

THEODORE R. LEWIS
THOMAS L. WALTERS

MAILING ADDRESS:
P. O. BOX A
EASTON, PA 18044-2099

LAW OFFICES
LEWIS AND WALTERS

46 SOUTH FOURTH STREET
EASTON, PENNSYLVANIA 18042-4532

(610) 253-6148
FAX (610) 253-5885

GEORGE F. COFFIN
1896-1937

GEORGE F. COFFIN, JR.
1928-1986

NAZARETH OFFICE:
BY APPOINTMENT ONLY
LIBERTY AND CENTER STREETS
NAZARETH, PA. 18064

December 3, 2012

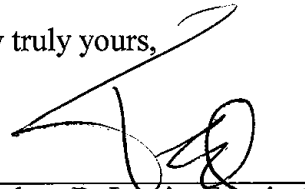
Yvonne D. Kutz, Zoning Officer
Hanover Township Municipal Bldg.
3630 Jacksonville Road
Bethlehem, PA 18017

Re: Hanover Township Zoning Hearing Board –
That's Amore Italian Restaurant

Dear Yvonne:

Enclosed herewith find copy of Findings of Fact and Conclusions of Law in the above matter, along with a copy of the cover letters enclosing the same.

Very truly yours,


Theodore R. Lewis, Esquire

TRL/bn
Enclosures

cc: J. Finnigan Jr
B.o.S
L. STRANZL
P. Balla
V. Horvath
J. Rosenthal
J. Bednarik
HANOVER ENCS
Leo DeVito

HANOVER TOWNSHIP ZONING HEARING BOARD

OF NORTHAMPTON COUNTY, PENNSYLVANIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Re : That's Amore Italian Restaurant
Application Dated : 08/31/12 modified by letter of 09/25/12
Property : 1259 Birchwood Drive

The Hanover Township Zoning Hearing Board, after conducting a hearing on Thursday, October 25, 2012, and rendering its oral decision denying the relief requested in the application as modified, hereby makes the following findings of fact and conclusions of law in support thereof:

1. The subject property is known as 1259 Birchwood Drive and is located in a C-1 Service Commercial District.

2. The applicant is Joseph Jurkivo who is the owner and operator of a restaurant known as That's Amore Italian Restaurant which is located on an adjoining lot known as 1267 Birchwood Drive.

3. The applicant desires to expand his restaurant use onto the patio area of 1259 Birchwood Drive for purposes of outdoor dining.

4. Attorney Mickey K. Thompson represented the applicant at the hearing.

5. During the course of the hearing Mr. Thompson called as witnesses Joseph Jurkivo, the applicant, David Harte, a Professional Engineer, and Nick Giacoumopoulos, president of Trigo T Inc.

6. According to the testimony, Trigo T Inc. is the owner of 1267 Birchwood Drive where the restaurant is located, 1259 Birchwood Drive, the subject property, and 2118 Schoenersville Road, a strip mall lying to the south of the restaurant and the subject property, where the applicant desires to locate additional parking spaces for his use. Trigo T Inc. also owns the two most immediate lots to the east of the subject property.

7. Mr. Jurkivo testified concerning a Lease Agreement (Exhibit A-1) between Trigo T Corporation and JCRD, LLC, which he indicated was for the restaurant premises. He stated that he is the majority principal holder of JCRD, LLC.

8. Mr. Jurkivo identified an aerial photograph (Exhibit A-2), which depicts the location of the restaurant in relationship to the proposed patio area on the adjoining property. It also shows the relationship of these two properties with the strip mall property on 2118 Schoenersville Road.

9. Mr. Jurkivo identified what he described as the Lease from Trigo T, Inc. of the 1259 Birchwood Road property (Exhibit A-3). This Lease, however, in fact refers to the property as 1247 Schoenersville Road.

10. Nick Giacomopoulos of Trigo T, Inc. testified that this address as shown on Exhibit A-3 was an error and the Lease was intended to cover the subject property and not 1247 Schoenersville Road.

11. Mr. Jurkivo indicated that the Lease was for the entire premises and that he would be subleasing out the existing residence on the subject property. He stated he would just be utilizing the patio area for the restaurant. This area is situated immediately behind the residence. The balance of the property to the rear would be fenced or roped off in some way so as to prevent restaurant users from going onto that portion of the property.

12. Mr. Jurkivo identified a parking lease agreement (Exhibit A-4) stating that he had the right to use 10 parking spaces on 2114 Schoenersville Road for the use of the restaurant. The lease indicates that it shall remain in effect throughout the term of the lease for the operation of That's Amore Restaurant.

