



Yerkes Associates, Inc.

Consulting Engineers / Site Planners / Land Surveyors

September 29, 2010

Kristin S. Camp, Esquire
Buckley, Brion, McGuire, Morris & Sommer LLP
118 W. Market Street, Suite 300
West Chester, PA 19382-2928

RE: Response to Request for Zoning Determination
The Whip Restaurant, West Marlborough Township

Dear Ms. Camp:

As the Zoning Officer for West Marlborough Township, I am in receipt of the correspondence you sent to Yerkes Associates on June 8, 2010 and July 8, 2010 regarding concerns your clients have regarding the business operations of the Whip Restaurant on property owned by Springdell Properties, LLC located at 1381-1383 N. Chatham Road ("Property"). In your letter, you request that the Zoning Officer (1) issue a formal written determination regarding certain questions and complaints you raise regarding the Whip and (2) revoke the Use and Occupancy Certificates that were issued by the Township on June 27, 2005. I have completed my review of this matter and I am providing you with this response, which should be considered a formal "determination" of the Zoning Officer as that term is defined under the Municipalities Planning Code ("MPC").

Preliminarily, I would like to provide some background to my investigation of this matter. As you may know, I was not acting as the Zoning Officer at the time that Springdell Properties, LLC acquired the Property in April of 2004 and so I had no first-hand involvement or knowledge regarding the issues you raised in your correspondence. Accordingly, in addition to reviewing your correspondence, I reviewed the Township's records relating to the Property, conducted an inspection of the Property, spoke with K.C. Kulp, one of the owners and the manager of the Whip Restaurant, and spoke with Louisa Emerick, who ran the restaurant business with Harold Young prior to the Property being sold. In addition, because you raised a number of legal issues, I also consulted with the Township's Solicitor, J. Dwight Yoder.

Based on my investigation, I have determined that the following occurred as it relates to the Property and the Whip Restaurant.

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- On April 1, 2004, Springdell Properties acquired the Property from Harold D. Young pursuant to a single deed that contained two tracts of land, identified as tax parcel numbers 48-3-24 ("parcel 24") and 48-3-24.1 ("parcel 24.1").
- The Properties are located within the R-1 Village Residential Zone.
- At the time Springdell Properties acquired the Property, parcel 24 included both the restaurant and the single family house while parcel 24.1 included a pool and a shed. There was a malfunctioning septic holding tank that had been used for the Property on the north side of the restaurant (on parcel 24) and a well located on parcel 24.1.
- Harold Young operated a restaurant on the Property under the name "Springdell Country Place." There were approximately 13 to 14 parking spaces for the restaurant when Springdell Properties acquired the Property.
- Mr. Young used a portion of the house on the Property as an office for the restaurant and he lived in the front part of the house. As mentioned above, the restaurant and the house were originally on the same lot.
- On April 24, 2004, Springdell Properties submitted a building permit application to perform renovations on the existing restaurant (located on parcel 24 with an address of 1383 N. Chatham Road), which included specific building plans, a site plan and a sketch plan for an outside patio area on the north side of the restaurant. The renovations primarily involved exterior improvements and some minor changes to the interior. The overall footprint of the restaurant did not change and the seating capacity was not changed. It appears that the renovations also included improvements on the existing house located on the same parcel as the restaurant. On May 4, 2004, the Township issued a building permit for the renovations (W-2004-9).

