

## **ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO. Z-09-11	:	
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APPLICATION OF:	:	
Pawlings Road Land Associates, LLC	:	
	:	DATE OF MAILING OF OPINION
	:	AND DECISION: January 8, 2010
PROPERTY:	:	
1433 Pawlings Road	:	
Phoenixville, PA 19460	:	
Parcel No. 43-00-10579-00-7	:	

### **OPINION, DECISION AND ORDER OF THE LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

The applicant, Pawlings Road Land Associates, LLC (hereinafter referred to as the "Applicant"), filed an application requesting three forms of relief with regard to use of the property located at 1433 Pawlings Road in Lower Providence Township, Montgomery County, Pennsylvania as an auto repair garage and residential duplex building: (1) an appeal from an Enforcement Notice dated May 14, 2009 to permit the continuation of nonconforming use and demolition/construction of proposed buildings; (2) an interpretation that existing uses are nonconforming and that the continuation of such uses along with the proposed expansion of buildings containing the nonconforming uses are permitted pursuant to Sections 143-145, 143-146, 143-149 and 143-150 of the Zoning Ordinance; and (3) variances from Sections 143-36, 143-145, 143-146, 143-149, and 143-150 of the Zoning Ordinance, to permit the continuation of the nonconforming uses and proposed expansion of the existing buildings (vested right and/or variance by estoppel). The application was properly advertised<sup>1</sup>, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on July 28, 2009, September 10, 2009, September 29, 2009, September 30, 2009, November 17, 2009, November 18, 2009,

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<sup>1</sup> During the Zoning Hearing Board public proceeding on July 23, 2009 copies of the application and the advertisement for the hearing on the application were entered into the record and the hearing on the application was continued at the parties' request.

November 21, 2009 and November 24, 2009 at the Lower Providence Township Administration Building and/or the IBEW Hall, at which all members of the Zoning Hearing Board except Mr. Eric Frey<sup>2</sup> were present as well as the Solicitor and the Court Reporter.

### **FINDINGS OF FACT**

1. The Applicant is Pawlings Road Land Associates, LLC.
2. The Applicant is the owner of the subject property.
3. The subject property is located at 1433 Pawlings Road, Phoenixville, PA 19460, in Lower Providence Township, Montgomery County (the "Property"). The parcel no. is 43-00-10579-00-7.
4. The applicable zoning is R-2 Residential District.
5. The Applicant was represented by legal counsel, Frank R. Bartle, Esquire, 1800 Pennbrook Parkway, Suite 200, Lansdale, PA 19446.
6. Adjacent property owners Mr. and Mrs. Harold Baird, with an address at 1428 Lincoln Street, Lower Providence Township, were represented during the proceeding by legal counsel, Lawrence Sager, Esquire, 43 High Street, Pottstown, PA 19464.
7. Adjacent property owner Charles Davidson, with an address at 1429 Pawlings Road, Lower Providence Township, was represented during the proceeding by legal counsel, Dennis O'Connell, Esquire, 89 Merkel Road, P.O. Box 303, Gilbertsville, PA 19525.
8. The lot size of the Property is approximately 78,336 square feet.
9. The auto repair garage use has existed inside the fenced-in area of the Property<sup>3</sup> and in the three garage buildings located on the Property since prior to 1966. In 1966 the Lower

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<sup>2</sup> Mr. Frey recused himself from the proceeding with regard to this application because his office represents the applicant.

<sup>3</sup> The same fence that existed in the 1960s is on the Property today.

Providence Township Zoning Board of Adjustment issued a decision recognizing the operation of an auto repair shop as a legal non-conforming use of the Property. [Exhibit A-3, tab 1.]

10. The Lower Providence Township Zoning Board issued a decision in 1983 with respect to an application of the then-owner of the Property, Joseph Carter, to permit the storage of vehicles for salvaging of parts and storage of vehicle parts in an outdoor area on the Property. [Exhibit A-3, tab 3.] In the 1983 Decision the Board found that the Property consisted of two apartments and three other buildings utilized in connection with the auto repair business -- a body shop, a repair shop and a utility shop. The Board concluded that its 1966 Decision ruled that storage of non-customer owned inoperable vehicles would not be permissible and any storage of repair parts or removed parts must be located within the existing buildings. The Board denied the application to modify its 1966 Decision.<sup>4</sup>

11. Carter operated the auto repair business on the Property until he retired in 2003.

12. Work on vehicles was previously done outside the buildings and vehicles were previously parked and/or stored outside the buildings.

13. Carter marketed the Property for sale as an auto repair garage after his retirement.

14. Carter died in December 2005.

15. The Property has continued to be assessed by Montgomery County for real estate tax purposes as an auto repair garage from 1998 through the present. [Exhibits A-15, A-16.]

16. The Property was sold at tax sale in September 2007, with a deed issued dated January 31, 2008. [Stipulation, N.T. 9/10/09, p. 105; Exhibit A-14.]

17. The Property was marketed for years as an auto service garage and multi-unit apartment building. [N.T. 9/10/09, p. 96, 98-102.]

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<sup>4</sup> In addition, the Township issued citations over the years which recognized the nonconforming auto repair garage use on the Property.

