

April 26, 2023

The regular meeting of the Zoning Hearing Board was held on Wednesday, April 26, 2023, at 6:30 p.m. in the Assembly Room of the Millcreek Township Municipal Building, 3608 West 26th Street.

PRESENT: Messrs. Tanner, Calhoun, Di Placido, Attorney Jeremy Toman, Matthew Puz, Zoning & Development Office, and Julie Maggio, Assistant Planning & Development Officer.

BUSINESS:

Appeal No. 23-07: BRIAN KUHL, for property located at 2624 West 32nd Street, seeking a use variance to change a condition approved on a prior variance (Appeal 66-3) that the beauty parlor is subject to the homeowner being the sole operator of the shop in the R1 Single Family Residential District. **Index 331-098**

Brian Kuhl, 2624 West 32 Street, was present to discuss this appeal. He stated that the home was originally built with a beauty salon in the basement. Upon purchasing the home two years ago he had updated the salon for his daughter to use after her graduation from school. He was requesting a variance that would allow his daughter to operate the beauty salon in the home even though she did not own the home. His daughter and son reside in home with him.

Douglas Wolf, 3133 Zuck Road, stated that he had no opposition to this variance. He noted that this home had operated a beauty shop for 35 years and he had no problem with it.

Mr. Di Placido asked if this would create hardship if this were not granted. Mr. Kuhl replied that it would be a financial hardship because of all the updating and remodeling they had done.

Mr. Calhoun asked if the intention when they bought the home was for the daughter's use of the beauty shop. Mr. Kuhl replied yes and had no intention of renting the space out.

Atty. Toman wanted to clarify with Mr. Puz that a variance was granted to allow the homeowner to operate the beauty salon in the home and were seeking to modify to the homeowner or immediate family member. Mr. Puz replied that was correct.

There were no other comments from the public.

A motion was made by Mr. Calhoun, seconded by Mr. Tanner, that this appeal be granted to modify the variance to include family members living at the residence. Motion 3-0

Appeal No. 23-08: MILLCREEK MARKETPLACE, LLC, for property located at 2067 Interchange Road, appealing the Zoning Officer's determination that a Car Wash, Accessory is not a permitted Accessory Use to a Retail Business Establishment (grocery store) in the C2 Regional Commercial District. **Index 733-004**

Atty. Toman stated that he will abstain from this appeal because his law firm historically represented Millcreek Marketplace. If the board needed legal advice, they may retain separate counsel. If the board did choose another counsel, they would prepare the legal adjudication. If they did not, he would provide the adjudication if the applicant would agree to. Atty. Agresti replied that the applicant would agree to have Atty. Toman provide the adjudication if separate counsel was not needed.

Atty. Michael Agresti, 300 State St., was present to discuss this appeal. He stated that they respectfully believe that the Zoning Office made some mistakes in how the ordinance was interpreted. The car wash was not a use customarily subordinate and incidental to the grocery store. He noted that there were no examples of a carwash being an accessory use to grocery store, much less a Retail Business Establishment, in Millcreek Township. The owner argued that this determination was incorrect because the Zoning Office focused too narrowly on the fact that there were no examples of car washes as accessory uses in Millcreek Township, as opposed to looking at national trends. The owner also cited the case law holding that just because something is the first of its kind does not negate a finding of "customarily subordinate and incidental." As a supplement to that argument, and in the alternative, the owner submits that the Zoning Office also erred in focusing on just a "grocery store" in making its finding. Instead, the Zoning Office should have looked more broadly at the "Primary Use" of the "Premises" as a "Shopping Center, Community". They provided **EXHIBIT A (SECOND ADDENDUM TO APPEAL)** and reviewed it. He argued that this was one parcel and met the definition of a Shopping Center Community. Atty. Agresti then called on Mr. Lee May, 101 Kappa Dr., Pittsburgh PA, Corporate Site Development Manager. He asked him how many WetGO car washes were in the Giant Eagle network. Mr. May replied there were approximately 45 current and working to construct 2-15 more. Atty. Agresti handed the members **EXHIBIT B (MAP OF THE PROPERTY AND PLACEMENT OF THE PROPOSED)**. Mr. May explained the surrounding property of Giant Eagle and what the proposed WetGo would consist of that was owned and operated by Giant Eagle. Atty. Agresti asked about advantage perks. Mr. May explained how the Advantage Card was used and how to build points with their purchases from the supermarket, WetGO, or GetGO. Atty. Agresti asked what the business purpose was. Mr. May replied that the more services you offer the more of a purpose they (the customer) choose you over someone else. Atty. Agresti asked if the main business was a grocery store. Mr. May replied yes. Atty. Agresti gave the members **EXHIBIT C (WetGO PERKS AND DEALS FLYER)** and asked Mr. May to describe it. Mr. May explained the promotional flyer deal.

