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Re: Norino Properties, LLC v. Mayor and Town Council
of the Town of Ocean View, Delaware
C.A. No. 3998-MG-VCN
Date Submitted: December 17, 2010

Dear Counsel:

This matter is before the Court on exceptions taken by Respondents Mayor and Town Council of the Town of Ocean View, Delaware ("Ocean View") to the Master's Final Report, dated August 30, 2010, which concluded that Petitioner Norino Properties, LLC ("Norino") is entitled to a declaratory judgment that its

proposed convenience store with eight fuel pumps is a permitted use in the GB General Business District (the “GB District”) under Ocean View’s zoning code.¹

The Court’s review of this matter of law, submitted on an administrative record, is *de novo*.

A convenience store is a permitted use in the subject property’s zoning district. Ocean View’s code is silent as to the sale of gasoline and other fuels in that zoning district. Moreover, it does not even define “convenience store.” The phrase “convenience store” first appeared in the Ocean View zoning code as a permitted use in the GB District in 2003. The question ultimately is whether the term “convenience store” includes the sale of fuel. Ocean View essentially argues that the Court should defer to its *ipse dixit* that fuel pumps are not allowed. To some extent, there is a “the ordinance means what we say it means” aura to its position. Such an argument fails under the recent Supreme Court decisions of *Dewey Beach Enterprises*² and *Chase Alexa*.³

¹ *Norino Props. LLC v. Mayor of Ocean View*, 2010 WL 3610206, at *4 (Del. Ch. Aug. 30, 2010).

² *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305 (Del. 2010).

³ *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148 (Del. 2010).

The ordinance must be read under the familiar principle that the words are to be given their common and ordinary meaning.⁴ The sale of gasoline is an integral part, or so it appears, of what comprises the commercial efforts of a convenience store.⁵ Of course, not all convenience stores sell gasoline. Nonetheless, one would think that the common meaning of “convenience store” encompasses the opportunity to sell gasoline, even if there are convenience stores that, for whatever reason, do not.⁶

⁴ *Dewey Beach Enters., Inc.*, 1 A.3d at 307 (observing that if a statute is unambiguous, “no statutory construction is required, and the words in the statute are given their plain meaning”).

⁵ See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 401 (4th ed. 2000) (defining a “convenience store” as “[a] small retail store that is open long hours and that typically sells staple groceries, snacks, and sometimes gasoline”); *but see* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 69a (Unabridged) (1993) (defining a “convenience store” to be “a small often franchised market that is open long hours”).

⁶ Convenience stores reflect the development of “quick, one-stop shopping for the most commonly needed food and household items . . . and[,] as a part of the one-stop shopping concept, such establishments increasingly seek to sell gasoline from self-service pumps.” 2 Edward H. Ziegler, Jr. et al., *Rathkopf’s the Law of Zoning and Planning* § 33:40 (4th ed. 2010 Supp.). The treatise thus recognizes that, “[d]epending upon the classification of the land and the terms of the ordinance,” a landowner may characterize its proposed use as “primarily a retail store, with self-service gas pumps as merely an included or accessory use.” *Id.* § 34:12 (citation omitted).

As early as the 1980s, courts highlighted the proliferation of the sale of gasoline along side convenience stores’ other retail products. See, e.g., *Gustin v. Zoning Bd. of Sayre Borough*, 423 A.2d 1085, 1086 (Pa. Commw. Ct. 1980) (“We recognize the current trend . . . toward the selling of gasoline, in addition to other commodities, by local retail convenience stores, particularly by the use of self-service gasoline pumps.”); *Exxon Corp. v. Bd. of Standards & Appeals of New*

The Master concluded that the term “convenience store” was ambiguous,⁷ and he proceeded to construe that phrase by reference both to other provisions of the zoning code, which, of course, should be read as a whole,⁸ and to certain extrinsic factors. The Court, however, is satisfied that the ordinary meaning to be ascribed to the phrase “convenience store” necessarily includes the right to sell gasoline. It differs with the Master in that it concludes that the phrase is not ambiguous and that the plain language of the zoning ordinance entitled Norino to the relief which it seeks.

