

NICHOLAS J. CANIGLIA, ESQUIRE
PIERCE CANIGLIA & TAYLOR
125 Strafford Avenue, Suite 110
Wayne, PA 19087
610-688-2626
Nick@pierceanigliataylor.com

ATTORNEY FOR APPLICANT
WAYNE PROPERTY ACQUISITION INC.

**Re: 302-306 E. Lancaster Avenue, Wayne, PA
SALDO # 2018-D-04**

**APPLICANT'S MEMORANDUM OF LAW IN SUPPORT OF
DETERMINATION OF TOWNSHIP'S ZONING OFFICER DATED APRIL 27, 2018**

A. The Zoning Officer is the final arbiter in zoning issues and his review is not subject to being overturned by the Solicitor for the governing body.

The matter before the Planning Commission involves the unprecedented opinion by the Solicitor for the Township advising the governing body to usurp the powers of the Zoning Officer and reverse his determination that the proposed development does not require submission to the Zoning Hearing Board.

On April 27, 2018 upon the request of the Applicant dated April 16, 2018 to issue a zoning determination letter of compliance with the provisions of the Zoning Code of Radnor Township, the Radnor Township Zoning Officer determined that no zoning relief is required for the proposed development (Copies of each correspondence is attached hereto as Exhibit "A"). As a result the Applicant had prepared and filed detailed engineered Land Development Plans, held six meetings/hearings attended by neighbors, provided revised Plans to the neighbors as suggested by the Planning Commission, addressed concerns expressed by neighbors and members of the Board of Commissioners' Community Development Committee, and responded to the Township's Consultants review letters. None of the review letters by township staff and the township consultants raised any zoning non-compliance issues. Eleven months after the issuance of the Zoning Determination letter, the Township Solicitor's office issued a Memo

inconsistent with the Zoning Officer's Determination, recommending that the Applicant needs to proceed to the Zoning Hearing Board for zoning relief.

It is well settled that the Municipalities Planning Code (the "MPC") vests the Zoning Officer as the final arbiter in the interpretation of a township's zoning ordinance. To allow otherwise, would politicize the entire land development process by allowing the governing body to interpret zoning ordinances under the guise of political expediency.

In *Borough of Jenkintown v. Bd. of Commissioners*, 858 A.2d 136 (Pa. Cmwlth. 2004), the Court addressed the zoning officer's role in making zoning determinations. The Court stated that zoning officers act in a gate-keeper-type capacity, sheltering zoning hearing boards from the duty to render preliminary decisions as to zoning compliance. *Id.* at 140.

The MPC provides developers with the option of seeking to have all zoning issues resolved before submitting a land development application, and having those issues decided preliminarily by a zoning officer, with the right to appeal his determinations to the zoning hearing board. *Id.* Moreover, the Court stressed the separation of authority between governing bodies and zoning hearing boards or zoning officers, stating, "while a governing body may interpret zoning ordinances in the land development review process, it has no authority to render final determinations resolving questions such as whether a use is permitted and whether relief from zoning ordinances is warranted." *Id.* as cited in *North Codorus Township v. North Codorus Township Zoning Hearing Board*, 873 A.2d 845, 848.

Radnor further codifies that the Zoning Officer is the determining force in making decisions on whether a development complies with the Zoning Ordinance. §255-14D(5) of the Subdivision and Land Development Ordinance ("SALDO") states:

The Zoning Officer shall, within 30 days following acceptance of the preliminary plan application: (a) Review the proposed zoning considerations in the application's submission; (b) Make recommendations to the Township Engineer.

Simply stated the Zoning Officer has the final say in making determinations regarding whether a development complies with the Zoning Code. Neither the governing body nor the solicitor of the governing body may overturn the Zoning Officer's determination.

B. The Retail use and the retail sale of gasoline are permitted used in the C-2 Zoning District.

Retail uses are permitted in the C-2 Zoning District. It is undisputed by all parties that the Wawa store is a permitted use. The sale of gasoline is also a retail use. As such it is permitted in the C-2 Zoning District.

Although the Township Solicitor appears to not have addressed the issue of whether the sale of gasoline is a permitted use or an existing non-conformity, the attorney for the Protestants contends that the sale of gasoline is only permitted in the C-3 Zoning District and its current use on the Site is an existing legal non-conformity. It is further surmised that since it is a nonconformity, a Special Exception is required to continue the use. This position is in error.

