

SMITHFIELD TOWNSHIP
MONROE COUNTY
COMMONWEALTH OF PENNSYLVANIA

IN RE:

Water Gap Capital Partners, LLC, : No. 2020-02
Applicant : Landowner Curative Amendment

TOWNSHIP'S DECISION UNDER PA MUNICIPALITIES PLANNING CODE

PROCEDURAL POSTURE:

This case deals with an application under the PA Municipalities Planning Code (hereinafter "MPC") where the Applicant proposes a curative amendment to open a "residential drug, alcohol and/or substance abuse treatment facility"¹ in an R-1 (Low Density) Residential Zoning District (hereinafter "Treatment Center").

Under the MPC, the Township must commence a public hearing on the request within sixty (60) days of the request²; and, such hearing was held on August 11, 2020 which was fifty six (56) days after the request was received.

HEARING PROCEDURES:

Pursuant to the MPC, a public hearing was held on August 11, 2020 so as to afford the all interested parties reasonable notice and opportunity to be heard; and, the testimony at the hearing was stenographically recorded.

By way of background, this same request was earlier heard by the Township pursuant to Section 302.2 of the Township Zoning Ordinance (hereinafter "Ordinance"); and, after six (6) public hearings, the Township Supervisors determined that such a use was allowed in the

¹ See Applicant's Exhibit No. 1 which is correspondence from the Applicant's attorney (dated June 12, 2020 and received by the Township on June 16, 2020) requesting the amendment.

² See MPC, 53 P.S. Section 10609.1(a).

R-1 (Low Density Residential) Zoning District as a conditional use. However and pursuant to an Order of the Monroe County Court of Common Pleas (issued by the Honorable Arthur L. Zulick) dated June 10, 2020, the Court held that the Supervisors did not have the jurisdiction to make this determination without formally amending the Ordinance; hence, the present application for a landowner curative amendment was filed.

The parties agreed that the individuals who were granted party status for and the public hearing testimony taken for the Ordinance Section 302.2 determination (comprising over six hundred [600] pages) be made part of the record.³ In addition, the parties agreed that the Supervisors Section 302.2 Decision of October 16, 2019 and the Opinion and order of Judge Zulick of June 10, 2020 be also made part of the record.⁴

The Hearing Exhibits presented (and admitted) were as follows:

Board Exhibit B-1: Township Advertising Notice of Hearing

Board Exhibit B-2: Township Solicitor Advertising Notice of Hearing

Board Exhibit B-3: Proof of Publication of Township Advertising Notice

Board Exhibit B-4: Proof of Publication of Township Solicitor Advertising

Notice

Board Exhibit B-5: Affidavit of Posting the Premises

Board Exhibit B-6: Monroe County Planning Commission Review

Correspondence dated July 9, 2020

³ See the Hearing Transcript of the August 2020 public hearing, page 14-line 14 through page 16-line 15 (abbreviated "AHT" 14:14-16:15").

⁴ See AHT 16:18-18:13.

Board Exhibit B-7: Township Planning Commission Meeting Minutes of July 30, 2020

Board Exhibit B-8: Advertising Notice of the Vote on the Request on September 9, 2020

Board Exhibit B-9: Proof of Publication of the Advertising Notice of the Vote on the Request on September 9, 2020

Protestants' Exhibit 1: Internet Screen Shot of Water Gap Wellness Website-Resort/Lodging⁵

Protestants' Exhibit 2: Internet Screen Shot of Water Gap Wellness Website-Treatment Protocol

Protestants' Exhibit 3: Internet Screen Shot of Water Gap Wellness Website Partial Hospitalization Program

Applicant 1: Correspondence from Applicant's Attorney dated June 12, 2020 requesting a Landowner Curative Amendment

After the conclusion of the public hearing, the Supervisors stated that the decision on the curative amendment request would be made at a duly advertised public hearing to be held on Wednesday, September 9, 2020⁶.

On September 9, 2020, the Board of Supervisors (on a split vote of 2-1) did grant the landowner's curative zoning amendment as the Board was permitted to do pursuant to the MPC, 53 P.S. Section 10609.1(c) so that a residential drug, alcohol and substance abuse

⁵ According to the Applicant's Representative, PA Nice Homes, LLC does business as the "Water Gap Wellness Center" in East Stroudsburg, PA where treatment is rendered; and the Water Gap Capital Partners, LLC does business as "Water Gap Wellness Inn" where the patients stay during their treatment. AHT 37:12 to 39:6.

