



WHITPAIN TOWNSHIP
MONTGOMERY COUNTY
COMMONWEALTH OF PENNSYLVANIA

ZONING HEARING BOARD

P.O. BOX 800
BLUE BELL, PA. 19422
(610) 277-2400
FAX: (610) 277-2209

June 20, 2008

JUN 23 2008

James J. Greenfield, Esquire
2 Radnor Station Building
Suite 100
Radnor, PA 19087

Marc B. Kaplin, Esquire
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422

RE: ZHB No. 1771-08
Ronald B. Glazer, Burton Stein & Bradley Beckman:

Dear Sirs:

Enclosed please find a copy of the Zoning Hearing Board Decision regarding the above-captioned matter.

Very truly yours,

Lena T. Cabot
Secretary to Zoning Hearing Board

/ltc

c: Chron
ZHB File 1771-08
Sign-In-Sheet

COMMONWEALTH OF PENNSYLVANIA

WHITPAIN TOWNSHIP ZONING HEARING BOARD

**APPEAL OF RONALD B. GLAZER, INDIVIDUALLY, AND FOR WINGS
CONCERNED CITIZENS, BURTON STEIN AND BRADLEY T. BECKMAN**

APPLICATION NO. 1771-08

DECISION AND ORDER DATED JUNE 19, 2008

I. HISTORY.

On or about December 28, 2007, Michael E. McAndrew, the Code Enforcement Officer of Whitpain Township (hereinafter referred to as the "CEO"), issued a Preliminary Opinion under Section 916.2 of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10916.2 (hereinafter referred to as "MPC"), pursuant to a request by the Wings Field Preservation Associates, L.P. (hereinafter referred to as "Wings") in connection with its Plan to demolish and replace two hangars on the Wings Field property at 1501 Narcissa Road, in the R-5 Residential Zoning District (hereinafter referred to as the "Subject Property"). The Preliminary Opinion states that the airport is an existing nonconforming use, and that the proposed development as depicted on the accompanying Hangar Layout Plan complies with the nonconforming use provisions of the Whitpain Township Zoning Ordinance of 1950, as amended (hereinafter referred to as the "Ordinance"), without the need for any variance from the Whitpain Township Zoning Hearing Board (hereinafter referred to as the "Board").

Notice of the issuance of the CEO's Preliminary Opinion was advertised in the Norristown *Times Herald* on January 3, 2008. Subsequent to the hearing, it came to the Board's attention that the second advertisement required by 53 P.S. § 10916.2 had not been published. Since the lack of proper publication was not raised at the hearing, the Board will not adjudicate this issue.

An Appeal from the CEO's Preliminary Opinion was filed on February 7, 2008, by Ronald B. Glazer, individually, and for Wings Concerned Citizens, Burton Stein and Bradley T. Beckman (hereinafter referred to collectively as "Appellants").

After notice duly given and advertised in accordance with law, a hearing was held on said Appeal at the Whitpain Township Municipal Building on Tuesday, April 29, 2008, and a stenographic record was made.

II. FINDINGS OF FACT.

1. The Subject Property is located at 1501 Narcissa Road, Blue Bell, Pennsylvania, in the R-5 Residential Zoning District and is owned by Wings.

2. The use of the Subject Property as a private airfield is an existing nonconforming use permitted to continue on the Subject Property. (Exhibit ZHB-2.)

3. The Appellants called Roman Pronczak, PE, as a witness.

4. Mr. Pronczak is the Township Engineer and Assistant Township Manager of Whitpain Township. [Notes of Testimony (hereinafter referred to as "N.T."), p.31.]

5. The Subject Property is presently improved with seven hangars, a building housing a repair hangar and offices related to the airport function, a cottage, the Pennsylvania Aviation Country Club building, a terminal, and a building housing Wings Travel. In addition, the Subject Property holds a fuel depot, a beacon and vault, and an AWOS weather station, which are not buildings. (Exhibit A-14; N.T., pp. 94, 96.)

6. The CEO was examined by Appellants' counsel as an adverse witness. (N.T., pp.39, 46.)

7. The CEO received a letter from Marc B. Kaplin, Esquire, the attorney for Wings, dated December 20, 2007 (hereinafter referred to as "Wings Letter"), requesting his Preliminary

Opinion regarding a proposed hangar expansion on the Subject Property pursuant to 53 P.S. § 10916.2. (N.T., p.59; Exhibit A-6.)