Mr. Calhoun asked how long Giant Eagle was on Interchange Road and why they did not build a WetGO at the time the store was being built. Mr. May replied he was not sure why they did not build it, noting he was not with the company at that time.

Mr. DiPlacido asked if WetGo would be open 24 hours. Mr. May replied that he did not believe so. Mr. DiPlacido asked if WetGO would have its own office staff. Mr. May replied that they report to the Executive Officer.

Atty. Caparosa, representing Millcreek Township, asked Mr. May if this was an accessory use to the Giant Eagle grocery store. Mr. May replied that was correct. She then asked what would happen to the carwash if Giant Eagle closed at this location. Mr. May replied that would be a business decision and he was not sure if that had ever happened. Atty. Caparosa asked if the WetGo could run independently if the grocery store closed. Mr. May was not sure because the public service may or may not be shared. She asked how many of the 45 carwashes were located on the same parcel with the store. Mr. May replied he was not sure of the exact amount. She asked if the carwashes that were being developed would be located on the store property. Mr. Mays replied that he knew one in the Columbus area. He noted that Giant Eagle liked to construct a WetGo on the existing supermarket parcel if there were room and if there was no room to construct one, they would look to an adjacent property. Atty. Caparosa asked if any of the carwashes on the grocery store property needed to obtain a condition use or special exception variance for a carwash. Mr. Mays replied yes. Atty. Caparosa asked if the grocery store and carwash shared entrances. Mr. Mays replied it was a public entrance. She then asked if the carwash would be selling any products. Mr. Mays replied maybe air freshener or something like that. She then asked how many parking spaces this would include. Mr. Mays replied that this location would have eleven vacuum spaces and was not sure if they would be considered parking spaces.

Mr. DiPlacido asked how many WetGo's were adjacent to the grocery stores. Mr. May replied that roughly 1/3 were on the same property or adjacent to the Giant Eagle stores.

Atty. Caparosa asked how many stand-alone carwashes they currently had. Mr. May replied approximately 20.

Atty. Agresti asked Mr. May if there was a certain distance where they would like to stay near the grocery store. Mr. May replied that they wanted to keep it in the same trade area.

Greg Baldwin, 2540 Village Common Dr., Millcreek MarketPlace, LLC, was asked what was on this site by Atty. Agresti. He stated that the site was 38-acres overall shopping center in phases with retail establishments. He informed the Board that Giant Eagle leases the land only and if approved, WetGo would lease the land also. Atty. Agresti then asked if his company had national holdings. Mr. Baldwin replied that they were a professional real estate development firm developing in 34-38 states. They were exposed to nationwide trends in the nation. They were now seeing the big box retailers expanding to add amenities with more accessories and incidentals in their parking lots outside of the main store. Atty. Agresti distributed **EXHIBIT D (EXAMPLES OF ACCESSORY CAR WASH USES FOR GROCERY STORES)** and **EXHIBIT E (EXAMPLES OF A CAR WASH IN SHOPPING CENTERS)**. Mr. Baldwin stated that they clearly acknowledge that the car wash could be independent of a WetGo and GetGO. This concept may not be customary to Millcreek Township but was customary nationally. He felt that with the closing of Bed Bath and Beyond, Office Depot, and Office Max nationwide shopping centers in general, needed to continue to work diligently to create co-tenancy and create amenities to attract customers to the shopping centers. He acknowledged that a carwash could operate as an independent entity and was not the issue. The issue was that WetGo just like the GetGo was a key component of the overall Giant Eagle strategy and key to the business and both were incidental operations that feed to the grocery store concept and support of the grocery store chain itself.

Atty. Caparosa asked Mr. Baldwin how many of the carwashes are permitted by right. Mr. Baldwin replied that he did not know, and it was irrelevant. Atty. Caparosa asked why it was irrelevant. Mr. Baldwin replied that because they were not talking about whether this carwash was permitted use in this district, and he knew it was not. It's only a carwash accessory which was an accessory by right for a permitted use and the retail business establishment was the permitted use which happened in this case a very narrow interpretation could be grocery store. The point of the examples provided was not to look at the specifics of the ordinances and how they were written in all the communities. The purpose was to show that it was becoming customary that carwashes are affiliated and incidental within shopping center themselves. He felt that there was no issue or public hazard to have a carwash in this district. Also, they met the criteria for the definition of Shopping Center as defined.

Atty. Agresti wanted to make sure that the examples they had shown, the addendum, and drawings that were provided were in the record. He believed that the second addendum submitted touched on the looking at the parcel as a shopping center community because there was too narrow of a focus on whether grocery stores and carwashes are customarily incidental to one another. They thought they were and had enough evidence to show it.