- On July 23, 2004, Springdell Properties submitted a building permit application to the Township (that included a full size plan) seeking approval to install new sewage holding tanks on parcel 24 that would serve both the restaurant and single-family home. One 1,500 gallon holding tank was to serve the single family home and two 5,000 gallon holding tanks were to serve the restaurant. The Township approved the permit on August 3, 2004 and issued a certificate of occupancy on June 24, 2005.
- On December 7, 2004, Springdell Properties submitted an application for a "Lot Line Change Plan" (File No. W-2004-2) to change the lot-line between parcel 24 and parcel 24.1 so that the single-family home and pool would be on a separate parcel (parcel 24.1) from the existing restaurant (which is on parcel 24). The pool was to be filled in and closed. The Township approved the Lot Line Plan in March of 2005 and it was recorded on May 31, 2005.
- The Lot Line Change Plan and accompanying notes also depicted the installation of the three new septic holding tanks on parcel 24 to replace the malfunctioning holding tank on the Property. Because the holding tank used by the single family house was now located on the adjoining parcel (parcel 24), an easement was prepared and recorded.
- On March 21, 2005, Springdell Properties submitted an application for a building permit to construct a patio at its restaurant to serve food and beverage. The application included a "Preliminary Landscape Concept" sketch depicting the general layout and configuration of the proposed patio.
- On April 4, 2005, the Township issued a building permit (W-2005-6) to Springdell Properties to install a 30' by 38' (1140 sq. ft) patio. The estimated cost of the patio set forth in the building permit was \$20,000. The Township approved an extension to complete the patio until June 11, 2007. Springdell Properties proceeded to install the patio pursuant to the building permit. The final patio is an off-center ellipse design with an approximate area of 794 square feet.

- On June 24, 2005, the Township issued a certificate of occupancy for the associated piping for the sewage holding tanks located on 1383 N. Chatham Road.
- On June 27, 2005, the Township approved the renovations done on the restaurant and issued a Certificate of Occupancy for the restaurant that included a maximum occupancy of 75 persons.
- On June 27, 2005, the Township issued a Certificate of Occupancy for the renovations done on the house that was now located on parcel 24.1 at 1381 N. Chatham Road.
- In June of 2006, Springdell Properties submitted an application for a zoning permit (W-2006-10) to excavate and install parking spaces on the west side of the house to alleviate the problem with parking that was occurring at the Whip Restaurant. The application included a site plan depicting the proposed parking spaces on parcel 24.1. The site plan also showed the "parking rationale" for the restaurant use as follows: 1 parking space for every 4 seats plus one for each employee on the largest shift. The site plan indicated there were 57 seats, which required fifteen (15) parking spaces and there were ten (10) employees. Therefore, the site plan indicated that 27 parking spaces were needed and the plan depicted 27 parking spaces. The site plan did not depict the patio area, which at this time had not yet been constructed.
- On June 11, 2007, the Township approved the zoning permit to excavate and install parking spaces at 1381 N. Chatham Road. The Township file also includes correspondence indicating that there was a delay in installing the parking spaces because of the limited availability of pervious pavement. Springdell Properties installed the parking spaces in 2008.

In addition to reviewing the Township's records related to the Property, I also inspected the Property at which time I confirmed that Springdell Properties installed the sewage holding tanks, the patio area and the additional parking spaces according to the permits that were issued. I observed that, at a maximum, there were 60 seats available

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in the restaurant building for eating. On the patio, there were 42 seats available for eating. I counted twenty-seven (27) parking spaces at the Property. In speaking with Mr. Kulp, he indicated that the normal number of employees he has on the largest shift is not more than twelve or thirteen employees.

The Township's records document that the Township has received complaints regarding the parking situation at the Whip restaurant. It appears the primary concern arises out of patrons parking along Springdell Road and North Chatham Road. As you know, the Supervisors adopted an ordinance to prohibit parking in certain areas along these roads to address these concerns. The no-parking restrictions along these roads are currently being enforced by local law enforcement and all complaints related to parking in these areas should be directed to the East Marlborough Township Police Department.

In your correspondence you identify three areas of concern: (1) the use of the house (now located on parcel 24.1) to store supplies for the Whip Restaurant located on parcel 24; (2) the installation of a patio area on parcel 24 that is used by the Whip Restaurant for outdoor seating of patrons; and (3) the installation of parking spaces on parcel 24.1 to provide parking for the Whip Restaurant. I will address each of your concerns in order.