13. During the course of the hearing it was stated that 11 not 10 parking spaces are required under the ordinance based on the size of the patio area. Mr. Giacomopoulos of Trigo T, Inc. then testified that he would amend this lease to provide a total of 11 spaces.

14. Also introduced was a portion of the zoning map of Hanover Township, which includes the subject property and the immediate area. (Exhibit A-5).

15. In addition, aerial photos of Prime Steak House and Wegmans, both of which have outdoor dining were introduced (Exhibits A-6 and A-7).

16. In addition, the Notice and cover letter, as well as a copy of the Findings of Fact and Conclusions of Law of the Hanover Township Zoning Board wherein approval was given to Prime Steak House for outdoor dining was introduced (Exhibit A-8).

17. Finally, a series of pictures were introduced. (Exhibit A-9 being sub-marked A through M). These pictures depict the back of the subject lot, the strip mall to the south, the front of the subject lot viewed in conjunction with the restaurant, the view from the patio towards the restaurant, the view from the back of the yard towards the patio, the view of the strip mall showing the walkway which pedestrians could use to go from the strip mall to the restaurant, the view from across the street of the Hair and Nail Studio where parking at one point in time had been provided for the restaurant, the view of the intersection, another view

of Birchwood Drive, a close-up view of the pylon sign for the shopping mall and the restaurant, and a front view of the restaurant.

18. Mr. Jurkivo described his restaurant as a casual family dining restaurant. He stated he was open seven days a week from 11:00 a.m. to 10:00 p.m. He also stated that he provides a complimentary glass of wine to his guests but that he does not have a license to serve alcohol beyond that. However, patrons can bring their own alcoholic beverages to consume on the premises.

19. He testified that at the present time he has 24 parking spaces, one of which is a handicapped parking space.

20. He indicated that the operation of a restaurant in this general locale has become a great deal more competitive and that he believed without the addition of outdoor dining he would not be as likely to succeed given all of the competition.

21. He also indicated that there is no room to provide outdoor dining on the lot where the restaurant is located

22. He indicated that the Nail and Hair Studio located across Birchwood Drive previously had provided some parking spaces but that the owner was no longer willing to do that.

23. He testified that Birchwood Drive is an exceptionally wide street, that the Birchwood intersection is controlled by a stoplight, but there are no pedestrian traffic controls so that pedestrians need to wait a long time before they can cross, and there is no crosswalk at that spot.

24. He stated that parking in the strip mall would not involve crossing any streets and there is a pedestrian walkway leading from the strip mall to the restaurant. He concluded therefore that providing parking for his patrons in the strip mall to the south would mean that they would have a safer walkway to his restaurant than providing parking for them across Birchwood Drive.

25. Mr. Jurkivo also testified concerning the improvements he made to 1259 Birchwood Drive since beginning his lease of the premises in January of 2012. He stated he had made extensive improvements to clean up the subject property including the trimming of trees and the removal of shrubbery on the rear portion of the subject property.

26. He stated he worked on the rear portion simply for aesthetics so that restaurant patrons would be able to have a nice view even though patrons would not have access to that portion of the lot.

27. He estimated that he has spent approximately \$115,000.00 on restaurant repairs on the restaurant lot, as well as repairs to the gazebo, shed, and garage on the subject premises.

28. Mr. Jurkivo believed that the patio had been constructed sometime in 1994-1995.

29. He estimated that the patio would be used approximately seven months out of the year. Weather permitting, it would be used Sunday through Thursday from 4:00pm to 9:00pm and Friday and Saturday from 4:00pm to 10:00pm.

30. He also stated that he would not have any music piped into this area and would not have live music or television in this area.

31. He indicated that he planned to use 7-10 watt bulbs for lighting and the lighting would not shine on any of the neighboring property.

32. He stated that the patio would be strictly seasonal and that there would be no covering at all on this patio area. He did state that there would be umbrellas over the tables.

33. He testified that the strip mall to the south consists of a bike shop, dry cleaner shop, barbershop and pizzeria. He said that based on his own observation there is at most between 5-8 cars parked there at any one time.

34. He stated that he estimated there were 37 spaces in that parking lot, 2 of which were handicapped.

35. He also testified that he would place signage inside the restaurant to tell patrons that they can park in that strip mall area.

36. Mr. Jurkivo also indicated that in the present restaurant he has 80 seats and in the patio area he would expect to have 7-10 tables, or what he estimates would be about 25-30 seats. His estimated his present restaurant's seating area to be about 1150 sq. ft. The patio area is about 546 sq. ft.

