a vehicle to back out onto a public street or sidewalk in order to vacate the space. The proposed parking areas require that the cars back out onto Carpenter Avenue and therefore; a variance issued by the Zoning Board of Appeals from this section is required.

Note* All parking spaces must be designed in accordance with the Village Parking Standards for residences measuring 9 ft. wide by 18.5 ft. long.

History

The original building was constructed in the late 1800's on a two-front – 12,803 sf lot that extends through, and fronts on two streets – N. Moger and Carpenter Avenue. On September 11, 1940, a building permit (permit No. 762) was issued for alterations and an addition of a new dormer located on the third floor of the building. Tax card(s) dated September 1954 and 1966 indicate a four (4) family conversion on three levels, and a four (4) car garage.

We looked back at the previous codes to determine if there were any parking requirements at that time. Pursuant to Building Zone Ordinance dated February 15, 1954, Section 10. Garages, stables and service stations (d) Garages in Residence "C" Districts. In Residence "C" districts, private garage space may be provided for three motor vehicles on any adequate lot; and space for one additional motor vehicle for each 1,250 sf by which the area of the lot exceeds 1,250 sf; but if space is provided for more than 6 motor vehicles, the total number of vehicles for which space is provided shall not exceed the number of families for which the principal building is designed. Although not required, we are assuming, given the current two-space code requirement, that the four (4) car garage was constructed to provide a minimum of one parking space for each of the existing dwelling units.

Last, Planning Board approval is also required.

Should you have any questions, please feel free to contact me.

Sincerely yours,

Peter J. Miley
Building Inspector

Anthony Giardina Jr .and Angela Giardina
as Trustees of the Giardina Living Trust
PO Box 158
Mount Kisco, NY 10549

October 19, 2021

VIA HAND DELIVERY
Chairman Harold Boxer and
Members of the Zoning Board of Appeals
Village of Mt. Kisco
104 Main Street
Mt. Kisco, New York 10549

Re: Application of Giardina Living Trust
Premises Known as 79 North Moger Avenue,
Mount Kisco, New York
Section 69.73 Block 3 Lot 5

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

We submit this document as our required typewritten statement of the principal points (facts and circumstances) on which we base our application. As confirmed by the deed that we are submitting as part of our application, prior to the transfer of this property to our Living Trust, my wife Angela and I purchased the property known as 79 North Moger Avenue, Mount Kisco, New York, taking title in March 1990, more than 30 years ago. Prior to purchasing the property, I spoke with former Building Inspector Austin Cassidy in an effort to determine whether there existed any violations or any other issues with respect to the property and I was advised that there was none. I was also advised that it appears as though the improvements on the property were constructed circa 1870, with the result that these structures and the associated parking areas have existed for many decades predating the adoption of zoning in Mount Kisco and, of course, many decades before the current zoning.

Over the years I have made an effort to maintain the properties in what I believe to be a first-class condition and I have made numerous improvements since taking ownership. I've complied with all fire and safety code requirements and I have filed the Landlord Registry forms annually, identifying all of the registered apartments including one two-bedroom apartment and three one-bedroom apartments in the main building and a small studio apartment over the detached garage. In other words, both in purchasing this property and subsequently thereafter, I made the appropriate inquiries regarding the legality of all structures and uses on the property, which I obviously presumed were either legally conforming (given that our property was located in a multifamily residential district) or grandfathered as a consequence of the age of the structures and my conversations with the then Building Inspector. I also want to confirm that, in addition to multiple conversations that I had with former Building Inspector Austin Cassidy prior to the purchase of this property, I also consulted with him regarding repairs and improvements, including interior repairs/upgrades made to the specific apartment which is the subject matter of this appeal.

