

Memo

To: Radnor Planning Commission
From: Mary Eberle
CC: Steve Norcini; John Rice
Date: May 4, 2019
Re: Wawa **Confidential Attorney Client Privileged**

Background

Shortly before your last meeting, we prepared a legal opinion on the nonconformities on the site of the proposed Wawa. The matter was tabled until your May 6th meeting to allow additional time for you to review our memo and to allow Mr. Caniglia to respond on behalf of the Applicant. In this memo, I offer responses to the issues raised in Mr. Caniglia's memo of May 3, 2019. It will do my best to keep my responses brief.

A. Is the Zoning Officer's letter of April 27, 2018 the final determination on the nonconformity issues?

Mr. Kochanski's letters notes that a thorough review of the Zoning Ordinance has not be conducted. The MPC authorizes the zoning officer to administer the ordinance, and Mr. Caniglia is correct that decisions of the zoning officer with regard to the issuance of permits cannot be overturned by the Planning Commission or Board of Commissioners. The decisions to which the MPC refers are the issuance of permits and the institution of enforcement proceedings. The MPC does not authorize the Zoning Officer to issue preliminary opinions, except in one very limited situation which does not apply here. The issues involved in determining the extent of the nonconformities are very complex legal issues and the Planning Commission and Board of Commissioners may seek legal counsel as part of the plan review. Note also, that a letter addressed to the Applicant and copied to no one, allows no opportunity for appeal by neighboring property owners. The Township is not bound by it, nor does the applicant have the right to rely on it.

B. and C. Are the retail use and retail sales of gasoline permitted uses in the C-2 Zoning District?

We do not agree that gasoline sales are permitted in the C-2 district. Each case cited by Mr. Caniglia involved a review of the applicable zoning ordinances in those cases, and the cases hinge on the language in those communities' zoning

ordinances. In this case, the zoning ordinance expressly prohibits uses which are not enclosed in a building, a provision which distinguishes this plan from the cases Mr. Caniglia cites in the memo. Mr. Kochanski made the same determination in his letter, and notes that gasoline sales would only be permitted as a nonconforming use.

D. Is Zoning Ordinance Section 280-101.A which requires ZHB approval of a change in occupancy of a nonconforming use invalid.

Section 280-101.A does not prohibit or require a variance for a change in the occupancy of a nonconforming use; it requires a special exception to insure that the new occupant does not operate the use in a manner which would be more intrusive on the neighborhood. A special exception is a form of a permitted use. Equally as important, the function of the planning commission is to review plans to determine compliance with ordinances. It is not the function of the planning commission to declare those ordinances invalid during a plan review.

E. Are the dimensional standards of the proposed structure existing legal nonconformities.

Mr. Caniglia cites the case of Money v. Zoning Hearing Board of Haverford Township, 755 A.2d 732 (Pa. Cmwlth. 2000) to support the position that a building which is dimensionally nonconforming may be razed and reconstructed, provided that the new structure is not larger than the original structure. In Money, the landowner proposed to tear down a dilapidated garage/chicken coop and replace it with a smaller garage in the same general location on the property. This case involves tearing down multiple buildings on two separate properties, combining the properties and constructing completely new buildings on the consolidated properties. We stand by our legal opinion that the destruction of the building on two properties, the merger of those properties, and the creation of a new use is an abandonment of the dimensional nonconformities on the site, including sales outside a building and sales beyond the front lines of a building.

The sale of gasoline (whether self-service or full-service) is not permitted in the C-2 Zoning District because gasoline sales are, by state law, required to be outside of a building. Gasoline sales as an accessory use as shown on the Wawa plan is not permitted for the further reason that the proposed gasoline sales are located in front of the principal building.

F. Rear Yard Provision

This was an argument made by the neighbors which will not be addressed in this response.