18. The Lower Providence Township Zoning Officer introduced Joseph DeLuca, a member of the Applicant, to the Property in February 2008, and told Mr. DeLuca that the Township wanted him to buy the Property, clean it up and bring it up to code, and replace the buildings and bring them up to code. [N.T. 9/10/09, p. 94; N.T. 9/29/09, p. 30-31.]

19. In May 2008 the Applicant entered into an agreement of sale regarding the Property with the purchaser of the Property at the tax sale, which provided for a due diligence period regarding permissibility of proposed uses and improvements on the Property. [N.T. 9/29/09, p. 26, 29-30; Baird Exh. 25.]

20. The Township Zoning Officer informed Mr. DeLuca that he did not need zoning approval for the proposed commercial use of the Property and that the auto repair business, public garage and a duplex on the Property were lawful nonconforming uses. [N.T. 9/10/09, p. 107; N.T. 9/29/09, pp. 41-43.]

21. Prior to his company purchasing the Property Mr. DeLuca did not learn any information indicating that his company could not use the Property as proposed. [N.T. 9/10/09, p. 108.]

22. When the Applicant conducted due diligence with the Township, the Township's file with regard to the Property did not contain the 1966 or 1983 Zoning Decisions.

23. Mr. DeLuca spoke with the Township Zoning Officer and another Township official regarding his proposed plans to renovate the duplex and combine the garage buildings on the Property, as noted on Exhibit A-1, and the Township officials told Mr. DeLuca he could proceed with the proposal without any zoning relief and would just have to apply for building and renovation permits. Mr. DeLuca testified that the Applicant's plan was (and always had been) as follows: to replace the first garage building (located on the west side of the Property

and noted as garage 1 on Exh. A-1) with a new pole barn; to renovate the existing residential duplex building; and to demolish the other two garage buildings (garage 2 being on the east side of the Property and garage 3 being on the north side) and build one replacement garage building which would be 23% larger than the combined area of the two demolished garage buildings (garage two and garage three).<sup>5</sup> [N.T. 9/10/09, pp. 74-79, 111-12, 120, 128-29, 131-32.]

24. The Township Zoning Officer sent a letter to the Applicant's bank dated August 19, 2008, prior to the Applicant's purchase of the Property, stating that the current use of an automobile repair garage with a residence on the Property is a nonconforming use with nonconforming structures, and the current nonconforming use has been determined not to be abandoned. [Exh. A-3, tab 6; N.T. 7/28/09, pp. 76-78; N.T. 9/10/09, pp. 109-10.]

25. On August 20, 2008, the Township issued a Certificate of Use and Occupancy or Commercial Resale U & O with regard to the resale of the Property. This approved the current and proposed use of the Property for "Automotive Business/Residential Duplex" as set forth in the Application for Commercial Certificate of Compliance for the Property filed with the Township on June 16, 2008. [Exh. A-3, tab 6; N.T. 7/28/09, pp. 72-74.]

26. The Applicant purchased the Property in September 2008. [N.T. 9/10/09, pp. 69-70; Exh. A-14.]

27. The Township Zoning Officer sent a letter to the Applicant's bank dated October 2, 2008, after the Applicant's purchase of the Property, stating that the current use of an automobile repair garage with a residence on the Property is a nonconforming use with nonconforming structures, and the current nonconforming use has been determined not to be

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<sup>5</sup> Garage two and garage three (2215 square feet and 720 square feet, respectively, having a total combined area of 2935 square feet) would be replaced with a single building of 3600 square feet. The proposed expanded single garage which would replace garage two and garage three would represent the 23% increase in area over the total combined area of garage two and garage three.

abandoned. This letter also stated that the current nonconforming buildings may be extended upon the lot provided that the area of such building may not be increased by more than a total of 25% of the area of such building existing on the date it became a lawful nonconforming building or a building of which a nonconforming use is made. [Exh. A-3, tab 6; N.T. 7/28/09, pp. 79-80, 83; N.T. 9/10/09, p. 110.]

28. After obtaining the Commercial Resale U&O and the two opinion letters, the Applicant began renovating the Property and obtained permits for the replacement of garage one and the renovation of the existing duplex. [N.T. 7/28/09, pp. 84-86; N.T. 9/10/09, pp. 112-15.]

29. The Applicant removed old cars, tires, trash, and other debris from the Property.

30. At the time the Applicant made application for the permit for the construction of the first garage building, the Township helped Mr. DeLuca measure the foundation of the first garage building and advised him what size replacement garage to build. [N.T. 7/28/09, p. 184; N.T. 9/10/09, pp. 117-18.]

31. The Applicant built the replacement garage as advised by the Township. The Township also permitted and inspected all work done to the residential duplex. The work on these two buildings is almost complete. [N.T. 9/10/09, pp. 113-17, 118.]

32. The area of garage one (as replaced) did not increase.

33. The area of the residential duplex (as renovated) did not increase.

34. After completing most of the work on the first garage building, the Applicant again discussed the second garage building and submitted a demolition permit application for the second garage building. After not hearing anything from the Township, the Applicant began demolishing the second garage building. At that time he was served with the May 14, 2009 Enforcement Notice which is a subject of this application. [N.T. 9/10/09, pp. 119-22.]