However, as a consequence of a fire inspection which took place in 2019, I was advised that the small studio apartment over the garage did not have a certificate of occupancy. I went to the Building Department in an effort to review the applicable files to ascertain whether there existed a certificate of occupancy but, despite all of the efforts of myself, Building Inspector Peter Miley and our attorney, Charles V. Martabano, Esq., we were unable to find a certificate of occupancy for the apartment over the garage despite the existence of the apartment when we purchased the property. Unfortunately, when I renovated the apartment subsequent to our acquisition of the property and sought the advice of the then Building Inspector as referenced above, I was advised by Mr. Cassidy that I did not have to obtain a permit for the limited work that I was doing with the result that I naturally did not seek a certificate of occupancy believing there was no need for same. I also did not maintain the records for the work done decades ago which would have otherwise possibly assisted Mr. Miley in being able to issue a certificate of occupancy or other evidence of compliance. I also want to point out for the record that, at all times, Building Inspector Peter Miley has been most professional and cooperative to work with and truly attempted to assist us in legalizing the apartment

without the necessity of an application to your Board. However, when we were unable to find proof in the record, we decided to legalize the apartment through an application to your Board.

Mr. Miley issued a Denial Letter on September 23, 2021, which we will refer to in this letter as the "Denial Letter". We are therefore required to submit an application in the alternative: i.e. either for an interpretation that the zoning code sections cited by the Building Inspector do not apply to our application or, in the alternative for a variance from the referenced sections cited by the Building Inspector.

With respect to the requested interpretations, we are advised by our attorney, Charles V. Martabano, that the terms of the zoning code of the Village of Mount Kisco are required to be construed strictly against the drafter of the code (the Village of Mount Kisco) and in favor of the property owners with any ambiguity, if any, required to be construed in the favor of the property owners (see letter from Charles V. Martabano, also being submitted with our application). We presume that the Village Attorney will agree with Mr. Martabano's citations to applicable law and provide guidance to your Board accordingly.

Throughout all the arguments that follow below, we are requesting that the Board not lose sight of the fact, as established by the record and confirmed by the content of the Denial Letter, that all of the structures on the site date back to the late 1870s; the footprints have not been altered; no new structures have been erected; and the uses have not been changed, at least since we acquired the property. While we reluctantly are forced to accept responsibility for not previously obtaining a certificate of occupancy based upon our conversations with the then Building Inspector, we are hopeful that the Board will accept our representations as to what transpired in connection with our acquisition of the subject property and subsequent renovation of the pre-existing apartment and issue the necessary interpretations or variances so that the property can be fully legalized. My wife and I, aged 78 and 81 respectively, depend upon the income from this property for our retirement. Again, we always acknowledged the existence of this apartment and duly registered the apartment with the Landlord Registry. Our neighbors will attest to the existence of this apartment for decades. We look at this process as simply legalizing a pre-existing condition and hope that the Board will agree with our position. We also ask the Board to consider the fact that, while

we are benefited by the existence of the RM-10 Medium-Density Multifamily District Regulations in a use context, those same regulations, as well as other regulations, being applied to our property more than a century after the construction of the existing structures and many decades subsequent to the establishment of the uses, places us in the position of having to attempt to apply or comply with regulations on an "after-the-fact basis", where compliance may be very difficult or impossible and therefore issuance of variances would be appropriate. I have been a member of the Zoning Board of Appeals in the Town of New Castle for 20 years and I have dealt with legalization situations such as this on many occasions and, from my perspective, a zoning board of appeals plays a most important role in the legalization of pre-existing structures and uses under appropriate circumstances.

As set forth below, all of the requested variances are area variances as none of the denial items represent a prohibited use but instead refer to dimensional or physical constraints. In this regard I am advised that Village Law section 7-712 b (3), as amended in 1993, provides in pertinent part as follows:

