

**Buckley, Brion, McGuire,
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July 8, 2010

RECEIVED

JUL 12 2010

YERKES ASSOCIATES, INC.

Russell Yerkes, Zoning Officer
West Marlborough Township
YERKES ASSOCIATES, INC.
Post Office Box 1568
West Chester, Pennsylvania 19380-0078

Re: Request for Zoning Determination

Dear Russell:

On June 8, 2010, I sent the attached letter to Al Giannantonio on behalf of my clients who own property in West Marlborough Township near The Whip. I should have addressed the letter to you as Zoning Officer of West Marlborough Township and I apologize for my mistake. Please accept this letter as my formal request for you, in your capacity as Zoning Officer of the Township, to review my letter and issue a formal zoning determination of the issues that I raise therein.

In my follow-up telephone conversation with Al Giannantonio yesterday, he advised that your firm is working on a response to the issues that I raised in my correspondence and expect to issue a response in the next few weeks after consultation with the Board of Supervisors.

If there is anything further that you need in order to issue a response, please advise.

Very truly yours,



Kristin S. Camp

KSC/akf

cc: Mr. & Mrs. Joseph Huston (*via electronic mail*)
Ms. Beatrice Cassou (*via electronic mail*)
Mr. & Mrs. Gus Brown (*via electronic mail*)

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June 8, 2010

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VIA CERTIFIED MAIL and EMAIL: agiannantonio@yerkes.com

Albert Giannantonio, P.E., Zoning Officer
WEST MARLBOROUGH TOWNSHIP
Yerkes Associates, Inc.
1444 Phoenixville Pike
West Chester, PA 19380-0078

RECEIVED

JUN 09 2010

YERKES ASSOCIATES, INC.

Re: Request for Zoning Determination

Dear Mr. Giannantonio:

Our Firm has been retained by a group of property owners in West Marlborough Township (the "Residents") to represent them before the Township with regard to nuisances that they are experiencing as a result of the business operations of The Whip, located at 1381-1383 N. Chatham Road ("The Whip"). We understand that you presently serve as the Township Zoning Officer. Accordingly, we submit to you the following information concerning The Whip and respectfully request that you issue a formal written determination with regard to the questions set forth below and revoke the Use and Occupancy Certificates that were issued by the Township on June 27, 2005 for the patio in the rear of The Whip and the single family dwelling.

I have reviewed the West Marlborough Township Zoning Ordinance (the "Ordinance"), as well as the various permits that were issued by the Township since the current owner of The Whip, Springdell Properties, LLC ("Springdell Properties"), acquired the property from Harold D. Young on April 1, 2004. It is clear that The Whip expanded the nonconforming restaurant use in violation of the Ordinance and without the proper zoning approval from the Township's Zoning Hearing Board. Outlined below are the various sections of the Ordinance that were not addressed or were ignored when building and zoning permits were issued allowing Springdell Properties to expand the area devoted to the nonconforming restaurant use.

At the outset, it is important to note that the Residents have no burden of proof. Rather, the Ordinance provides that it is the burden of an applicant seeking to expand or alter a nonconforming use to produce conclusive evidence as to the extent of the nonconformity when it was created and then prove that any expansion or alteration of the nonconforming use is permissible under the Ordinance. See Section 603.1 of the Ordinance.

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Section 201.2- Use Regulations in the R-1 Village Residential Zone

The Whip is operated on the following two separate parcels of property located at the northwest corner of the intersection of Pennsylvania Route 841 and Springdell Road: (1) Chester County Tax Parcel No. 48-3-24 ("Parcel 24"), located at 1383 N. Chatham Road which contains a net lot area of 16,963 square feet and is improved with a one-story building which has historically been used as a restaurant/tavern and is currently used for The Whip; and (2) Chester County Tax Parcel No. 48-3-24.1 ("Parcel 24.1"), located at 1381 N. Chatham Road which contains a net lot area of 7,260 square feet and is improved with a three-story dwelling which was historically used as a single-family detached dwelling and has more recently been used by the current owners for accessory uses associated with the nonconforming restaurant use at The Whip. Both Parcel 24 and 24.1 are located in the R-1 Village Residential Zone and in the Floodplain Overlay Zone. The permitted uses in the R-1 District are specified in Section 201.2 of the Ordinance and do not include restaurants or taverns. Therefore, the restaurant located on Parcel 24 may only continue as a nonconforming use pursuant to Section 600 of the Ordinance. When Springdell Properties purchased both Parcel 24 and Parcel 24.1 in April of 2004, the single-family detached dwelling located on Parcel 24.1 was used as a single-family dwelling which conforms to the use regulations of the R-1 District. (See Section 201.2(4)).