⁶ See AHT 110:4-111:7 and Board Exhibits (B-8 and B-9) entered into the record at the September 9, 2020 vote.

treatment facility would be allowed on the Applicant's property subject to the conditional use provisions of the Ordinance. See Transcript of Voting Meeting, September 2020 (hereinafter "SVM") 136:20 to 137:4 and 152:1-8.⁷

FINDINGS OF FACT:

1. The property at issue is a portion of what has been known as the Delaware Water Gap Country Club with an address of 296 Mountain Road, Delaware Water Gap, Monroe County, PA 18327. It has been interchangeable referenced throughout the proceedings as a hotel, inn, country club and golf course
2. The Water Gap Country Club consists of several separate parcels of real estate comprising one hundred and fifty six (156) acres where three (3) parcels are in Delaware Water Gap and three (3) parcels are in Smithfield Township. HT-April 2019 page174: line 15 to page 175: line 7 (hereinafter abbreviated "HT-April 2019 174:15-175-7").
3. No new construction is proposed (so the building footprint remains the same) and there is no new impervious surface. AHT 20:5-6.

⁷ As per the Discussion, infra, this decision is site-specific and in not applicable throughout the R-1 (Low Density Residential) Zoning District. On July 28, 2020, the Township adopted Township Ordinance No. 237 which established an Economic Development (ED) Zoning District in the Township which zone eliminated the existing C-1 (Commercial), B-1 (Planned Boulevard) and the B-2 (Business and Professional Office/Medical) Zoning Districts. That ED Zone specifically provides for a "rehabilitation facility" which is defined as "a licensed establishment, with 24 hour supervision whose primary purpose is the rehabilitation of persons. Such services include drug and alcohol rehabilitation, physical therapy, occupational therapy, speech pathology services, assistance to emotionally and mentally disturbed persons, and halfway houses for prison parolees and juveniles". (emphasis added) The principal of the Applicant has described the Treatment Center in question as a "residential treatment center for treating patients that have alcohol or drug addiction." See the Hearing Transcript of the April 2019 hearing, abbreviated as HT-April, 2019-page 222: lines18-20. Accordingly, the instant use would have fallen under the ED definition of a "rehabilitation facility" had the ED Zone be in existence at the time the Applicant made its application for a landowner curative amendment.

4. The Applicant intends to lease the property to an outside entity to operate the Treatment Center; and, such lease consists of approximately forty (40) acres of land and includes the hotel property, all buildings, the swimming pool and the parking lot areas. HT-April 2019 176:23 to 177:25 and 194:1-13.
5. The hotel presently consists of 24-double occupancy rooms with a maximum capacity of 48 individuals, a pro-shop and an apartment above the pro-shop. HT-April 2019, 180:5-9 and AHT-46:1-11.
6. The hotel is not serviced by central water or central sewer. Both utilities are provided on-lot. HT-April 2019, 181:8-19 and AHT 20:16. However the on-lot septic system has been upgraded for at least 50...statistically 75...individuals AHT 59:21-60:2.
7. The project proposes fifty (50) to sixty (60) beds⁸ which include the hotel rooms and the apartment. HT-April 2019, 184:7-18.⁹
8. Access to the site is by a public road known as "Mountain Road" and all traffic to/from the Treatment Center would utilize this road¹⁰. HT-April 2019, 194:15-21, 203:22-24.
9. The principal of the Applicant has described the Treatment Center as a "subacute care residential treatment center for treating patients that have alcohol or drug addiction."¹¹ HT-April 2019, 222:18-20.

⁸ It was not clear how the facility would accommodate 50-60 beds with the existing 24 double occupancy rooms and one apartment.

⁹ Testimony at the August 2020 hearing was that an average of 25-30 people stay at the Inn. AHT 41:16-24.

¹⁰ There is another road behind the property but there was no evidence presented that this other road was a public road. HT-April 2019, 194:17-18.