1. The use of the house on parcel 24.1.

One of the concerns you raised in your correspondence was that Springdell Properties was using the house to support the Whip Restaurant. You claim the use of the house for commercial purposes violates the Township's Zoning Ordinance.

When Springdell Properties acquired parcels 24.1 and 24 in 2004, parcel 24 included both the house and the restaurant, while parcel 24.1 only included the pool and a shed. Both parcels were (and continue to be) located within the R-1 Village Residential Zone, which allows single-family dwellings but does not permit restaurants or related uses. As you correctly indicate in your correspondence, the use of parcel 24 for a restaurant represents a preexisting non-conforming use that is allowed to continue under the Zoning Ordinance. Based on my investigation, Mr. Young used the house both for residential purposes and to support his restaurant business. For example, while Mr. Young lived in a portion of the house, he also maintained an office in the house for the restaurant and used portions of the first floor for storage and restaurant related uses. In a phone discussion with Ms. Emerick, who assisted Mr. Young in running the restaurant, she indicated that they stored materials in the house to support the restaurant business; although there was no specifically designated area of the

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dwelling for such storage, it all was on the first floor. Ms. Emerick also stated there was a UV well water treatment system in the basement of the house that served both the house and restaurant. In addition, she indicated that the daughter of Charles Thompson (the owner prior to Howard Young) performed a substantial amount of cooking in the house kitchen for service in the restaurant.

The present situation is complicated because Springdell Properties elected to change the lot-line between parcels 24.1 and 24 by moving the line so that the house was placed on a separate parcel (24.1) from the restaurant. Since acquiring the Property, Springdell Properties has used the house to support its restaurant business and not for residential purposes. It continues to use the office area as an office area but it also uses other parts of the house for storage of dry goods, linens and kitchen utensils. I also observed refrigerators that were used to store food for the restaurant.

As to this matter, it is my determination that the use of the first floor of the house constitutes a permissible, nonconforming use related to the operation of the restaurant. Therefore, Springdell Properties may continue to use the first floor of the house for its restaurant use pursuant to section 600 of the Township's Zoning Ordinance. However, the use of the second floor of the house does not constitute a preexisting nonconforming use. I also could not find any zoning approval or permit that authorized Springdell Properties to use additional areas of the house (e.g. the second floor) to support its restaurant business. Therefore, unless Springdell Properties can establish a preexisting nonconforming use of the second floor of the house to support the restaurant business, Springdell Properties must first obtain either special exception approval (to expand a nonconforming use) or a variance before using the second floor of the house to support its operation of the Whip Restaurant. Accordingly, I will be issuing the appropriate notice to Springdell Properties, LLC regarding its use of the second floor of the house to support the restaurant business.

2. The installation of the patio at the Whip Restaurant.

You also state in your letter that Springdell Properties installation of a 1,200 square foot patio on parcel 24 (which the zoning application indicates is used for "Restaurant/Patio Food Beverage Service") was done in violation of the Zoning Ordinance. You state that Springdell Properties never obtained special exception approval to expand its non-conforming use as required by the Zoning Ordinance; that the installation of the patio did not comply with the requirements of the Floodplain Zone; and that additional parking was not provided to account for the increased number of seats located in the patio area. You request that I revoke the previously approved building permit for the patio.

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As this issue involves questions of a legal nature, I consulted J. Dwight Yoder, the Township's Solicitor for advice regarding the legal standards applicable to revoking a previously issued permit. Mr. Yoder advised me that a previously issued permit may be revoked if the permit was issued based on false statements or misrepresentations of fact by the landowner in the initial application. Mr. Yoder also advised me that in *Petrosky v. Zoning Hearing Board of Upper Chichester*, the Pennsylvania Supreme Court held that a landowner acquires a "vested right" in a building permit that is erroneously issued by a municipality if the owner attempted to comply with the law, proceeded in good faith, expended substantial unrecoverable funds in reliance on the permit, the appeal period expired without an appeal being taken, and the use of the permit does not adversely affect individual property rights or the public health, safety or welfare. 401 A.2d 1385, 1388 (Pa. 1979).