I have enclosed correspondence from K.C. Kulp, one of the principals of Springdell Properties, LLC, addressed to Denis Forrest, P.E., dated February 19, 2004, prior to when Springdell Properties acquired the two parcels. In this letter, Mr. Kulp acknowledges that the dwelling on Parcel 24.1 was being rented as a five bedroom dwelling prior to Springdell Properties' purchase of the same. This letter confirms that when Springdell Properties purchased Parcel 24.1 in 2004, the use of the dwelling was and had been as a conforming single-family dwelling use and not as part of the nonconforming restaurant use on Parcel 24.

I have also enclosed a letter from Denis Forrest, P.E., dated March 29, 2004, addressed to Springdell Properties wherein Mr. Forrest confirms that the property owned by Springdell Properties is two separate lots, each with a distinctive tax parcel number and use. This was not always the case. Until 1966, Parcel 24 and Parcel 24.1 were a single parcel identified as Chester County Tax Parcel No. 48-3-24 by the County Assessment Office. In 1966, the two parcels were subdivided and Parcel 24.1 was conveyed to a different owner. In 1971, the two parcels were brought back into single ownership and to our knowledge have remained in common ownership since that date under two separate tax parcel numbers.

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Springdell Properties has never used the single-family dwelling on Parcel 24.1 for its permitted use as a residential dwelling but instead has continuously used it for storage for the restaurant use, an office for the owners and as a prep kitchen. These accessory uses are not permitted pursuant to Section 201.2 of the Ordinance and are also not permitted as an expansion of the nonconforming restaurant use on Parcel 24 for reasons enumerated below.

Section 603- Expansion or Alteration of a Nonconforming Use

Section 603 of the Ordinance governs the expansion or alteration of a nonconforming use. The Township records reflect that the Township issued a building permit on April 4, 2005 to allow Springdell Properties to construct a 1,200 square foot patio at the rear of the restaurant. The construction of this patio constituted land development as defined in Section 112 of the Ordinance and the Pennsylvania Municipalities Planning Code and hence should have required land development approval pursuant to the requirements in the Township's Subdivision and Land Development Ordinance. Moreover, the construction of the patio represents an expansion and alteration of the nonconforming restaurant use and thus, required special exception approval from the Township's Zoning Hearing Board pursuant to Section 603.1. Before the Zoning Hearing Board could grant a special exception to allow the nonconforming restaurant use to expand beyond the footprint of the building which had historically been used as a restaurant onto a new patio, Springdell Properties would have had to prove all of the criteria set forth in Section 603.1 or obtain a variance from the provisions that it could not prove.

I have copied Section 603.1 of the Ordinance below in bold and included beneath the Ordinance language my comments in brackets as to whether Springdell Properties could prove the necessary criteria to be entitled to the grant of a special exception.

Section 603. Expansion or Alteration

603.1. Any nonconforming use may be expanded or altered through the obtainment of a special exception and subject to the following criteria, and those contained in Section 704.3: [Springdell Properties never obtained a special exception and never proved compliance with the standards set forth in Section 704.3.]

1. Expansion of the nonconformity shall be confined to the lot on which it was located on the effective date of this Ordinance, or any amendment thereto creating the non-conformity. [This provision would prohibit the nonconforming restaurant use, including parking, to be expanded onto Parcel 24.1 since the law requires that the nonconforming restaurant use be confined to the lot on which it was located on the effective date of the Zoning Ordinance. Neither Parcel 24.1 or the

Albert Giannantonio, P.E., Zoning Officer

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dwelling on such parcel could be used as an accessory use to the restaurant without a variance from this Section.]