The C-3 Zoning District permits a "Motor Vehicle Service Station" (§280-55.B). An "Automobile Service Station" is defined §280-4 of the Zoning Code as follows:

A lot with principal and accessory buildings used for the sale of gasoline, oil and motor vehicle accessories *and* (italics added) the servicing of motor vehicles, including washing of cars and minor repairs, but not for body and fender work or painting.

In addition to the undisputed permitted retail store use, the proposed use only provides for the retail sale of gasoline. As such it does not meet the definition of "Automobile Service Station" which definition in addition to the sale of gasoline, also requires that the use include the servicing of motor vehicles. There is no servicing of motor vehicles to be provided on the Site.

The Township Solicitor is accurate in her description of the Zoning Code as being antiquated. In today's world, frequently gas is sold without the accompanying servicing of motor vehicles. However, this does not relieve the Code from the Strict Scrutiny standards of analyzing ordinances. The words of an ordinance must be construed as broadly as possible to give the landowner the benefit of the least restrictive use when interpreting its own Zoning Code. Shevkh v. Zoning Hearing Board of Stroud Township, 154 A.3d 408, 412 (Pa. Cmwlth. 2017). Any doubt must be resolved in favor of the landowner. *Id.*; 53 P.S. §10603.1. It is an abuse of discretion to construe the terms of an ordinance for the intended purpose of restricting a property's use. *Id.* Stated otherwise, a municipality cannot advance a new and strained interpretation of its zoning ordinance in order to effect what it would like the ordinance to say without an amendment. *Id.* As a result, the only manner to interpret the sale of gasoline proposed for the Site is as a permitted use, which does not require relief from the Zoning Hearing Board.

C. The Sale of Gasoline is a permitted accessory use to permitted Retail Store Use.

It is undisputed that the Wawa retail store is a permitted use in the C-2 Zoning District. The C-2 Zoning District also allows Accessory Uses in §280-51M as permitted in §280-47J. §280-47J states:

- Accessory uses *may* (italics added) include:
- (1) Storage ...
 - (2) Living accommodations ...
 - (3) Signs

The key word in this section of the Zoning Code is “*may*”. That is, it does not limit the types of Accessory Uses. It merely permits these types of Accessory Uses as well as other Accessory Uses as permitted in the Zoning Code.

§280-4 of the Zoning Code provides the definition of Accessory Use:

ACCESSORY USE – A use of a building, structure or land that is not a principal permitted use but which is entirely incidental and subordinate to the principal permitted use on the same lot.

The retail store is the permitted use. The issue becomes what is permitted accessory uses to a retail store. The Supreme Court of Pennsylvania provided the answer to that question in *Borough of Fleetwood v. Zoning Hearing Board*, 538 Pa. 536, 649 A.2d 651 (1994).

In *Borough of Fleetwood*, Turkey Hill Markets sought to sell gasoline on the same site as its retail convenience store. The Supreme Court determined that Turkey Hill was not required to obtain a variance or special exception since the sale of gasoline on the site of its convenience store is a customary accessory use. The Supreme Court also rejected the opposing Borough's argument that the sale of gas was the same as a gasoline service station which was permitted in a different zoning district and, therefore, not allowed as an Accessory Use.

Practically exactly similar to the Radnor Ordinance, the ordinance under question defined Permitted Accessory Uses as those "Located on the same lot with the permitted principal use ... customary accessory uses and buildings, provided such are clearly incidental to the permitted use." *Id.* at Pa. 541, A.2d at 653. Citing the aforementioned well-settled Pennsylvania law the Court applied the principles of strict construction to the interpretation of the zoning ordinance with any doubt resolved in favor of the landowner and the least restrictive use of the land. *Id.* Pa. at 19-20, A.2d at 656-657. As such the self-service gasoline pumps were permitted as an Accessory Use to the retail use of the lot.

D. The Radnor Zoning Ordinance cannot require that any change in nonconforming nonresidential occupancy to be a change in use requiring relief from the Zoning Hearing Board.