37. Attorney Leo DeVito of the Solicitor's Office represented the township at the hearing and voiced his client's objection to the relief requested by the applicant.

38. Attorney DeVito introduced a series of 11 pictures (Exhibit T-1) depicting the subject premises, the strip mall, the zoning signs, and the fence and row of arborvitae between the subject property and the property to the east.

39. On cross-examination by Attorney DeVito, Mr. Jurkivo, did acknowledge that the strip mall leases could change and that therefore the intensity of use of the parking lot could increase.

40. Mr. Jurkivo also acknowledged on cross-examination that he had also put a bocce court on the rear portion of the subject premises. He stated this was strictly ornamental and not for use of the restaurant's patrons

41. Finally Mr. Jurkivo acknowledged on cross-examination that he could have less seating on the subject premises then requested and the patio could be somewhat smaller. However later on re-direct by Attorney Thompson he indicated that having 7-10 tables was the minimum necessary to justify the extra expense of having an employee to take food out to these patrons eating in the patio.

42. David Harte, Consulting Engineer, testified with respect to his familiarity with zoning ordinances and the Municipalities Planning Code. He stated that in his opinion the subject lot is a non-conforming lot.

43. He indicated that the area in the back of the subject property could not readily be used for parking because to get access to it one would need to eliminate parking spaces that now exist on the restaurant property.

44. He estimated that there are 37 parking spaces on the strip mall lot to the south and that based on his observations only a few of these parking spaces are occupied at any one time.

45. He testified that Birchwood Drive has no sidewalks and there is no crossroads at the intersection.

46. He also indicated that the house that is on the subject lot has an architectural style that is compatible with the restaurant.

47. He stated that there is no definition in the ordinance for outdoor dining and that in his opinion outdoor dining is an accessory use customarily found with restaurants.

48. The applicant relies on Section 185-22 A 3 of the zoning ordinance for authority to expand the restaurant use onto the adjacent lot. This section states: "*Accessory buildings and uses shall be on the same lot as the main building or on an immediately adjacent lot in the same ownership.*"

49. Since this section does not provide authority for the location of a principal use on the adjacent lot an essential premise of the applicant's case is that the proposed use is an accessory use and not a principal use.

50. The applicant argues in that regard that since he could operate this restaurant without outdoor dining the use is incidental to the restaurant.

51. Furthermore, the outdoor dining is seasonal, operating approximately seven months out of the year, weather permitting

52. The dining area has no enclosure or structure other than the patio stones

53. The applicant also points out that outdoor dining is often provided in many restaurants and therefore he argues it is customary.

54. On the other hand the Township argues that this patio is for the purpose of providing a place for patrons to consume food. They argue that the primary activity of this restaurant is to provide patrons with seating and a place where the food prepared on the premises is served to them for their consumption. Therefore this additional dining area is in fact an expansion of the principal use.

55. Neither outdoor dining nor restaurants are defined in the ordinance.

56. Restaurants are clearly permitted as a principal use in a C-1 District pursuant to Sect. 185-30.A (3) which allows: *"Food service stores, including restaurants without drive-thru windows, bakery, confectionary and food markets not exceeding 8,000 square feet in area."*

57. Sect. 185-30.B. sets forth the accessory uses permitted in a C-1 District. Subsection 2 thereof permits: *"Customary accessory uses in service commercial areas."*

58. Sect. 185-12 does contain a definition for ACCESSORY USE OR ACCESSORY-. It requires in subsection 2 thereof that the use be: *"Clearly incidental to, and customarily found in connection with a particular principal use."*

59. The Board readily accepts that outdoor dining is often associated with a restaurant use, and is in that sense it is customary.

60. In the present case if one uses the criteria of number of seats or square footage of the seating area, it is hard to classify the proposed use as incidental since the proposed number of seats will be approximately 30% to 47% of the seating in the indoor restaurant, and the square footage of the seating area is about 40% of the square footage of the seating area in the indoor restaurant.

61. However, the major difficulty in concluding that the use is incidental is that it the use really involves the very same activity as the principal use, just at a different location, outside, instead of inside.

62. The existing restaurant is not a "fast food" establishment and has no drive-thru windows. As such patrons are invited to come to the premises and are provided a place on the premises for being served and consuming the food prepared. The place where the food is prepared is usually the called the kitchen and the place where people sit and eat is usually classified as the dining area. Whether that dining area is indoor or outdoor does not really change the primary activity and purpose of the dining area, which is essential and not incidental to a restaurant use.