8. The Wings Letter concerns a proposal to demolish hangars 3 and 4 and to replace them with new hangars in compliance with all dimensional requirements of the R-5 Residential Zoning District.

9. The demolition of existing hangars 3 and 4 and the replacement with new hangars 3 and 4 will result in a net increase of 6,830 sq. ft. of hangar space which is less than the 25% expansion permitted by Section 160-208 of the Ordinance.

10. The total square footage of buildings in existence in 1984 was 83,163 sq. ft. (N.T., p.71; Exhibit A-14.)

11. The building designated as “Main Building” on the Wings Field Plan is used as a repair hangar and office area. (N.T., p.70.)

12. The CEO issued his Preliminary Opinion to the effect that the proposed plan did not violate the Ordinance. (N.T., p.50; Exhibit A-7.)

13. The CEO testified that the basis for his opinion was an examination of the Ordinance to make sure that the relocated hangars would be moved back from the front yard setback along Narcissa Road; an examination of the information showing that the hangars would not exceed the height requirements of the Ordinance for the zoning district; and, an examination of the 1984 Board Opinion (Exhibit A-12), which had previously permitted expansion of a nonconforming use of Wings Field. (N.T., p.62.)

14. The CEO then examined Section 160-208 of the Ordinance, enacted in 1984, concerning permitted expansions of nonconforming uses. (N.T., pp. 63-64; Exhibit A-3.)

15. The CEO determined that the proposed expansion did not exceed the 25% maximum allowed by Section 160-208 of the Ordinance (N.T. pp.69-72.).

16. The CEO determined that if the hangars were relocated out of the required setback, it would not be detrimental to the health, safety, morals or general welfare. (N.T., p.66.)

17. A further determination concerning the welfare of the community will be made by the Board of Supervisors at the time of a land development application by Wings.

18. The 25% expansion permitted by Section 160-208 of the Ordinance is correctly calculated by considering the square footage of all buildings on the Subject Property existing in 1984. (N.T., p.72.)

19. Based on his calculations, the CEO concluded that Wings was permitted to expand by approximately 20,000 sq. ft. (N.T., pp.72, 106.)

20. The net proposed increase in building size after demolition and replacement of Hangars Nos. 3 and 4, would be 6,830 sq. ft. of hangar space. (N.T., p.81.)

21. The CEO correctly opined that the square footage of all buildings which were on the airport in 1984 are to be aggregated as the base for calculating the permitted potential expansion. (N.T., p.107.)

22. The two hangars which are being reconstructed, hangars 3 and 4, are presently in violation of the setback requirements of the Ordinance and Wings' proposed Plan will bring them into compliance with the Ordinance's setback requirement. (N.T., p.110.)

23. The Preliminary Opinion correctly found that the proposed airport hangar demolition and replacement complied with the nonconforming use provisions of the Ordinance.

III. DISCUSSION.

In 1950, Whitpain Township zoned Wings Field and the surrounding property R-1 Residential, making the airport a pre-existing nonconforming use. (Exhibit W-14.) Section 160-208 of the Ordinance was enacted in 1984. Section 160-208 provides as follows:

§ 160-208. Extension of nonconforming use.

A nonconforming use of a building or structure or a nonconforming use of a lot, tract or piece of ground, which use was lawful at the time it became nonconforming, may be expanded so long as that expansion shall not exceed either 25% of the gross square footage of floor area of the principal building or structure, exclusive of accessory buildings or accessory structures, in which said nonconforming use is situate or 25% of the gross square footage of the lot coverage area of the original nonconforming use; provided, however, that such expansion shall comply with all other applicable provisions of this chapter and shall not otherwise be detrimental to the health, safety, morals or general welfare of the community where situated.

- A. No vertical expansion of a nonconforming use shall be permitted which shall exceed the height limitations of the existing nonconforming use, building or structure in which the nonconforming use is located or will exceed the height limitations of all other buildings or structures in the zoning district in which the nonconforming use is located. Further, no vertical expansion of any nonconforming use shall be permitted that increases the bulk, volume or square footage of the nonconforming use in excess of 25% of the nonconforming use as of the date the use first became nonconforming.
- B. No expansion of any nonconforming use above the first floor level thereof shall exceed the yard setbacks in the zoning district in which the nonconforming use is located.

The Court of Common Pleas, the Hon. Maurino J. Rossanese, Jr. presiding, ruled on April 25, 2008 (Exhibit W-14), that any present application for expansion should be calculated from the 1984 date when the 25% expansion allowance was enacted, and not from 1950, when the Subject Property first became a nonconforming use. (Exhibit W-14, Footnote 5.)