If the sale of gasoline is not a permitted use under the Zoning Code, both the Township Solicitor and the Protestant's attorney raise the issue of the need to proceed to the Zoning

Hearing Board for a Special Exception. Assuming arguendo, that the sale of gasoline is not a permitted use, §280-101.A of the Radnor Zoning Code recognizes that nonconforming uses may continue, however, a 1997 Amendment provides that any change in *nonresidential* (italics added) occupancy shall be deemed a change of use requiring the grant of special exception by the Zoning Hearing Board. This provision not only is improper as it discriminates between residential and nonresidential nonconforming uses, it runs contrary to the long-standing constitutional guarantee afforded by Pennsylvania to nonconforming uses.

Since 1928 the Pennsylvania Supreme Court has consistently held that nonconforming uses are constitutionally protected, shall continue, and run with the land. *Smalley v. Zoning Hearing Board of Middletown Township*, 675 Pa. 85, 834 A.2d 535; *Haller Baking Company's Appeal*, 295 Pa. 257, 145 Atl. 77 (1928). A municipality has no right to restrict a legal nonconforming use. In *DoMijo, LLC v. McClain*, 41 A.3d 967 (Pa. Cmwlth. 2012), a municipality attempted to terminate a non-conforming use by passing a zoning ordinance requiring registration of the non-conforming use. The Court held that a non-conforming use is a constitutionality protected right that runs with the land, and could not be lost by a subsequent zoning amendment.

Any argument that the Applicant must proceed to the Zoning Hearing Board for a special exception since occupancy has changed is ill-placed and clearly contrary to well-established law in the Commonwealth of Pennsylvania.

E. The dimensional standards of the proposed structures are permitted or are existing legal nonconformities.

The Zoning Officer addressed §280-49.A and §280-49.D of the Zoning Code. These provisions state:

- A. Every use other than a parking lot, shall be completely enclosed within a building.
- ...
- D. No permanent storage of merchandise, articles or equipment shall be permitted outside a building, and no goods, articles or equipment shall be stored, displayed or offered for sale beyond the front lines of a building...

If these are in fact, existing nonconformities, the Zoning Officer is correct in determining that since these legal non-conformities are being reduced, they may continue. §280-101.A of the Code, recognizes the constitutionally protected status of the nonconforming uses: "...the lawful use of a building structure or any land or premises existing at the time of the effective date of this chapter or any subsequent amendment or at the time of a change in the Zoning Map may be continued, although such use does not conform to the provisions hereof or of any subsequent amendment."

§280-101B.(1) also recognizes dimensional nonconformities: "A nonconforming building being used for a conforming purpose may continue and may be altered or enlarged if the alteration or enlargement does not increase the nonconformity of the building or structure with respect to the setback, land coverage and density requirements of this chapter..." The Zoning Officer applied this provision since there was no increase in the existing nonconformities.

The Township Solicitor contends that these nonconformities disappear once the structure is removed. This view is contrary to the ruling in *Money v. Zoning Hearing Board of Haverford Township*, 755 A.2d 732 (Pa. Cmwlth. 2000), which permitted the complete razing of a nonconforming structure provided that the new structure did not increase the existing nonconformity of the structure.

One matter not considered by the Zoning Officer or the Township Solicitor is the fact that §280-49.A&D are inapplicable to the sale of gasoline. The provisions deal with goods and

merchandise being offered for sale in an outside setting. The 1964 Zoning Code did not anticipate self-service sale of gasoline. If these provisions were strictly applied to modern day America, self-service gasoline would be a prohibited use throughout the Township. The doctrine of exclusionary zoning forbids a zoning ordinance from excluding an otherwise legitimate use.

F. The Wawa retail store complies with the rear yard provisions of the Zoning Code.

The Protestant's attorney argues that the proposed Wawa convenience store violates the rear yard setback requirements of the Zoning Code. This has not been raised in any of the Township's Consultants' review letters.

The Site fronts on two streets; Aberdeen Avenue and Lancaster Avenue. The architecture of the building designates the rear of the building along the residential properties. In addition to the appearances of frontage on both streets, this affords the residential neighbors the benefit of a significant setback of 86 feet, rather than the side yard requirement of 30 feet. As a result, the yard setback requirements of the Zoning Code are met.

RESPECTFULLY SUBMITTED BY:



**NICHOLAS J. CANIGLIA, ESQUIRE
ATTORNEY FOR APPLICANT**