35. The Enforcement Notice listed three violations of the Township's codes, as follows:

- A. Storage of landscape and contracting equipment and products in violation of permitted uses for the subject property;
- B. Earthmoving activities conducted and storage of landscape and contracting equipment without securing Land Development Approval in violation of township codes; and
- C. Earthmoving activities conducted without a zoning permit in violation of permitted uses for the subject property.

36. Upon receipt of the Enforcement Notice, all of the Applicant's activities on the Property ceased as required by the Enforcement Notice. [N.T. 9/10/09, p. 122.]

37. The Township has withdrawn the Enforcement Notice, pursuant to an agreement with the Applicant that after the Zoning Board issues its decision in this matter the Applicant will submit an engineered plan regarding compliance with grading and storm water regulations of the Township and use of the Property will be confined to an auto repair garage use as well as a residential duplex. [N.T. 7/28/09, pp. 20-24; Exh. A-2.]

38. Prior to the filing of this application, the Township issued a citation (which is not before this Board) for work being completed without a permit. That was remedied once the Township issued the demolition permit with regard to garage two that had been applied for, but not yet issued, when demolition work began. [N.T. 7/28/09, p 87.]

39. Prior to the filing of this application the Township issued a second citation, for Applicant's failure to clear garbage and rubbish from the Property. The Enforcement Notice (which was before this Board until it was withdrawn by the Township) was a cease and desist notice. The Enforcement Notice prohibited any further activity on the Property as of May 2009.

This included a prohibition on the Applicant cleaning up any debris from the demolition of the second garage building. The Applicant has agreed to clean up the Property once a decision is rendered by this Board and the Applicant knows what size replacement building it is permitted to build.

40. The proposed renovation of the auto repair garage buildings is necessary to meet today's standards. The additional space in the proposed auto repair garage is necessary for the business to comply with current building codes and ADA accessibility regulations, to accommodate modern and larger tools, and increased technology and equipment including alignment machines and computer diagnostic equipment and to accommodate today's larger vehicles. It also will permit repair work previously done outside to be done inside the garage. [N.T. 9/10/09, pp. 134-35, 137, 140-44; N.T. 9/29/09, pp. 162-71, 181-83.]

41. Protestant Baird's witness Phil Young, a real estate broker who had marketed the Property, testified that the doors of the garage building in question were too small to accommodate anything larger than a pickup truck. He also testified that due to the low height of the ceiling the whole building would have to be raised to service larger vehicles and that the auto repair garage use would be better served by replacing the garage with a new building. [N.T. 9/30/09, pp. 164-65.]

42. The current auto repair garage use currently repairs and/or inspects, and the proposed renovated auto repair garage would repair and/or inspect, passenger cars and light trucks, trucks over 17,500 pounds and motorcycles and trailers. The proposed auto repair garage use would have 7 bays (there are four bays in existing garage one and there would be three bays in proposed garage two including one 60 feet long bay) and have five to six part-time or full-time employees. The overhead doors in proposed garage two would face Pawlings Road. There will



be no driveway access onto Catherine Street or Lincoln Street as part of the proposed redevelopment of the Property. [N.T. 9/30/09, pp. 47-57, 62-63, 65-66.]

43. The proposed renovation of garage two would move the garage use on the Property closer to Pawlings Road, a busy roadway in the Township.

44. The Applicant acted with due diligence and relied in good faith on the representations of the Township in connection with the purchase, renovation and proposed renovation of the Property.

45. The Applicant expended substantial funds in connection with the purchase, renovation and proposed renovation of the Property, which would be unrecoverable if the proposed renovation of the Property or the continuation of the auto repair garage use and residential duplex use were not permitted.

46. Permitting the requested continuation of the auto repair garage use and residential duplex use and the proposed renovation of the Property subject to the conditions imposed by the Board in connection with the determination of this application will not result in any detriment to the public safety, health and welfare.

#### **CONCLUSIONS OF LAW**

1. The Applicant, as owner of the Property, has standing to appear before the Board regarding the requested relief.

2. The nonconforming residential duplex use at the Property has not been abandoned and is entitled to continue as a legal nonconforming use.

3. The nonconforming auto repair garage use at the Property has not been abandoned and is entitled to continue as legal nonconforming use.

4. The proposed expansion and redevelopment of the Property as shown on Exhibit A-1 is permitted as the continuation of a legal nonconforming use which was not abandoned.

5. The nonconforming residential duplex use at the Property is entitled to continue under the theory of vested rights including equitable estoppel.

6. The auto repair garage use at the Property is entitled to continue under the theory of vested rights including equitable estoppel.

7. The proposed expansion and redevelopment of the Property as shown on Exhibit A-1 is permitted under the theory of vested rights including equitable estoppel.

8. The existing residential duplex use and auto repair garage uses of the Property are similar to and/or constitute a natural expansion of the prior nonconforming uses of the Property.