2. The total of all such expansions or alterations of use shall not exceed an additional fifty percent (50%) of the area of those buildings or structures devoted to the nonconforming use as they existed on the date on which such buildings or structures first became nonconformities. The applicant shall furnish conclusive evidence as to the extent of the nonconformity when it was created. [Springdell Properties would have had to establish the area in the one-story building on Parcel 24 which was devoted to the restaurant use as of the date when such use became nonconforming. Any expansion of the nonconforming use is limited to 50% of such area.]

3. Provision for vehicular access, off-street parking and off-street loading shall be consistent with standards required by this Ordinance. [This provision requires Springdell Properties to demonstrate that there was sufficient off-street parking available to accommodate the number of seats which are located inside the restaurant and outside on the patio, as well as accommodate the number of employees on the shift of greatest employment. In a recent inspection at the restaurant, I counted 44 seats inside, 10 seats at the bar and 46 seats on the patio. Mr. Allen admitted at a Board of Supervisor meeting on June 2, 2009 that The Whip has 15 employees working on a busy weekend night. Based on the parking regulations in Section 311 of the Ordinance, Springdell Properties would have to provide 40 off-street parking spaces. In a site inspection that I conducted last year, I counted 27 off-street parking spaces on the parcels- 13 less than what the Ordinance requires.]

4. Provision for yards, building height and building area shall be consistent with the standards required for permitted uses in the zone in which the nonconformity in question is located. [Springdell Properties would not have been able to prove compliance with this Section since the existing restaurant is nonconforming with respect to front yard setbacks, rear yard setbacks, lot area, total impervious coverage and minimum lot width at the street line.]

5. Appearance should be harmonious with surrounding properties; this feature includes, but is not limited to, landscaping, enclosure of principal and accessory uses, height control, sign control, architectural control, and maintenance of all improvements and open spaces. [The addition of an unenclosed, unscreened patio in the rear of the restaurant which is often filled with over 50 patrons of the restaurant producing noise at levels easily audible to the neighbors is not harmonious with the rural character of the neighboring properties in the R-1 Zone.]

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6. Buffers and screens shall be provided as necessary to adequately protect neighboring properties. This includes, but is not limited to, fences, walls, plantings, and open spaces. [Springdell Properties did not provide any buffer or screen for the patio to adequately protect neighboring properties. The noise and lights emanating from the patio are a nuisance to the neighbors at most times of the day and night.]

7. The expansion shall not create new dimensional nonconformities or further increase existing dimensional nonconformities, except as provided for in Section 603.2 of this Ordinance. [The addition of the patio on the rear of the restaurant increased the existing nonconforming rear yard setback and also increased the nonconforming maximum total impervious coverage, therefore, conformity with these criteria could not have been proven by Springdell Properties.]

8. No expansion of a nonconforming structure or a nonconforming use located outside of a structure existing on the effective date of this Ordinance shall be permitted in the Floodplain Zone. [Springdell Properties would not have been able to prove this criteria since the expansion of the patio occurred within the Floodplain Zone. Springdell Properties would not have been entitled to a special exception to expand the nonconforming restaurant use by adding a patio in the Floodplain Zone without obtaining a variance from this Section.]

9. Excluding expansion, any modification, alteration, repair, reconstruction or improvement of any kind to a nonconforming use or structure located in the Floodplain Zone shall be permitted when either elevated above the base flood elevation or flood proofed in accordance with the requirements described in Section 204.7. of this Ordinance. In no case, shall any modification, alteration, repair, reconstruction, or improvement cause unacceptable increases in flood height, velocities or frequencies. [This section precludes any expansion of a nonconforming use or nonconforming structure located in the Floodplain Zone. The restaurant use is a nonconforming use and the restaurant building is a nonconforming structure- thus prior to building a patio in the rear of the nonconforming use and nonconforming building, Springdell Properties needed to obtain a variance from this Section.]

There is no evidence in the Township files that The Whip obtained a special exception or variances from the provisions in Section 603 of the Ordinance to allow the expansion of the nonconforming restaurant use by adding a patio to the rear of the restaurant building.