I confirmed that Springdell Properties installed the patio according to the terms and conditions of the building permit issued by the Township. I could not identify any false statements or misrepresentations of fact regarding the patio or how it would be used. It also appears to me that Springdell Properties proceeded in good faith and with due diligence in attempting to obtain all necessary municipal approvals. This is not a case where a property owner constructed an addition and then after-the-fact sought the necessary approvals. I also confirmed that Springdell Properties expended significant funds to construct the patio in reliance on the permit. The permit itself indicated the expected cost of the patio was \$20,000. Therefore, even assuming that your analysis is correct (*i.e.* that before obtaining a building permit for its patio Springdell should have first obtained zoning approval to expand its nonconforming use and should have provided additional parking), it is my determination that under the unique circumstances of this case Springdell Properties acquired a vested right in the building permit. Accordingly, I will not be revoking the permit as you requested.

Any aggrieved individual or group of individuals had a right to take an appeal to the issuance of the building permit within thirty days from when the permit was issued, or, at least promptly from when they first observed that the patio had been installed. In my opinion that would have been the proper procedure for addressing the issues you are now raising.

3. The installation of restaurant parking on parcel 24.1.

The last issue you raise in your correspondence is that Springdell Properties should have obtained zoning approval before constructing parking places for its restaurant on parcel 24.1. While I agree that the commercial use of parcel 24.1 for the Whip Restaurant is not permitted "as of right" (*i.e.* it would require separate zoning approval), my review of the Township records shows that similar to the patio issue, Springdell Properties applied for and the Township approved a zoning permit to install

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additional parking spaces on parcel 24.1. Indeed, it appears that these parking spaces were added at the urging of the Township to address the very concerns with parking that your clients have been raising for quite some time. Springdell Properties submitted an application for a zoning permit along with a site plan showing that the parking would be located on parcel 24.1. Based on my review of this matter, Springdell Properties proceeded in good faith and with due diligence to obtain the necessary municipal approvals. They also expended significant sums of money in installing the parking spaces in reliance upon the zoning permit. Thus, similar to my conclusion regarding the patio permit, it is my determination that I cannot revoke the zoning permit approving the parking on parcel 24.1, even if it was erroneously issued, because Springdell Properties acquired a vested right in the permit.

I would note that the number of parking spaces for the restaurant also constitutes a preexisting nonconforming site condition. My understanding is that when Mr. Young operated the restaurant, there were only 13 to 14 parking spaces, which is less parking than what is required for the existing restaurant on this Property under the current Zoning Ordinance.

As explained in response to your complaint regarding the installation of the patio, the parking on parcel 24.1 was well known to your clients for many years and they could have taken an appeal to the zoning hearing board as it related to this parking. They choose not to do so and based upon my review of this matter, I have concluded that I cannot now revoke this permit.

In conclusion, I will be issuing an appropriate notice to Springdell Properties regarding its use of the house on parcel 24.1 to support its restaurant operation. I will not revoke the permit the Township issued to Springdell Properties for installing the patio on parcel 24. I also will not revoke the permit the Township issued to Springdell Properties for installing the parking spaces on parcel 24.1. In both instances, I have determined that Springdell Properties acquired a vested right in these permits even if the permits were issued in error.

If you disagree with my determination, you have the right to file an appeal to the Zoning Hearing Board within thirty (30) days as provided for by the Municipalities Planning Code.

If you have any further questions, please do not hesitate to contact me.

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Sincerely,

YERKES ASSOCIATES, INC.



Russell Yerkes
West Marlborough Township Zoning Officer

Cc: Shirley Walton, Township Secretary
J. Dwight Yoder, Solicitor