9. The proposed auto repair garage use according to the expansion/redevelopment shown on Exhibit A-1 is similar to and/or constitutes a natural expansion of the prior and continuing nonconforming use of the Property.

10. The appeal periods have expired with respect to the permits previously issued by the Township for the Applicant's expansion and redevelopment of the Property.

11. Denial of the Applicant's requested relief as to the continuation of the nonconforming residential duplex use and auto repair garage use and the proposed expansion and redevelopment of the Property as shown on Exhibit A-1 will impose an unnecessary hardship upon the Applicant.

12. The continuation of the nonconforming residential duplex use and auto repair garage use and the proposed expansion and redevelopment of the Property as shown on Exhibit A-1 will not be detrimental to the public health, welfare and safety.

## DISCUSSION

### **A. The Nonconforming Residential Duplex and Auto Repair Garage Uses of the Property Were Not Abandoned and May Continue**

Pursuant to Section 143-145 and 143-146 of the Zoning ordinance the lawful nonconforming use of land and buildings may continue. Section 143-145 provides in pertinent part as follows:

Any land, the existing lawful use of which at the time of passage of this chapter does not conform to the regulations of the district in which it is located, either because of the original passage of this chapter or because of subsequent amendments of applicable regulations, shall have such use considered as a nonconforming use, which may continue on such land but shall be subject to the regulations governing nonconforming uses. . . .

Section 143-146 provides in pertinent part as follows:

Any lawful building or the lawful use of any building existing at the time of the passage of this chapter that does not conform to use, height, location, size or bulk regulations of the district in which it is located either because of the original passage of this chapter or because of subsequent amendments of applicable regulations shall be considered a nonconforming building or use and may continue as such in its present location but shall be subject to the regulations governing nonconforming uses.

The Township's documents from 1966 through today recognize the nonconforming auto repair garage use on the Property. These documents include prior zoning decisions, prior citations, resale use and occupancy permits, zoning opinion letters issued to the Applicant and/or its lender, and building permits issued to the Applicant. Additionally, plans from the 1970s show that the area used for the nonconforming auto repair garage includes all areas of the Property inside of the existing fence. Further, witnesses for both the Applicant and the protestants testified that the same fence that existed in the 1960s is on the Property today. Testimony also demonstrates the prior and continuing existence of the nonconforming auto repair garage use and the residential duplex use on the Property.

The Applicant proposes to continue these uses on the Property and to renovate/replace the existing buildings for the existing nonconforming uses. Prior to the hearings in this matter, there were no allegations of abandonment of the preexisting nonconforming uses. There is no basis to find any abandonment of either the auto repair garage use or the residential duplex use. In this case, the Property has been continuously used and/or marketed for the nonconforming uses since the 1950s. For several years prior to the Applicant's purchase of the Property, it was continuously marketed for those uses and the buildings were retained for such purpose.

Even where a zoning ordinance contains provisions directing that discontinuance of a use for a prescribed time-period constitutes abandonment, such requirement alone will not satisfy the burden to show an actual intent to abandon. Robertson v. Henry Clay Twp. Zoning Hearing Bd., 911 A.2d 207 (Pa. Commw. 2006); see also Merion Park Civic Association v. Zoning Hearing Bd. Of Lower Merion Township, 109 Pa. Commw. 38, 530 A.2d 968 (1987) (owner permitted to replace area previously used as nonconforming greenhouse with parking lot for nonconforming nursery use even though subject greenhouse had been demolished by owners years earlier). The burden is on the party alleging abandonment to show both discontinuance pursuant to the terms of the zoning ordinance and "actual intent to abandon." Id.

The protestants have failed to sufficiently prove abandonment. Prior owner Mr. Carter's surrender of his professional license, the sale of Mr. Carter's tools, and an alleged period of non-use following Mr. Carter's death do not prove abandonment of the nonconforming auto repair garage use.

Mr. Carter's retirement as a mechanic in 2003 does not show his intent to abandon the auto repair garage use. According to the testimony an inspection license is particular to an individual and cannot be transferred to another individual. [N.T. 9/30/09, pp. 96-97]. Therefore,

even if before he became ill Mr. Carter had personally handed the keys to his garage to the Applicant, the Applicant would still have needed to obtain a new license. The evidence demonstrated that after he retired Mr. Carter marketed the Property for use as an auto repair garage and residential duplex, and therefore did not intend to abandon such uses of the Property.

The protestants' argument that Mr. Carter's act of selling his tools constitutes abandonment similarly fails. At the same time and on the same day that he was selling his tools, Mr. Carter was also selling the Property as an auto repair garage and duplex. Interested parties at the auction therefore had the opportunity to buy Mr. Carter's tools or his property with the automotive garage and duplex, or both.

The protestants' argument that an alleged failure to use the Property for a period of more than one year constitutes abandonment does not meet the standard under the applicable law. Lack of use alone is insufficient to prove abandonment. Pappas v. Zoning Bd. Of Adjustment of City of Philadelphia, 527 Pa. 149, 153, 589 A.2d 675, 677 (1991). Furthermore, the courts have held that "the burden of proof of abandonment is on the party asserting [that an abandonment took place]." Id. at 154.