10. The typical patient would be 25-40 years old with alcohol or substance abuse addictions (HT-April, 233:16-22) and will be pre-screened. HT-May 2019, 332:20-24.
11. The ordinary stay at the facility would be thirty (30) days with some stays being sixty (60) to ninety (90) days. HT-April 2019, 261:4-9.
12. The residents would all be admitted on a voluntary basis. There would be no court-ordered treatment. They would be free to leave the facility if they so chose, HT-April 2019, 230:13-17 and 231:22 to 232:4.
13. The facility will be gated and will have manned security and video security. HT-April 2019 248:20-22.
14. The Treatment Center would provide various services to its residents such as medical and clinical services, residential living quarters, educational and after-care services (HT-April 2019, 222:24 to 223:13) and will be fully staffed by both clinical and non-clinical personnel. See Applicant's Exhibit 1-April 2019 Hearing¹².
15. The project does not impose any significant impact upon the roads¹³ or sewer/water supplies, schools or other public services as the site has/had been a long-time hotel, inn, country club and/or golf course.

¹¹ At the August 2020 hearing, testimony from the Applicant's Representative was that the Water Gap Wellness website advertises service to those individuals with a primary mental health diagnosis, substance abuse disorder or co-occurring disorder. AHT 32:14-16.

¹² While not specifically stated, the Township also will consider any exhibits introduced during the prior public hearings.

¹³ While the Supervisors understand that Mountain Road is the only realistic means of access to the site, this has always been the case when the site was being operated as a hotel, inn, country-club and golf course; and the Objections presented no testimony from a traffic expert as to why this road could not accommodate Treatment Center traffic.

16. While the proposed use is residential, this use does not have any impact on the regional housing needs; and, indeed, provides housing to those individuals who may have been lawfully excluded from such housing because of their drug/alcohol or substance abuse addiction.
17. As a former hotel, inn, country club and/or golf course, the topography, natural resources and other natural features of the site is suited for the lower intensity of the proposed use.
18. There is minimal (if any) impact upon the site's soils, slopes, woodlands, wetlands, flood plains, natural resources, natural features.
19. There is minimal (if any) impact on the preservation of agriculture or other land uses which are essential to the public welfare.
20. The Objectors did present testimony from residents who were concerned that the project would adversely affect the residential neighborhood¹⁴
21. While the neighbors expressed concerns regarding increased traffic, safety, security and decrease in property values (see fn. 14 infra), this testimony was presented by individuals who reside in close proximity to the project, have an emotional attachment to the area but (respectfully) have little (if any) expertise to convincingly testify in any of those areas¹⁵.

¹⁴ See the Supplemental Memorandum of Law submitted by John Shoemaker et al. page 6 that describes "fear of patients undergoing detoxification and withdrawal, leaving the center and wandering the neighborhood, increased traffic, and adverse effect upon property values.

¹⁵ It is acknowledged that one individual, a Mr. Jack Shoemaker, does have some experience in real estate as he has been a realtor in the Poconos for several years. HT-July 2019 538:15 to 540:3.

22. Many of the neighbors' concerns are better left to be presented at the conditional use proceeding stage where their concerns can be addressed at possible conditions to the use.¹⁶
23. The proposed use does fall within the District Intent of the R-1 (Low Density Residential) Zoning District.
24. The attempts by the neighbors to object to the use are an attempt to-at best-to be unnecessarily exclusionary and-at worst-discriminatory to those with disabling illnesses and addictions especially since individuals with disabling illnesses and addictions can reside in any of the permitted or conditional uses presently permitted in the R-1 Zoning District.
25. The landowner curative amendment has validity and the Treatment Center is a use that is proper in the R-1 (Low Density Residential) Zoning District and the landowner curative amendment should be granted.
26. On July 28, 2020, the Township adopted Township Ordinance No. 237 which established an Economic Development (ED) Zoning District in the Township which zone eliminated the existing C-1 (Commercial), B-1 (Planned Boulevard) and the B-2 (Business and Professional Office/Medical) Zoning Districts.
27. That ED Zone specifically provides for a "rehabilitation facility" which is defined as "a licensed establishment, with 24 hour supervision whose primary purpose is the rehabilitation of persons. Such services include drug and alcohol rehabilitation,

¹⁶ Under the Ordinance, "[i]n granting a conditional use, the Board of Supervisors may attach such reasonable conditions and safeguards, in addition to those expressed in this Chapter, as it may deem necessary to implement the purposes of this Chapter and the Pennsylvania Municipalities Planning Code." (emphasis added) See Ordinance Section 805 and the Pa Municipalities Planning Code, 53 P.S. Section 10913.2(a).

physical therapy, occupational therapy, speech pathology services, assistance to emotionally and mentally disturbed persons, and halfway houses for prison parolees and juveniles” (emphasis added); and, the principal of the Applicant has described the Treatment Center in question as a “residential treatment center for treating patients that have alcohol or drug addiction.”