York, 515 N.Y.S.2d 768, 774 (N.Y. App. Div. 1987) (“[T]he sale of some products at gasoline stations, or the sale of gasoline in connection with convenience store operations, is becoming commonplace in this country.”); *E. Serv. Ctrs., Inc. v. Cloverland Farms Dairy, Inc.*, 744 A.2d 63, 68 (Md. Ct. Spec. App. 2000) (agreeing with lower court’s “statement during trial regarding the emerging trend of gasoline stations operating with convenience stores”); *Alessi v. Millcreek Twp. Zoning Hearing Bd.*, 814 A.2d 278, 284 (Pa. Commw. Ct. 2002) (“Today, gasoline pumps may be considered a customary, though certainly not mandatory, accompaniment to a retail convenience food store business.”). Thus, when Ocean View revised its zoning code to adopt the undefined term “convenience store” in 2003, the common usage of that phrase seemingly entailed the sale of fuel.

⁷ “A statute is ambiguous if it is reasonably susceptible of two interpretations.” *Dewey Beach Enters., Inc.*, 1 A.3d at 307.

⁸ See *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) (“[E]ach part or section [of a statute] should be read in light of every other part or section to produce an harmonious whole.”).

In the event that the Court is wrong and the phrase “convenience store” is indeed ambiguous, then the Court adopts the sound analysis of the Master because he reviewed and properly applied the appropriate factors in concluding that the correct construction of Ocean View’s ordinance is that the sale of gasoline at a convenience store is a permitted use within the GB District.⁹

⁹ If the Master is correct in his determination that Ocean View’s ordinance is ambiguous as to whether a convenience store includes the sale of fuel, then the Court must follow the canons of statutory interpretation discussed in the Supreme Court’s decisions of *Dewey Beach Enterprises* and *Chase Alexa*. Accordingly, even if the Court deems the undefined term “convenience store” ambiguous under Ocean View’s zoning code, two reasonable interpretations emerge—either that it does or does not include the sale of gasoline as an element of that land use. In that instance, “the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant.” *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985). Because the zoning code as a whole gives little indication—if any at all—as to whether the usage of “convenience store” as a permitted use in the GB District includes the sale of gasoline, in resolving the two reasonable interpretations discussed above, “the interpretation that favors the landowner controls.” *Chase Alexa, LLC*, 991 A.2d at 1152 (citing *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972)); see also *Dewey Beach Enters., Inc.*, 1 A.3d at 310 (“[T]o the extent that there is any doubt as to the correct interpretation [of a zoning ordinance], that doubt must be resolved in favor of the landowner.”). For that reason, had the Court determined that the term “convenience store” was ambiguous under Ocean View’s zoning framework, Delaware case law would have required the Court to have adopted the interpretation favoring Norino—specifically, that its proposed usage of the subject property as a convenience store with fuel pumps is permitted in the GB District.

Both *Chase Alexa* and, perhaps to a somewhat lesser extent, *Dewey Beach Enterprises* may be read as requiring a court to resolve ambiguity in proscriptive language in a zoning ordinance in favor of a landowner’s reasonable interpretation. In this instance, the arguably ambiguous language is permissive. (Of course, if the sale of gasoline were not permitted, it would be proscribed.) Nevertheless, the interpretive principles set forth in *Chase Alexa* and *Dewey Beach Enterprises* draw no distinction between proscriptive and permissive text. Moreover, it appears

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Accordingly, under either theory, the holding of the Master and his Final Report are confirmed and the relief which he proposed is adopted by the Court.

Counsel are requested to confer and to submit an implementing form of order.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: The Hon. Sam Glasscock, III
Register in Chancery-S

that ambiguous, permissive provisions have been construed broadly to permit a landowner more expansive use of her land. *See, e.g., Bakerstown Container Corp. v. Richland Twp.*, 500 A.2d 420, 421 (Pa. 1985) (“We are mindful that permissive terms in zoning ordinances should be construed expansively, so as to afford the landowner the broadest possible use and enjoyment of his land.”); *Hafner v. Zoning Hearing Bd. of Allen Twp.*, 974 A.2d 1204, 1210 (Pa. Commw. Ct. 2009) (“[W]hen construing ambiguous zoning ordinances, courts must afford permitted uses the broadest interpretation so that a landowner may have the benefit of the least restrictive use of his or her land.”). In short, the regulatory body may, as a general matter, draft its regulations as it sees fit. With that drafting freedom, however, come the consequences of any ambiguity.