In addition, Pennsylvania case law has consistently held that discontinuance of a nonconforming use based on forces beyond the owner's control will not prove actual abandonment. Smith v. Bd. Of Zoning Appeal of City of Scranton, 74 Pa. Commw. 405, 410, 459 A.2d 1350, 1353 (1983); see also, e.g., Latrobe Speedway Inc. v. Zoning Hearing Bd. Of Unity Twp., 686 A.2d 888 (Pa. Cmwlth. 1996) (racetrack not used for 14 years, but no intent to abandon when racetrack structures not dismantled, racetrack marketed as such to potential buyers and taxes based on racetrack use assessment during period of non-use which was result of financial inability of owner to continue race schedule). As in the Latrobe Speedway case, there

was no dismantling of any of the buildings on the Property; the Property was marketed for the nonconforming auto repair garage and duplex use; and there was no change of the assessment of the Property for tax purposes as it remained assessed as an auto repair garage and duplex from 1998 thru today.

The prior owner who operated the auto repair garage on the Property, Mr. Carter, died in 2005. Prior to that, he retired as he was ill. Thereafter, he attempted to sell the property at auction in 2003 and through realtors in 2003 and 2004. The Carter family marketed the sale of the property for the nonconforming duplex and auto repair garage uses. Further, after Mr. Carter retired and passed away, his wife, who is not a mechanic, was financially unable to maintain the property, but she did, however, market the property for sale as a garage and multi-unit apartment building.

The evidence presented at the hearing did not demonstrate overt acts of the Applicant or prior owners showing an actual intent to abandon the nonconforming uses of the Property. Accordingly, as set forth in the above quoted sections of the Zoning Ordinance, the Applicant has a right to continue these nonconforming uses.

**B. The Nonconforming Residential Duplex and Auto Repair Garage Uses of the Property May Continue Under the Theory of Vested Rights**

The Applicant has requested in the alternative equitable relief under the theory of vested rights, under three classifications: variance by estoppel, vested rights and equitable estoppel. In Appeal of Kreider, 808 A.2d 340 (Pa. Commw. 2002), the court summarized such claims seeking to prevent the enforcement of ordinances as follows:

A variance by estoppel is one of three labels assigned in Pennsylvania land use/zoning law to the equitable remedy precluding municipal enforcement of a land use regulation. Our courts have generally labeled the theory under which a municipality is estopped: (1) a “vested right” where the municipality has taken some affirmative action such as the issuance of a permit, (citations omitted); (2) a

“variance by estoppel” where there has been municipal inaction amounting to active acquiescence in an illegal use, (citations omitted); or, (3) “equitable estoppel” where the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon the misrepresentation, (citations omitted);

808 A.2d at 343. The Kreider court described the three classifications further by explaining that:

[E]xcept for the characterization of the municipal act that induces reliance, all three theories share common elements of good faith action on the part of the landowner: 1) that he relies to his detriment, such as making substantial expenditures, 2) based upon an innocent belief that the use is permitted, and 3) that enforcement of the ordinance would result in hardship, ordinarily that the value of the expenditures would be lost. (citations omitted).

Id.

Other courts have added an additional element to consider: the impact on individual property rights and the public health, safety and welfare. Petrosky v. Zoning Hearing Board of Upper Chichester Township, 485 Pa. 501, 402 A.2d 1385 (1979).

In Petrosky, the Pennsylvania Supreme Court outlined a five-pronged test to be applied in considering a vested rights case:

The five factors that must be weighed in determining whether one has acquired vested rights . . . are:

- (1) [an applicant’s] due diligence in attempting to comply with the law;
- (2) [an applicant’s] good faith throughout the proceedings;
- (3) the expenditure of substantial unrecoverable funds;
- (4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
- (5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

Petrosky, 485 Pa. at 507, 402 A.2d at 1388.

As noted in the above quote, the five part test is not a checklist. The list sets forth factors which must be considered so that each factor may be weighed in determining the correct outcome. Even if a factor is not met at all in a specific case, an applicant can still obtain a vested right if the weight of the other four elements tips the scale in his favor.

Factors one and two are met in this case because the Applicant proceeded with due diligence in attempting to comply with the law and it did so in good faith. The Applicant requested and obtained a Commercial Resale Use and Occupancy Permit prior to purchasing the Property. The Applicant also discussed with the Township the plans to renovate the existing buildings and to expand the one building prior to purchasing the Property and again prior to applying for permits and doing any work. At each time, the Township advised that the Applicant's renovation plans would be permitted without the need for zoning relief (including the two opinion letters directed to the Applicant's lender).<sup>6</sup> In addition, the Applicant began renovating the Property and completed the first garage building and residential duplex pursuant to the permits and inspections done by the Township.<sup>7</sup> This satisfies the "good faith" and "due diligence" elements of each type of vested right classification. Petrosky, 485 Pa. at 507, 402 A.2d at 1388; see also Arduino v. Zoning Hearing Bd. of Borough of Dunmore, 2005 WL 4124885 (Pa.Comm. 2005).