> Area variances. (a) The zoning board of appeals shall have the power, upon an appeal from a decision or determination of the administrative official charged with the enforcement of such ordinance or local law, to grant area variances as defined herein.
>
> (b) In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was

self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

With the foregoing as background, the first item set forth in the Denial Letter indicates that we require a variance from section 110-12 (G) because the apartment in issue is physically located within an accessory structure and section 110-12 (G) indicates that an accessory structure should not be utilized for a "separate residence". It is imperative that the Board understand that there is no question as to the legality of the underlying residential apartment use in the RM-10 Modern-Density Multifamily District which allows for multifamily uses on lots of 10,000 SF or more. As set forth in our application and confirmed by the Denial Letter, our property is 12,803 SF and therefore multifamily uses are permitted. Accordingly, this is not a situation where we are dealing with a use variance because the underlying apartment/multifamily use is a permitted use. Therefore, this is a question of allowing an otherwise permitted use to be physically located within an accessory structure, a physical constraint for which we will seek a variance. Application of the variance standards to our request in this regard is set forth below.

Item 2 of the Denial Letter indicates that we require a variance of section 110-31, supplementary development regulations, whereby the code requires that "[e]xcept for designed multistructure developments, such as but not limited to shopping centers, office parks or multifamily or townhouse developments, not more than one principal building hereinafter erected shall be permitted on any lot in the Village of Mount Kisco". It is the position of the Building Inspector that the "conversion" of the garage creates a second principal structure and therefore a variance is required.

Initially we want to set forth our position that, based upon the rules of strict construction of zoning codes as set forth in our attorney's letter, we do not believe that this section is applicable to our situation at all. Initially, and as indicated above and as set forth in the Denial Letter, all structures in issue were erected circa 1870. The code section in issue says that "not more than one principal building ***hereinafter erected*** shall be permitted on any lot…". The erection of structures on our lot occurred long before the adoption of any zoning codes and therefore the

structure in issue cannot be said to be "hereinafter erected" i.e. erected subsequent to the adoption of the code section in issue. The Denial Letter speaks in terms of a "conversion" of the garage building into a second principal structure and, had the drafters of the code desired to insert that prohibition, they could have done so. They did not. The conversion of a pre-existing structure is not, we believe, in any way equivalent to the "erection" of a new structure. We therefore believe it is clear that this section does not apply to us and request your interpretation to that effect.

Additionally, we believe that this section, again subject to the doctrine of strict construction, clearly by its terms exempts multifamily housing developments from the purview of the prohibition because the code section states that the prohibition applies except in connection with designed multistructure developments which explicitly identifies "multifamily developments" as a specified example. Even though it is clear that our structures were constructed many decades before the effective date of this code section, it also appears clear that our structures would have been perceived to be part of a multifamily development and therefore again the code section would not apply. Accordingly, separate and apart from our request for variance relief in the alternative, we would request that your Board find that this section does not apply to our situation based on the doctrine of strict construction of zoning codes.

Item 3 of the Denial Letter references the fact that three (3) parking spaces are located adjacent to and south of the pre-existing garage and asserts that section 110-28 regarding off-street parking and loading regulations specifies that (1) all off-street parking shall be subject to requirements set forth in this article (Article IV) and that subsection D (2) indicates that "no parking space shall be designed so as to require a vehicle to back out onto a public street or sidewalk" and therefore asserts that a variance is required. As indicated above, the structures at 79 North Moger Avenue were constructed circa 1870. While we do not know when the parking spaces in question were constructed (long before our ownership) these parking spaces have been existing and utilized in this manner for many decades. We believe that it is clear that this section was intended to apply prospectively as it specifically references the design of parking spaces, clearly referring to the prospective construction of parking spaces, not parking spaces which have been in place for decades. Were it to be otherwise, we believe that a survey of

existing conditions throughout the Village would result in determinations of noncompliance of significant proportions and we believe that constitutional protections apply to pre-existing conditions.