Matthew Puz, Jr., Zoning & Development Officer for Millcreek Township, was asked by Atty. Caparosa in his capacity as Zoning & Development Officer if she was correct that he reviewed and evaluated requests for use. He replied that was correct. Atty. Caparosa asked if he issued a determination with respect as to whether a carwash accessory was an accessory use to retail business establishment. Mr. Puz replied yes. She then asked what the current use of the subject property. Mr. Puz replied it was C-2 with a shopping center that was comprised of retail businesses. Atty. Caparosa asked Mr. Puz if the document she showed him was his March 13th determination. Mr. Puz replied yes. She then asked what his reason for the determination was for carwash, accessory was not an accessory use to a retail business establishment. Mr. Puz replied he began looking into the definition of retail business establishment. Atty. Caparosa asked under the Municipality Planning Code in the role as a Zoning Office he was directed to administer the zoning ordinance in according to the literal terms and he did not have power to permit any use or change of use that doesn't conform to the zoning ordinance. Mr. Puz replied that was

correct. She then asked why he began with retail business establishment. Mr. Puz replied because when the initial request was returned that the carwash accessory was an accessory use to a grocery store which grocery store is not defined and fell into the category of retail business establishment. Atty. Caparosa asked that Mr. Puz summarize retail business establishment. She asked if he reviewed the definition of carwash and carwash accessory. Mr. Puz replied that he did review them and read the definitions aloud. She then asked Mr. Puz if a single bay carwash used in conjunction with an accessory to the principal use, how did he as a Zoning Officer determine it. Mr. Puz replied that it would be a carwash accessory to that particular use. She then asked in the C-2 District under Section 145-19 C what was permitted. Mr. Puz replied that accessory uses provided by right and read the Section aloud. She then asked if carwash accessory identified as one of the accessory uses. Mr. Puz replied yes. Atty. Caparosa asked to qualify for one of the accessory uses do they need to meet the definition of accessory use. Mr. Puz replied yes. She then asked if the proposed carwash met the definition of carwash accessory. Mr. Puz replied no because it was an independent structure that functions independently from the grocery store. The carwash did not depend on the grocery store to function as the grocery store did not depend on the carwash to function. Atty. Caparosa asked if there were separate regulations for carwashes. Mr. Puz replied yes. She then asked if there were separate regulations for carwash common accessory. Mr. Puz replied, no. She then asked if Section 145-47 (carwash) would not apply to accessory carwashes. Mr. Puz replied that was correct. Atty. Caparosa asked based on his review of the information and experience as a Zoning Officer why he felt this was not permitted accessory use. Mr. Puz replied that by definition of retail business establishment carwashes were not permitted with retail business establishments. Atty. Caparosa asked as indicated previously that there was no existing use of the accessory carwash in the retail location in Millcreek. Mr. Puz replied that was correct. She then asked if he reviewed any of the multiple examples that were provided of them being used by Mr. Baldwin were permitted by right. Mr. Puz replied he did.

Mr. Calhoun asked if after Mr. Puz rendered the decision on March 13th based on what he read and what he applied to the decision if he heard anything here today with the discussion that would sway him differently. Mr. Puz replied, no.

Mr. Tanner asked if the Township had an official position on this matter. Atty. Caparosa replied that they had not had a formal discussion on the position but was clear with the Zoning Ordinance that was adopted in April by the Supervisors clearly excluded carwashes from that zoning district.

Mr. Waldinger, Director of Planning & Development, Millcreek Township, stated that Atty. Caparosa stated it well that the Township's position was stated as written and the determination of the Zoning Officer as prescribed in the Municipalities Code and the Zoning Ordinance.

Mr. Tanner was worried about the customary and incidental in Millcreek Township versus a brand-new idea that came to Millcreek Township. Mr. Waldinger responded that there was a recourse in the Zoning Ordinance through the MPC that a variance could be asked for in any situation. This was not the path the appellant chose to take, they decided to challenge the determination and the validity of the Zoning Ordinance.

Atty. Agresti asked Mr. Puz if he agreed that as the Zoning Officer when construing the Zoning Ordinance, he needed to look at it in the broadest sense possible from the property owner's perspective. Mr. Puz replied yes. He then asked if the overall goal of the Zoning Ordinance was how much safety, health, morals, and general welfare. Mr. Puz replied that was correct. Atty. Agresti asked if they could agree that the car wash would not have any impact on public health. Mr. Puz replied that he could only think of oil and other contaminants from the vehicles getting into the water supply. Atty. Agresti asked if this were allowed to have limited hours could he put stipulations on it. Mr. Puz responded no. He then asked if they could agree on with regards to the determination of the use of conjunction not the phrase in conjunction with which was a different meaning. Mr. Puz replied yes. Atty. Agresti then read conjunction definition and the definition conjunction with from his second addendum he submitted. Atty. Agresti then asked if there was anything in the ordinance that required the accessory use to be wholly dependent upon the principal use such that it could not function without the principal use and was there anything in the statute that said that. Mr. Puz replied other than stated that an accessory use is permitted by right and use and accompanied structure that were customarily subordinate meaning dependent upon. Atty. Agresti stated that it was up to the Board to decide if the carwash was subordinate to or dependent. Mr. Puz felt subordinate meant under.