The third factor is satisfied because the Applicant expended substantial unrecoverable funds. In reliance on the communications with and statements by the Township with respect to permissible uses of the Property, the Applicant expended substantial amounts of money

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<sup>6</sup> As the Township's file did not contain the 1966 and 1983 Zoning Decisions when the Applicant conducted its due diligence with the Township the Township did not and could not have advised the Applicant regarding those decisions.

<sup>7</sup> At no point prior to the issuance of the Enforcement Notice was the Applicant informed that anything improper was being done. As previously noted, pursuant to the Applicant's agreement to certain conditions the Township has withdrawn the Enforcement Notice and the Applicant's appeal of the Enforcement Notice in this proceeding has been rendered moot.



purchasing the Property, removing old cars, tires, trash, and other debris from the Property, fixing up existing structures, installing replacement buildings, demolishing old buildings, and preparing engineering plans for the Property.

The fourth factor also is satisfied as no appeals have been taken from the issuance of any permits and all appeal periods have expired. These permits include the Resale Use and Occupancy Permit, the building permit for the first garage building (for which a use and occupancy permit has been issued), the building permit for the renovations to the residential duplex, and the demolition permit for the second garage building. These permits were issued between August 2008 and June 2009. There has been no appeal of any permits issued in this matter by the Township or any property owner and there can be no appeal as all appeal periods have expired. Three Rivers Youth v. Zoning Hearing Bd. of Adjustment for City of Pittsburgh, 63 Pa. Commw. 184, 437 A.2d 1064 (1981).

The fifth factor also is satisfied because there is an absence of injury to the public interest. If not permitted to continue the nonconforming uses of the Property, the Applicant will lose the benefit and the use of the Subject Property which it purchased in reliance on representations and actions of the Township. The uses have existed since the 1950s so there will be no change in use impacting other properties by the continuation of the existing nonconforming uses.

The Applicant also has made an argument for application of the doctrine of equitable estoppel should the auto repair garage and duplex uses be claimed or deemed not to be valid nonconforming uses. Relief under equitable estoppel is appropriate where a municipality intentionally or negligently misrepresented its position with reason to know that the landowner

would rely upon the misrepresentation. A party that asserts equitable estoppel must establish that the governmental agency:

- (1) Intentionally or negligently misrepresented a material fact;
- (2) Knew or had reason to know that the other party would rely justifiably on the misrepresentation; and
- (3) Induced the other party to act to its detriment because of its reliance on the misrepresentation.

Ryan, Pennsylvania Zoning Law and Practice, §8.37 (citing Cicchielo v. Bloomsburg Zoning Hearing Board, 151 Pa. Commw. 506, 617 A.2d 835 (1992)).

The three factors of equitable estoppel have been met. Prior to the Applicant's purchase of the Property, the Township issued a resale use and occupancy permit and an opinion letter indicating that the proposed auto repair garage use was permitted and that expansion was to be permitted as set forth in the Zoning Ordinance. Prior to expending any time or money on renovations, the Applicant again requested, and the Township issued, a second opinion letter which confirmed the uses and stated that the buildings could be expanded up to 25% under the provisions of the Zoning Ordinance. It was clear to the Township that the Applicant would rely upon these representations. The Township's inducement of the Applicant's purchase and efforts in renovating the Property also was exhibited by its contacting the Applicant with regard to the availability and permissible use of the Property and by issuing various permits allowing the Applicant to conduct work on the property that was in furtherance of the nonconforming uses.

The Applicant has demonstrated that it is entitled to continue the existing auto repair garage and residential duplex uses on the Property under the doctrine of vested rights, including equitable estoppel.

**C. The Proposed Expansion and Redevelopment Is Permitted as a Continuation of a Legal Nonconforming Use, and Under the Theory of Vested Rights**

As the proposed auto repair garage use is a continuation of the preexisting nonconforming use, the Applicant may replace and modernize the existing buildings as proposed and shown on Exhibit A-1. As set forth in Section 143-6(B) of the Zoning Ordinance, an “auto repair garage” is defined as follows:

**AUTO REPAIR GARAGE**

A building and/or land where repairs and installation of parts and accessories for motor vehicles and/or boats are conducted that involves work that is more intense in character than work permitted under the definition of "auto service station." An auto repair garage shall include, but not be limited to, any use that involves any of the following work: major mechanical or body work, straightening of body parts, painting, welding or rebuilding of transmissions. This use may also include any use described in the definition of "auto service station."

The protestants have argued that the use will change as the occupant of the Property now works on and will work on different types of vehicles than the type allegedly worked on by prior owners. However, the Zoning Ordinance does not differentiate between types of vehicles in defining the auto repair garage use. Accordingly, the use proposed by the Applicant is not a change of use but simply the continuation of the existing use.