There are two legal issues as framed by the Appellants. The first is that the expansion should have been limited under Section 160-208 of the Ordinance to 25% of the “principal building or structure,” not the aggregate of all buildings on the Subject Property. The second is that Appellants claim the CEO’s Opinion is invalid because he did not make a determination that the expansion is not detrimental to the health, safety, morals or general welfare of the community in conformance with Section 160-208 of the Ordinance.

A. The CEO correctly calculated the 25% expansion based on the gross square footage of floor area of all the buildings on the Subject Property, all such buildings being the principal buildings comprising the airport use.

Judge Rossanese’s Opinion in Montgomery County Court of Common Pleas Case No. 06-16401 was admitted into evidence as Exhibit W-14. Footnote No. 5 on Page 5 of that Opinion states:

Please note, in 1950, the Township zoned Wings Field and the surrounding property R-1 residential, making the airport a preexisting non-conforming use. Whitpain, 550 A.2d at 1357. Section 160-208 of the Whitpain Township Ordinance, mandating a 25% expansion limitation, was enacted in 1984. As of 1984, the airport’s non-conforming pre-existing use covered 209.9 acres, with a 429 percent expansion. Whitpain, 550 A.2d at 1357,1360, respectively. Consequently, the Supervisors properly calculated the 25% expansion from the date when the Ordinance was enacted in 1984, and not from 1950 when the property became a non-conforming use. (Emphasis supplied.)

The Board takes judicial notice of this Opinion and the legal conclusion reached by Judge Rossanese.

The Appellants refused to state directly whether or not they were challenging Footnote No. 5.

(N.T., pp.54-56.)

Wings Field is a private airport; that is the pre-existing, lawful, nonconforming use. The existing buildings on the Subject Property are seven hangars, a building used as a repair hangar and airport office, a small cottage, an aviation country club, a terminal, and an office which houses

Wings Travel. The total square footage of footprint floor area of these buildings is 83,163 sq. ft.

(Exhibit A-14.)

The term “accessory building” is defined as follows in the Ordinance, Section 160-5:

ACCESSORY BUILDING - A building subordinate to the principal building on the lot and used for purposes customarily incidental to those of the principal building, including but not limited to the following: stables, swimming pools, bathhouses, toolsheds.

There is no definition of the term “principal use” or “principal building.”

In the Aviation Code, 74 Pa. C.S.A. § 5102, the term “Airport” is defined as:

Any area of land or water which is used, or intended to be used, for the landing and takeoff of aircraft and any appurtenant areas which are used, or intended to be used, for airport buildings or air navigation facilities or rights-of-way, together with all airport buildings and facilities thereon. Unless indicated otherwise, airport shall include heliports and public airports.

The Board’s research has disclosed no zoning cases dealing with the issue of which buildings at an airport is the “principal building” as a matter of law. Under the definition quoted above from the Aviation Code, the Board is able to conclude that the term “Airport” itself includes all airport buildings and facilities located on an area of land used for landing and takeoff of aircraft. Therefore, all of the buildings on the Subject Property should be counted to calculate the permissible 25% expansion.

In a zoning context, whether or not a building is the “principal building” can vary depending on the nature of the operation. In *Oliver v. Zoning Hearing Board of South Londonderry Township*, 38 Pa. Cmwlth. 213, 392 A.2d 350 (1978), the property in question was a farm. The Commonwealth Court held that with no showing that the original barn on the premises was the “central structural focus” of a farming and pasturing use, another building constructed as an animal shelter could be found to constitute a principal building for that use, so as to be subject to a 50 ft. setback

requirement. The landowner's position was that the animal shelter was not a "principal" non-residential building, but only an accessory building, for which no setback was prescribed. The landowner testified that he used some of his land for farming and some for pasturing. He kept cows and steers and had built the animal shelter to house them. Because the landowner did not prove that the original barn was the central structural focus of the farming and pasturing use, the court was forced to conclude that the animal shelter itself constituted a principal building, rather than an accessory building.

In the instant case, the Appellants made no attempt to show that any particular building was the central structural focus of the airport use. They pointed instead to the fact that Wings itself had designated a certain building as "Main Building" on an earlier Plan, but they did not elicit any testimony as to why this building had been so designated, and did not prove that this particular building as used was central to the airport operation. The CEO testified that the building designated "Main Building" is used as a repair hangar and office area. (N.T., p.70.)