28. In view of the recently adopted ED (Economic Development) Zone, the curative amendment is not adopted throughout the R-1 (Low Density Residential) Zoning District but the amendment is site specific to the Water Gap project.
29. The present use of the Water Gap Wellness Inn is not relevant or probative as to the proposed use of the Inn which will be different if the Treatment Center would be located there. (see AHT 69:15-70:10)
30. The present use of the Water Gap Wellness Inn is not relevant or probative to the issue at hand i.e. whether or not to adopt the landowner curative amendment (see SVM 121:19-24).

DISCUSSION:

Pursuant to the MPC, a municipality which has determined that a validity challenge has merit¹⁷, may accept the landowner’s curative amendment, with or without revision, or may adopt an alternative amendment which will cure the challenged defects. 53 P.S. Section 10609.1(c).

¹⁷ Based upon the prior Section 302 determination, the Board of Supervisors would be hard pressed to now deny the validity of the challenge. Monroe County Judge Zulick-in his opinion dated June 10, 2020 on the Section 302 challenge-also spoke to the invalidity of the zoning ordinance. The Judge stated “...[t]here is no dispute that the Smithfield Township Ordinance did not identify a ‘drug and alcohol rehabilitation facility’ as a permitted use in the R-1 Zone. In fact, the ordinance (sic) did not permit the use in any zone...”. See page seven (7) of the Judge’s Opinion.

Under the MPC, a governing body-when considering a landowner curative amendment-shall also consider the following¹⁸:

(1) the impact of the proposal upon roads,¹⁹ sewer facilities, water supplies, schools and other public services;

(2) if the proposal is for residential use, the impact upon regional housing needs and the effectiveness of the proposal in providing housing units of a type actually available to and affordable by classes of persons otherwise unlawfully excluded by the challenged provisions of the ordinance;

(3) the suitability of the site for the intensity of the use proposed by the site's soils, slopes, woodlands, wetlands, flood plains, aquifers, natural resources and other natural features;

(4) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, aquifers, natural resources and other natural features, the degree of which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and

(5) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.²⁰

¹⁸ The Applicant's attorney argued at the hearing that several of these criteria did not apply to the proposed use in question. AHT 18:16 to 19:2.

¹⁹ While the Objectors' attorneys attempted to address traffic issues by use of golf carts and vans (characterized as "shuttle buses") a few times a day, that testimony was not persuasive inasmuch as this testimony dealt with the present use and not the use as a Treatment Center which testimony (as noted above) is not relevant and not probative to the issue at hand. Also, and as earlier stated, no testimony was presented by an expert in traffic or road design issues.

²⁰ See MPC, 53 P.S. Section 10609.1(c)(1)-(5).

In this case, there is little (if any) change to the existing building footprint. There is no proposed significant earthmoving that adversely impacts upon soils, slopes, wetlands, woodlands, natural resources and natural features. As such, the project has little (if any) environmental impact. The effect upon public utilities would be no different than when the site was used as a hotel, inn, country club and/or golf course. In fact, the impact on water and sanitary sewage services may be less.

The intent of the R-1 District "...includes large land areas that should, to the degree practical, be developed in a manner that preserves their open space character and natural amenities..." See Ordinance Schedule of District Regulations. Here, the Applicant proposes one (1) principal use on forty (40) acres of a 156 acre tract. Not only is forty acres a large land area but the use preserves the open space character of the property (just as the hotel, inn, country club and/or golf course did).