This is confirmed by a reading of the applicable Pennsylvania case law. The two leading cases for determining whether a use is a continuation of a nonconforming use or a change in use are Pappas v. Zoning Board of Adjustment of the City of Philadelphia, 527 Pa. 149, 589 A.2d 675 (1991), and Limley v. Zoning Hearing Board of Port Vue Borough, 533 Pa. 340, 625 A.2d 54 (1993). In Limley, the Supreme Court ruled that a new activity is a permitted continuation of a nonconforming use if it is “similar” to the existing use, taking into account the right of expansion inherent in the original use. The Supreme Court stated:

To qualify as a continuation of an existing nonconforming use, a proposed use must be sufficiently similar to the nonconforming use as not to constitute a new or different use. [Citations omitted]. **The proposed use need not, however, be identical to the existing use; rather, similarity in use is all that is required.** Pappas v. Zoning Board of Adjustment, 527 Pa. 149, 154–55, 589 A.2d 675, 677–78 (1991) (pizza restaurant with seating for forty customers was similar to existing use as a sandwich shop that had very limited customer seating and sold primarily take-out food); Upper Providence Township Appeal, supra (proposed day camp and swim club were similar to existing use as an amusement park); Mutimer Co. v. Wagner, 376 Pa. 575, 103 A.2d 417 (1954) (proposed machinery sales office was similar to existing use as a real estate sales office); Veltri Zoning Case, 355 Pa. 135, 49 A.2d 369 (1946) (restaurant selling intoxicating liquors was not sufficiently similar to existing use as a dairy store).

In determining what is a proper continuation of a nonconforming use, to wit, whether a proposed use bears adequate similarity to an existing nonconforming use, the doctrine of natural expansion must be given effect. As stated in Pappas v. Zoning Board of Adjustment, 527 Pa. at 154, 589 A.2d at 677,

[T]he doctrine of natural expansion . . . permits a landowner to develop or expand a business as a matter of right notwithstanding its status as a nonconforming use. Chartiers Twp. v. W.H. Martin, Inc., 518 Pa. 181, 542 A.2d 985 (1988). In Chartiers, we stated that “once it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural development and growth.” Id. 518 Pa. at 188, 542 A.2d at 988.

In Pappas, we held that a proposed eat-in restaurant was a natural expansion of a nonconforming use as a sandwich shop serving primarily take-out food, and that the proposed restaurant did not, therefore, constitute a new and different use. Similarly, in Chartiers Township v. W.H. Martin, Inc., 518 Pa. 181, 542 A.2d 985 (1988), we held that, under the doctrine of natural expansion, a nonconforming use as a landfill could expand its daily intake of trash without becoming a new and different use. **We reaffirmed the principle that a nonconforming use cannot be limited to the precise magnitude thereof which existed on the date the ordinance was adopted, and, further, rejected overly technical approaches to the assessment of nonconforming uses.** Id. at 186-88, 542 A.2d at 988-89. Accord Pappas, supra.

Limley, 533 Pa. at 343–44, 625 A.2d at 55–56 (emphasis supplied).

The protestants have argued that there is a change in use due to the Applicant’s tenant repairing larger vehicles. Under the Pappas and Limley natural expansion doctrine, however, that is not a different use. Moreover, the Zoning Ordinance definition (as quoted above) shows that the Applicant’s proposed use of the Property, including pursuant to the proposed expansion

and redevelopment of the Property as shown on Exhibit A-1, is the same “auto repair garage use” that has long existed on the Property.

Once a nonconforming use exists and is recognized, the Pennsylvania courts have consistently permitted landowners to demolish nonconforming structures and replace them with new nonconforming structures. See Money v. Zoning Hearing Bd. Of Haverford Twp., 755 A.2d 732 (Pa. Commw. 2000); Amoco Oil Co. v. Ross Twp Zoning Hearing Bd., 57 Pa. Commw. 376, 426 A.2d 728 (1981). The Pennsylvania courts also have not permitted an overly technical assessment of the use as a basis to stunt its natural development and growth. Paulson v. Zoning Hearing Bd. Of Wallace Twp., 712 A.2d 785 (Pa. Commw. 1998). A nonconforming use cannot be limited to the precise magnitude that existed on the day when the zoning was adopted, and the owner cannot be prevented from making necessary additions to an existing structure, or to replace that structure as needed to accommodate increased trade and changes in the marketplace. Id.

As the area of land to be used for the auto repair garage and residential duplex will not change, there is no expansion of use requested. There is, however, a proposed change with regard to two existing garage buildings as shown on the plans. The proposed redevelopment includes the work already completed (residential building and garage one)<sup>8</sup> as well as the work proposed which is demolition of two other garage buildings totaling 2935 square feet (2215 sq. ft. and 720 sq. ft = 2935 sq. ft.) and their replacement with a single building which is 3600 square feet (23% of additional building coverage).<sup>9</sup> As the proposed expansion with respect to

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<sup>8</sup> The evidence shows that the footprints of the residential duplex and garage one did not change.

<sup>9</sup> The evidence shows that the additional building coverage has been minimized. PennDOT regulations require bays which are 63 feet and 42 feet in length, but the Applicant has testified that it can comply with these state regulations and still do the work within the building so long as the bays are 60 feet and 40 feet in length.

replacement of garage two and garage three is under 25%, the expansion may be permitted by right.