The Township files also contain a zoning permit that was issued on June 1, 2007 to allow excavation and installation of parking spaces on the two parcels owned by The Whip. Prior to the issuance of a building permit for these improvements, Springdell Properties needed to obtain special exception

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approval from the Zoning Hearing Board pursuant to Section 603.1 of the Ordinance. Again, the Township records do not reflect that Springdell Properties ever obtained a special exception to expand the parking lot for the nonconforming restaurant use. Moreover, Springdell Properties should not have been permitted to expand the parking for The Whip onto Parcel 24.1 without obtaining a variance from Section 603.1.1 which limits the nonconforming use to the lot which was used for the nonconforming use as of the effective date of the Ordinance, which in this case is Parcel 24.

The following actions represent unlawful expansions of the footprint of the nonconforming restaurant and bar use onto Parcel 24.1 without the requisite zoning approval:

1. in 2004 and 2005 Springdell Properties installed on Parcel 24.1 sanitary sewage holding tanks to service The Whip;
2. in 2007, Springdell Properties constructed a patio on a portion of Parcel 24 comprised of floodplain associated with Doe Run and which was not historically used for restaurant and/or tavern purposes;
3. in 2008 Springdell Properties installed on Parcel 24.1 off-street parking spaces for customers and employees of The Whip; and
4. Springdell Properties has continuously used the dwelling located on Parcel 24.1 as office and storage space and preparatory kitchen space for The Whip- uses which are not permitted in the R-1 District.

Section 311- Off-Street Parking Requirements

The Whip is also in violation of the off-street parking requirements in Section 311 of the Ordinance. The off-street parking regulations in Section 311 became applicable when The Whip sought to expand the restaurant use by adding more seats on the patio pursuant to Section 311.1.3. There are currently 27 off-street parking spaces provided for the Whip which are located on both Parcel 24 and Parcel 24.1. I reviewed a draft of a site plan which was prepared for The Whip by Bolmar Associates, LLP, dated April 12, 2006. The parking table on this site plan calculates the number of off-street parking spaces that Springdell Properties intended to provide based on the Ordinance criteria. On this plan, Springdell Properties indicated that there were 57 seats at the tavern which would require 1 off-street parking space for every 4 seats or 15 parking spaces. The plan also indicates that there were 10 employees in the shift of greatest employment that required 1 space for every employee or 10 spaces. Based on this 2006 site plan, Springdell Properties attempted to demonstrate compliance with the parking regulations in the Ordinance.

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In the fall of 2009, I counted the number of seats and parking spaces at The Whip to determine if the restaurant use complied with the parking regulations in the Zoning Ordinance. I counted 44 seats inside, 10 seats at the bar and 46 seats on the patio. According to the owners' admission at a public Board of Supervisors meeting, there are 15 employees on the shift of greatest employment. Based on Section 311.1.(3) of the Ordinance the off-street parking regulations in Section 311 applied when The Whip was permitted to alter the one story building on Parcel No. 24 and enlarge it by adding 46 seats on the patio, which increases the amount of parking spaces required. Springdell Properties had the burden to demonstrate by clear and convincing evidence that it had sufficient off-street parking to accommodate the total number of seats inside and outside of the restaurant and for all employees on the greatest shift of employment. According to my calculations, a minimum of 40 parking spaces is required- 13 less than what is provided today. Moreover, it is clear from the fact that vehicles are regularly parked several cars deep on the Whip property and in the public rights of way and on private property near The Whip, (in violation of a Township Ordinance) that there is not enough off-street parking to support the current operation at The Whip. The Whip should not have been permitted to make any expansion of the nonconforming restaurant use without providing the minimum number of off-street parking spaces that the Ordinance requires or obtaining a variance from such provisions.

There are other provisions of Section 311 that should have been complied with when The Whip sought a zoning permit to install the patio, including installation of curbs pursuant to Section 311.5, the lighting standards in Section 311.13 and the landscaping and screening requirements in Section 311.15.