Appellants have not proven that the building which they claim should be considered the principal building, the repair hangar and office-use building, is the central structural focus of the airport operation. Therefore, the Board concluded that there is no reason why that particular building, nor any one building, must be deemed to be the sole principal building on the Subject Property, for the purpose of determining the permitted expansion.

All of the buildings on the Subject Property are related to and an integral part of the airport use. Eight of the buildings are used or partly used as hangars, which cannot be said to be unrelated aviation purposes. There is an airport terminal, also clearly related to aviation purposes. Similarly, the aviation country club and the travel office are reasonably related to the Subject Property's use as a private airfield.

The CEO's interpretation of the Ordinance is entitled to deference and should not be disregarded unless shown to be clearly erroneous. *McIntyre v. Board of Supervisors*, ___ Pa. Cmwlth. ___, 614 A.2d 335, at 337 (1992). Appellants did not present any testimony indicating that any particular building on the lot should be considered to be the sole principal building, meaning that it and no other was the central structural focus of the airport use (*Oliver*, supra). Furthermore, Appellants did not present any evidence that the buildings which it sought to exclude, being all buildings except for the repair hangar and office-use building, meet the definition of "accessory building" in Section 160-5. B. of the Ordinance.

It is difficult to see how the majority of these buildings could possibly be accessory to any one of the others, that is, subordinate to it. For example, there are seven buildings completely devoted to airplane hangar use. None of these hangar buildings could logically be said to be "subordinate" to the other hangars. The building which Appellants wish to designate as the "principal building" is partly a repair hangar and partly devoted to airport office-use. There appears no evidence, and no logical reason, why the other hangar buildings should be subordinate to that building. Similarly, just as a matter of logic, there appears to be no reason why the terminal building and the aviation country club should be subordinate to that repair hangar/office building. Therefore, the Board finds that the CEO's calculation concerning the permitted 25% expansion is correct.

B. The CEO correctly concluded that the proposed hangar demolition and replacement was not contrary to the health, safety, morals or general welfare of the community.

53 P.S. § 10916.2 provides in pertinent part as follows:

- (1) The landowner may submit plans and other materials describing his proposed use or development to the zoning officer for a preliminary opinion

as to their compliance with the applicable ordinances and maps. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance.

Appellants argued that the CEO did not make a determination concerning the health, safety, morals or general welfare of the community. Appellants did not themselves present any independent evidence that this proposed expansion would in fact be detrimental to the health, safety, morals or general welfare of the community.

A preliminary opinion under Section 916.2 of the MPC does not represent a preliminary or final land development approval or approval for a building permit. As such, it does not represent a final review of the proposal contained in the Wings Letter.

The Board finds that the CEO did conclude that, since the demolition and replacement of the hangars would eliminate the setback encroachment, the proposed activity would not be contrary to the health, safety, morals or general welfare of the community. Further review would be made by the Township Supervisors at the time of land development. In fact, the CEO testified that in connection with any permit application, he does not normally make a determination as to whether or not it is detrimental to the health, safety, morals or general welfare of the community. He considers that if properties or uses are not in compliance with the Ordinance, they are deemed to be in violation of the health, safety, morals and welfare of the Township. (N.T., p.118.) He testified that the purpose of the Ordinance is to protect the health, safety, welfare and morals of the community (N.T., p.118) and, therefore, compliant uses had already been determined to so protect. (N.T., p.120.)

The CEO correctly determined that the proposed 25% expansion was permissible based on the square footage of existing buildings in 1984, pursuant to Section 160-208 of the Ordinance. Therefore, being compliant with the Ordinance, the proposed demolition and replacement of hangars was not detrimental to the health, safety, morals or general welfare of the community.

IV. CONCLUSIONS OF LAW.

1. The airport use by Wings is a lawful pre-existing nonconforming use of the Subject Property.
2. All buildings presently on the Subject Property are “principal” buildings, central to the lawful nonconforming use of the Subject Property as a private airport, and there is no one building which more than any other constitutes the sole central structural focus of the airport use.
3. The CEO properly calculated the 25% expansion under Section 160-208 of the Ordinance from the date when that section of the Ordinance was enacted in 1984, and not from 1950 when the Subject Property became a nonconforming use.
4. The total square footage of buildings in existence in 1984 was 83,163 sq. ft.
5. In issuing the Preliminary Opinion, the CEO determined that the demolition and replacement of the hangars was not detrimental to the health, safety, morals and general welfare of the community.
6. The Preliminary Opinion issued December 28, 2007 in response to the Wings Letter is in compliance with the facts and the law.