63. It is true that one particular portion of the dining area may not be essential from a dollar and cents point of view in that it is not the primary dining area. In fact it is not unusual for restaurants to offer patrons a choice of dining areas such as the main dining area, the upstairs dining area, the dining area with the fire place, the dining area adjacent to the bar, the dining area on the patio or deck etc. While these different dining areas may each have a different ambiance, view, seating capacity, or level of service they are all in reality an expansion of this essential characteristic of the restaurant – to have a place where patrons are served and consume the food prepared on the premises

64. Moreover, the proposed additional dining area is unlike other uses which are traditionally accepted as accessory such as parking, or a storage for trash or equipment, a pedestrian walkway or other structure designed to make it easier for customers to come to the premises. These traditional accessory uses may in fact be more essential from a business standpoint than an additional dining area but they only support the main use, they are not the use itself.

65. Therefore, the majority of the Board believes that the outdoor dining area is an expansion of the principal use as a restaurant by providing a different place for dining and the fact that it is not enclosed and not immediately adjacent to the restaurant building does not change this fundamental purpose of providing an additional dining area.

66. The applicant points out that the Board in the Prime Steak House case gave relief from the provision of the ordinance which states in Sect. 185-29.D (3) that, all principal or accessory uses in a C-1 District must be located within an enclosed building. (Emphasis Supplied)

67. However, it must be pointed out that in the Prime Steak House case the Board did not have to decide the question as to whether or not the outdoor restaurant was a principal or an accessory use. The provision for which relief was granted applied whether or not the use is a principal or accessory use. Therefore, the Prime Steak House case is not precedent for the question as to whether or not outdoor dining is an accessory use or a principal use to a restaurant.

68. Based on its decision that the proposed use is an expansion of the principal use and therefore locating the use on the adjacent lot is not authorized under the aforesaid section, the Board did not reach the question as to whether it would have granted approval under Sect. 185-29.D (3).

69. The Board also did not reach a conclusion as to whether even if the use were considered an accessory use, does the location of the patio dining area in the present case satisfy the dimensional requirements of the ordinance.

70. Clearly the fact that an accessory building or use is located on an adjacent lot in the same ownership is not a basis to deny the accessory building or use.

71. However, this section of the ordinance can not be read to say that accessory buildings and uses can be located on adjacent lots no matter what is already on the adjacent lot and no matter where the accessory building and use is actually located on the lot in question.

72. For example, it would be well beyond the scope of this language to assume that an accessory use located on an adjacent lot would not have to follow any setbacks or dimensional requirements for an accessory use just because 185-22 A (3) says the accessory use can be located on an adjacent lot.

73. In the present case we are not dealing with a vacant lot, which now is going to be utilized for purposes of providing accessory use for the principal adjacent lot. Instead, we are dealing with an adjacent lot, which already has a principal use as a residence with the dimensional requirements for the same. This application proposes to locate the restaurant patio right in the middle of that residential lot.

74. The Board also did not reach a conclusion as to whether the applicant can satisfy its parking requirements of 11 spaces by utilizing parking spaces on the adjoining lot to the south.

75. In general, parking of course is an accessory use and thus the fact that the parking spaces are on the adjoining lot owned by the same person would be authorized on the basis of the section relied upon by the applicant.

76. However, from the testimony it appears as though the number of parking spaces on the adjoining lot is only one more than what is required under the ordinance. Therefore, the adjoining property owner could not lease those parking spaces out to the applicant without being in violation of the ordinance. There is no request before the Board by the owner of that lot for a variance to permit him to reduce the number of his parking spaces for the uses on his lot below that which is required under the ordinance.


77. In that regard, the Board notes Sect. 185-17.D (1) provides that: "*Parking spaces required for one building type or use shall not be included in the computation of required spaces for a second building or use.*"

78. Finally, it is noted that the consequences of the Board concluding that the patio outdoor dining is an expansion of a principal use means that there would be two principal uses on the subject tract. In that situation the dimensional requirements as to lot size, etc. and setbacks would all be applicable. The applicant is clearly not in conformance with those sections and has not requested variances from the ordinance for any of those dimensional requirements on the subject lot.

WHEREFORE, the Hanover Township Zoning Hearing Board hereby adopts the above Findings of Fact and Conclusions of Law, and by a 2-1 majority, denies the request to

expand the restaurant use by means of an outdoor patio on the adjacent property, the subject of this zoning hearing.

HANOVER TOWNSHIP ZONING HEARING BOARD

By: 
Paul A. Balla, Chairman

Dated: December 3, 2013