As to possible neighborhood or community impact, the uses that are presently allowed in the R-1 District (as either permitted uses or conditional uses) are more intense than the proposed use i.e. inter alia membership clubs, camps, associations and municipal recreation and entertainment facilities (on lots of 5 or more acres) are allowed as permitted uses; while federal, state and county buildings and uses, inns, Planned Residential Developments (PRDs), resorts, schools, colleges and educational facilities are all allowed as conditional uses.²¹ All of these uses are much more intense by way of traffic impact, safety and security and adverse effect upon property values. For example, what about a federal or state prison being constructed in this zone or a camp for emotionally or physically challenged individuals?

²¹ See Ordinance Schedule of District Regulations and Ordinance No. 192, supra.

What about the tremendous influx of traffic, people and property in a PRD setting? What about a "cookie-cutter" residential subdivision on 146 acres? Certainly such uses would affect the quality of life for those in the area much more adversely than a 50-60 bed Treatment Center. To suggest that traffic, safety and property value issues are only associated with a Treatment Center...and not the other presently permitted or conditional uses in the R-1 Zoning District...is incredulous.

The project is a Treatment Center on a large forty (40) acre tract in a residential district. It will be a gated facility with both man and video surveillance. The age or physical or emotional health of the residents are not factors to be considered. The various concerns with traffic, safety, neighborhood security and property values (if legitimate) can be duly addressed at the conditional use proceedings.

Parenthetically, Objectors' counsel is of the opinion²² that the Township's adoption of the ED (Economic Development) Zone cured the alleged defect as suggested by Water Gap. If the ED Zone Ordinance was pending at the time of the filing for the landowner curative amendment, that might be the case. However, those are not facts before the Board as the ED Zone Amendment was not advertised until July 10 and 17, 2020 which was after the landowner curative amendment request was filed on June 12, 2020²³. In other words, the ED Zone amendment was not "pending" at the time the curative amendment was filed.

In a case styled Piper Group, Inc. et al. vs. Bedminster Township Board of Supervisors et al., 30 A.3d 1083 (Pa 2011), the Pa Supreme Court (in dicta) stated that a governmental body is not required to consider a landowner's curative amendment filed after the

²² See AHT 25:8-19 Statement of Attorney Fareri.

²³ See the Memorandum of Law submitted by John Shoemaker et al. page two (2).

government's declaration of a zoning ordinance amendment. However, a zoning ordinance amendment cannot be considered pending at the time of the landowner's curative amendment challenge if the ordinance amendment was not advertised at the time the challenge was filed. In the case sub judice, Water Gap's challenge was filed on June 12, 2020 and the Township's ED Zoning Amendment was not advertised until the first advertisement on July 10, 2020. This being said, the ED Zoning Amendment cannot be considered a pending cure. Indeed, a "municipality [cannot] be permitted to modify or amend its ordinance in such a way that the defect is cured but the landowner who had raised the challenge obtain[s] no relief." See Piper, supra, 30 A.3d at 1096 (citations omitted). This would be the case here since-if the ED Zoning Amendment would be considered a cure- a Treatment Center would not be allowed in the R-1 Zoning District so Water Gap would receive no relief.

The Objectors also argue that the Township Zoning Officer "failed to make the proper determination that the use was permitted in a B-2 Zone"²⁴ Further, the Objectors argue that the Township could proceed under the MPC Municipal Curative Amendment provisions-53 P.S. Section 10609.2²⁵; however, that is not what is before the Board for determination. As stated by the Objectors in their own Memorandum, "[t]he Supreme Court specifically noted that where the governing body determines that the landowner's challenge has merit, the

²⁴ See the Memorandum of Law submitted by John Shoemaker et al. page six (6). However, that ship has sailed a long time ago i.e. before the Section 302 hearings were conducted. Further, the Objectors filed no appeal to Judge Zulick's decision where he agreed with the Zoning Officer's determination that the Zoning Ordinance did not allow a drug or alcohol facility in any...let alone the R-1...zoning district. See, infra, page 7 of the Opinion. That argument has been waived.

²⁵ See the Memorandum of Law submitted by John Shoemaker et al. page seven (7).

governing body shall proceed in accordance with Section 609(1) [...not Section 609(2)...]of the Municipalities Planning Code".²⁶ (emphasis added).