The 1966 Zoning Decision does not prohibit this proposed expansion. The Applicant has not proposed an expansion of the nonconforming auto repair garage use as it has existed on the area of the Property from the fence (identified in the 1966 Decision) and Pawlings Road since the 1950s. The area of that use will continue to occupy only the area of the Property between the existing fence and Pawlings Road. The Applicant's proposed expansion of the building which is used for the nonconforming use is not addressed or prohibited by the 1966 Zoning Decision. The 1966 Zoning Decision does not address the 25% building expansion limitation (which existed in the 1966 Zoning Ordinance). Accordingly, the 1966 Decision, by its express terms, does not limit the expansion of the building over land already utilized for the nonconforming use.

The proposed replacement building is to be constructed over area which was previously macadam; the proposed building is to be located in an area where auto repair work was completed in the past; and the proposed building will serve to enclose the area so that the mechanics can work indoors thereby protecting them from the elements and protecting the neighbors/public from the noise associated with auto repair work. As the proposed building expansion complies with the requirements of the Zoning Ordinance, the expansion is permitted by right.

In the alternative, the proposed expansion and redevelopment of the Property as shown on Exhibit A-1 may be permitted under the doctrine or legal theory of vested rights, including equitable estoppel. This doctrine applies to the Applicant's proposed expansion and redevelopment of the Property for the reasons discussed in Section B above with regard to the continuation of the nonconforming uses of the Property. In addition, the proposed

redevelopment updates the existing buildings to meet current building codes and current vehicle codes, and will allow work which was previously done outside to be done indoors. That constitutes a benefit, not a detriment, to the public health, safety and welfare. Further, Mr. DeLuca, a member of the Applicant, testified that the Township informed him it wanted him to purchase the Property, clean it up and bring it up to code, and replace the buildings and bring them up to code. Also, the opinion letter from the Township stated that expansion of up to 25 % was permitted. The Applicant's proposed replacement of garage two and garage three with a single expanded garage building as shown on Exhibit A-1 (which Mr. DeLuca testified has always been the Applicant's intention) constitutes an expansion of 23% of the combined areas of garage two and garage three.

### **DECISION**

The decision of the Lower Providence Township Zoning Hearing Board is as follows:

1. The application to permit the continuation of the nonconforming residential duplex use on the Property is granted, based on the fact that this use was not abandoned, by a vote of 4 to 0.
2. The application to permit the continuation of the nonconforming residential duplex use on the Property is granted, based on the legal theory of vested rights including equitable estoppel, by a vote of 4 to 0.
3. The application to permit the continuation of the nonconforming auto repair garage use on the Property is granted, based on the fact that this use was not abandoned, by a vote of 3 to 1.

4. The application to permit the continuation of the nonconforming auto repair garage use on the Property is granted, based on the legal theory of vested rights including equitable estoppel, by a vote of 4 to 0.

5. The application to permit the expansion and redevelopment of the Property as shown on Exhibit A-1 is granted, based on the fact that the use was not abandoned, by a vote of 3 to 1.

6. The application to permit the expansion and redevelopment of the Property as shown on Exhibit A-1 is granted, based on the legal theory of vested rights including equitable estoppel, by a vote of 3 to 1.

7. The relief granted herein by the Board is subject to the following conditions, which are hereby placed on and imposed upon the Applicant in connection with such relief, by a vote of 4 to 0:

(a) The Applicant shall build a six-foot high wooden fence along the buffer of the Property, along with evergreen trees;

(b) The Applicant shall only operate an auto repair garage pursuant to the definition set forth in Section 143-6 of the Lower Providence Zoning Code, dated March 2008;

(c) There shall be no vehicles stored on the Property, except for those vehicles being serviced;

(d) There shall be no storage of any vehicles of any other business on this Property;

(e) There shall be no other business run out of this Property, except for an auto repair garage business;

(f) The Applicant/owner will submit a grading plan for the Property for the review and approval of the Township engineer prior to the final grading of the Property;



(g) The Applicant/owner will not add any uses to the Property, but will only continue the nonconforming auto repair garage and residential duplex uses;

(h) The Applicant/owner will, within thirty days of December 15, 2009, surrender the cement drain pipes indicated as Township property during the testimony to the Township Public Works Department; and

(i) The Applicant/owner will abide by all other rules and regulations of Lower Providence Township.

Dated: January 8, 2010

**ORDER**

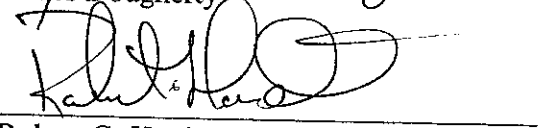
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

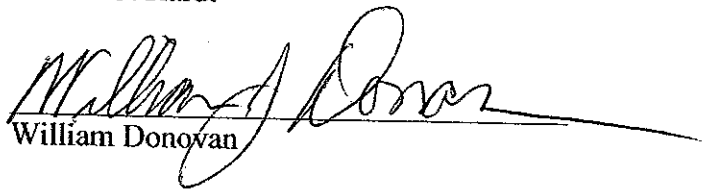
LOWER PROVIDENCE TOWNSHIP  
ZONING HEARING BOARD

  
Janice Kearney

Eric Frey

  
James Dougherty

  
Robert G. Hardt

  
William Donovan

**NOTE TO APPLICANT**

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.