Atty. Caparosa asked Mr. Puz with respect to carwash accessory in the interpretation that if it was a carwash, accessory it could not be independently operated from the principal use. Mr. Puz replied that was correct. She then asked if it would be fair to say that if the business was closed that had an accessory use that it could not be used by anyone else. Mr. Puz replied that was correct. Atty. Caparosa asked if using in conjunction was using in conjunction with the operation of the principal use not a separate use. Mr. Puz replied yes that was correct.

Atty. Agresti asked what the principal use of this parcel was. Mr. Puz responded a shopping center, community. He then asked if it was correct that if Giant eagle closed and the WetGo remained open it could still be working in conjunction with shopping center, community. Mr. Puz responded he did not know what the accessory use would be to and would at that point become a principal use. Atty. Agresti then asked if there was anything in the ordinance that states that the accessory use needed to be tied to a particular retail establishment on the greater parcel or was it accessory to the property which contains nine different businesses.

Atty. Caparosa stated that this was getting into the original shopping center argument that was just raised this evening and have not an opportunity to prepare a response to that and was not part of the original determination with respect to shopping center. As they know a shopping center was comprised of retail business establishments but with respect to if something was discontinued that's the larger parcel that might not be permitted.

Mr. DiPlacido asked Mr. Puz when evaluating different issues and defined words he did interpret it the same way in the past. Mr. Puz replied that he had been a Zoning Officer for over twelve years and had always consistently enforced/interpreted the Ordinance consistently.

Atty. Agresti stated the Zoning Ordinance was meant to be read broadly in favor of the owner. There were restrictions on the owners' rights to do what they want to do with their property but know they were important because otherwise there would be chaos. With all due respect to Mr. Puz when he opened the book his mind needed to be in a place where he looked at it as how can he allow this in a way that would allow what the applicant was asking for. When Mr. Puz read the definition of retail business establishment, he created limitations that was not in the definition. It stated may include and did not say only includes which he felt was a narrow reading of the definition which was problematic. Secondly, there was a narrow review of the definition carwash accessory in conjunction with compared to just the word conjunction. Thirdly, customary and incidental, there had to be a first or Millcreek would never progress or any Township. When Mr. Puz stated there were no other examples in Millcreek Township, he was viewing this narrowly. There always must be a first.

Atty. Lydia stated that the Township position of the proposed carwash did not fall within the scope of carwash, accessory for the zoning district. It was clear by Mr. Waldinger's testimony that the district did not allow carwashes as permitted use generally and this was an attempt to put a carwash in where it was not permitted in that zoning district. She understood the concern about shopping center and retail business establishment that Mr. Puz read. What it came down to was the definition of carwash, accessory. This was not being used in conjunction with grocery store, this was being used as a separate operation entity with separate access points that people could use without going to the grocery store. As Mr. Waldinger's testimony as well the carwash, accessory was used in conjunction with for example vehicle sales, automotive detailing, automotive repair shops that may need to wash vehicles afterword. Also, with respect to customary and incidental it was not used in conjunction with a grocery store that a carwash, accessory was not a customary incidental operation. She understood the market was changing but this was not looking to put a carwash somewhere and that this was a separate accessory use. Section 145-19 D provides for a narrower application because they do not get to put a carwash wherever they wanted. The intent was to use in conjunction with the primary use of the property. She respectfully requested that they uphold Mr. Puz's determination that the carwash, accessory proposed did not meet the definition of carwash, accessory and therefore not permitted as an accessory use in a retail business establishment.

Mr. Di Placido asked if there would be any harm if there was no carwash at this store location. Atty. Ageresti responded that no, other than it would lose competitive advantage and could harm them in the long run. They were not here on a variance or looking for undue hardship or harm. This was why they took the path that they did.

There were no other comments from the public.

A motion was made by Mr. Calhoun, seconded by Mr. Tanner that this appeal be granted to deem the carwash as an accessory to Giant Eagle and to overturn the determination of the Zoning Officer as stated. Motion 2-1 (Mr. Di Placido)

There being no further business, the meeting was adjourned at 8:59 p.m.



Scott Calhoun - Secretary