While the Objectors also take the position that the Applicant is already operating a Treatment Center-so there is no need for a curative amendment²⁷ - they do not concede that the " 'de facto' operation of the former Country Club as a Drug and Alcohol Rehabilitation Facility (also treating mental health)²⁸ is not in violation of the Smithfield Township Zoning Ordinance"²⁹. So even if the Township would agree that there is no need for the curative amendment that would not be the end of the inquiry where the Objectors will continue to object to the present activity at the Water Gap Wellness Inn at all costs.

Finally the fact that the Township Planning Commission was of the opinion that the use belongs in the Township B-2 (Business and Professional Office/Medical District)³⁰ is of no import. The Planning Commission is merely a recommending agency - see 53 P.S. Section 10209.1(b)(1); and, its recommendations are not binding on the Supervisors See

²⁶ See the Memorandum of Law submitted by John Shoemaker et al. page ten (10).

²⁷ While the Objectors referenced the Township Solicitor comments at the start of the August 2020 hearing that "**some** of this [present use] testimony **may** be relevant to determine whether or not a curative amendment is even needed..."-emphasis added-see AHT 26:2-5, the Solicitor made very clear that this would be for a limited purpose; and, certainly issues of whether or not such testimony is probative were not waived by the Township.

²⁸ The curative amendment ordinance defines the Treatment Center use as a "RESIDENTIAL DRUG, ALCOHOL AND/OR SUBSTANCE ABUSE TRETMENT FACILITY: facilities in which a combination of temporary housing, medically supervised subacute care, personal supportive services an counseling for individuals of all ages seeking rehabilitation for drug, alcohol and substance abuse reasons. Such facilities may include services for individuals requiring temporary skilled nursing services but will also include services focusing on mental health therapy." This definition does not state that mental health treatment per se is proposed but "mental health therapy" as it presumably relates to drug, alcohol and/or substance abuse issues. The recitation of the types of service on the Applicant's website does not take precedence over what is in the proposed ordinance language and the testimony of the Applicant's Representative. See Finding of Fact Number Nine (9) supra.

²⁹ See the Supplemental Memorandum of Law submitted by John Shoemaker et al. page six (6).

³⁰ With adoption of the ED (Economic Development) Zoning District on July 28, 2020, that zoning district no longer exists in the Township.

Todrin vs. Board of Supervisors of Charlestown Township, 367 A.2d 332, 334 (Pa. Cmmwith 1976) ...especially when those recommendations...as here...are flawed.

CONCLUSIONS OF LAW:

1. The Applicant is proposing a landowner curative amendment that allows a residential drug, alcohol and/or substance abuse treatment facility as a conditional use in the Township R-1 (Low Density Residential) Zoning District.

2. The curative amendment requires a minimum acreage of twenty five (25) acres and the proposed use is to be sited on forty (40) acres with a mailing address of 296 Mountain Road, Delaware Water Gap, PA 18327.

3. The property is located in Smithfield Township which is a Pennsylvania Township of the Second Class.

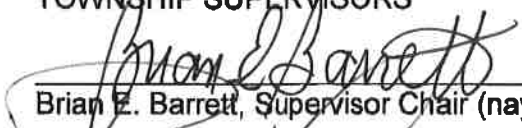
4. As a Township of the Second Class and since the Applicant's property is located in the Township, both the Applicant and the Township are bound by the PA Municipalities Planning Code, 53 P.S. Section 10101 et seq.

5. The curative amendment has validity; however and in view of the recently adopted ED (Economic Development) Zone, the curative amendment is not adopted throughout the R-1 (Low Density Residential) Zoning District but is site specific to the Water Gap project only.


6. The Applicant has established its right to a cure and to proceed with its residential drug, alcohol and substance abuse treatment facility at its property noted in Conclusion of Law Number Two (2).

7. However and before the project can proceed, the project shall require approval by the Township Board of Supervisors as a conditional use; and, the Board shall schedule public hearings thereon.

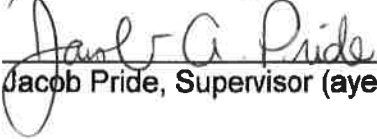
TOWNSHIP SUPERVISORS



Brian E. Barrett, Supervisor Chair (nay)



Robert Lovenheim, Supervisor (aye)



Jacob Pride, Supervisor (aye)

DATED: September 22, 2020