Section 204-Floodplain Zone Regulations

Because both parcels are located in the Floodplain Zone, the provisions of Section 204 of the Ordinance applied to Springdell Properties' proposal to build the patio or expand the parking lot for the restaurant. The patio and expanded parking lot are not permitted uses identified in Section 204.6(1), nor are they permitted by special exception pursuant to Section 204.6(2). Moreover, Section 204.6.3(N) specifically prohibits "encroachments, including fill, new construction, substantial improvements and other development within the adopted regulatory floodway that would result in any increase in flood levels during the occurrence of the base flood discharge."

If Springdell Properties had applied for a special exception to build the patio in the Floodplain Zone, it would have had to demonstrate compliance with the design and construction standards set forth in Section 204.7 which apply to all construction and development proposed in the Floodplain Zone. It could not have done so.

Albert Giannantonio, P.E., Zoning Officer

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Section 204.8A(3) states that, “[n]o nonconforming use or structure shall be expanded, enlarged or altered in any way which increases its nonconformity with respect to height, area, yard and other requirements established in Section 204.7 and other sections of this Zoning Ordinance, nor in any way which causes it to occupy more space within the Floodplain Zone than was occupied by it on the effective date of this section.” Based on this section, the nonconforming restaurant use could not have been expanded, enlarged or altered since any expansion or enlargement in the rear would increase its nonconformity with respect to the yard requirements and because any expansion or enlargement of the area devoted to the nonconforming use would mean more encroachment in the Floodplain Zone.

Before Springdell Properties expanded the restaurant by adding the patio to the rear or by adding additional parking spaces within the Floodplain Zone, it had the burden of either: (a) proving compliance with the requirements of Section 204.9 by clear and convincing evidence; or (b) obtaining a variance pursuant to the requirements in Section 204.10. There is no record of the property owner obtaining or even requesting a special exception or variance to expand into the Floodplain.

In addition to requiring zoning approval from the Zoning Hearing Board prior to constructing the patio and expanding the parking lot, Springdell Properties should have been required to obtain land development approval from the Board. If land development plans were submitted, the owners would have then had to demonstrate compliance with certain provisions in Article 5 of the Zoning Ordinance concerning protection of environmentally sensitive land areas which are identified on the Township’s Natural Features Map.

Based on the information that I have gathered through my research, I ask you to confirm the following determinations:

1. Non-Conforming Use. The use of Parcel 24 as a restaurant and bar is a nonconforming use and must be limited to Parcel 24, which is the only lot which was used for the restaurant use as of the effective date of the Ordinance.
2. Expansion of Non-Conforming Use (Parcel 24). Springdell Properties violated Section 603.1.of the Ordinance when it expanded the footprint of The Whip on Parcel 24 (by adding the patio) without obtaining a special exception from the Zoning Hearing Board.
3. Floodplain. Springdell Properties violated Section 204.6. of the Ordinance when it constructed (and thereafter used) the patio within the floodplain associated with Doe Run without obtaining a variance from the Zoning Hearing Board.

**Buckley, Brion, McGuire,
Morris & Sommer LLP**

ATTORNEYS AT LAW

Albert Giannantonio, P.E., Zoning Officer

June 8, 2010

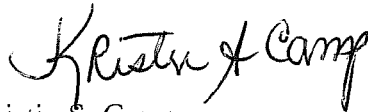
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4. Expansion of Non-Conforming Use (Parcel 24.1). Springdell Properties violated Section 603 of the Ordinance when it expanded the footprint of The Whip onto Parcel 24.1 by adding the accessory parking spaces and the new septic holding tank and using the dwelling on Parcel 24.1 as accessory to The Whip without obtaining a variance from the Zoning Hearing Board.
5. Off-Street Parking. Springdell Properties is in violation of Section 311.19. of the Ordinance by continuing to operate The Whip without providing the number of off-street parking spaces required.

For the reasons enumerated above, the Residents believe that the use and occupancy certificates that were issued for the patio and dwelling should be revoked pursuant to your authority in Section 800.1(2)(K) and 801.1(9) of the Ordinance. In June of 2009, I sent a letter to the Board of Supervisors outlining the zoning violations that I have explained in detail above. There has been no response to that letter from either Springdell Properties or the Township. The Residents and I respectfully request that you respond to this letter with your determination of the issues presented above.

Please contact me if you need additional information.

Very truly yours,



Kristin S. Camp

KSC/akf
Enclosures