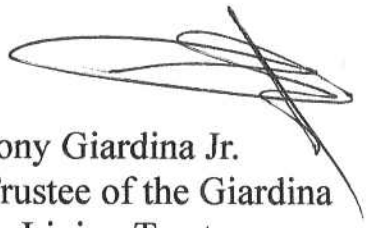
It is important to note that this aspect of the Denial Letter does not indicate that we have inadequate parking. Accordingly, if your Board were to find that any variance were required, it does not relate to the required number of parking spaces and we are not required to install any additional parking spaces for which we would have the opportunity to "design" such parking spaces. The Denial Letter also indicates that, subsequent to the construction of the original structures, building permits were applied for and issued. In this regard, we do wish to note that section 110-28 J (1) does provide that "[s]tructures and land uses in existence for which building permits and site plans have been previously approved shall not be subject to the revised requirements for off-street parking spaces set forth in this chapter, provided that any parking facilities currently existing and serving such structures or uses shall not, in the future, be reduced except where they exceed such requirements". It appears that the code section relied upon by the Building Inspector was adopted in 1987 and there exists no doubt whatsoever that the parking arrangements that existed with respect to this property existed in precisely the same manner as now existing prior to the adoption of the code provision. We therefore believe that where, as here, we do not require a parking variance as to the number of spaces and therefore nothing about this application actually triggers the need for additional parking or for the design of new parking spaces, we believe that the Building Inspector's reliance on this section is misplaced as nothing that we are doing in any way calls into question the existing parking, which we believe need to be viewed as grandfathered by reason of their prior existence in exactly the same condition (other than necessary maintenance and repair) for many decades. While the provisions of the code governing noncomplying buildings and structures do not appear to specifically address the issue of parking spaces, we believe that the intent of the provisions governing noncomplying buildings and structures combined with the provisions of section 110-28 J (1), clearly evidence an intent to protect parking arrangements which have been in place for many decades such as is the case with our application. We hope you will agree that we are entitled to an interpretation that the requirements of section 110-28 A do not apply to our specific situation.

To the extent that your Board determines that we require any variances, as indicated above, these variances represent area variances because none of the use aspects of the application represent prohibited uses and, as indicated above, we are entitled to the protection accorded grandfathered structures and uses. However, to the extent that you determine that variances are required, we would desire to point out that in our opinion, application of the 5 factors referenced in the Village Law should result in a determination on the part of your Board to grant the requested variances. Once again, in considering the 5 factors, it must be remembered that our property has been utilized in precisely the same manner as now requested for many decades. The area in which our property is located (Carpenter Ave., Barker Street) has many residential multi-structure multifamily developments. Legalization of the accessory apartment will not in any way bring about an undesirable change in the character of the neighborhood or present a detriment to nearby properties. Unfortunately, as a consequence of the content of the Denial Letter, the benefit that we seek cannot be achieved by some method, feasible for us to pursue, other than an area variance. Our property does not contain sufficient area to modify the parking so as to prevent the need to utilize the parking spaces in the manner which they have been utilized for decades (see site plan being submitted with our application). We do not believe that any of the requested variances are substantial in nature under the unique circumstances applicable to our application because the granting of these variances will not in any way effectuate any change whatsoever to existing conditions. The requested variances will not have any adverse effect or impact on the physical or environmental conditions in the neighborhood or district because, as indicated above, our property has been operated in exactly the same manner for many decades without any incident or complaint, many properties in the area have similar circumstances (we will be bringing pictures to the meeting to demonstrate this fact) and we are not introducing any new nonconformities by reason of our requested relief which is, as indicated above, sought solely to legalize existing conditions. The same is true with respect to the factor which indicates that the granting of the proposed variances will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. These same conditions have existed for many decades; no changes being introduced whatsoever. We will also be presenting letters of support from our neighbors. With respect to the fifth factor, to the extent that your Board

finds that we could be chargeable with a self-created hardship by reason of our failure to obtain a certificate of occupancy, we would respectfully point out that self-created hardship is a factor that could be relevant to your decision but not necessarily preclude the granting of the requested area variances.

We therefore believe that to the extent that your Board finds that the code sections relied upon by the Building Inspector necessitate the granting of one or more variances, we believe that we have met the requirements for issuance of the necessary variances. We look forward to appearing before your Board.

Respectfully Submitted



Anthony Giardina Jr.
Trustee of the Giardina
Living Trust