



Glenn C. Mandalas
302-677-0061
www.bmbde.com
glenn@bmbde.com

August 31, 2017

VIA U.S. MAIL

William Mears, Building Official
Town of Dewey Beach
105 Rodney Avenue
Dewey Beach, Delaware 19971

RE: Request for Determination of Nonconforming Use for 2110 Coastal Highway

Dear Mr. Mears:

My firm represents W & C Catts Family Limited Partnership which owns, among other things, the real property located at 2110 Coastal Highway in Dewey Beach (the “Property”) that was known for many, many years as Ed’s Chicken & Crabs (“Ed’s”). Please accept this letter as a request for an official determination by the Town of Dewey Beach Building Official as to the nonconforming use status of the Property as a food service enterprise providing carry-out and eat-in food and beverage service that is operated partly or entirely outdoors (the “Uses”). The Town’s letter dated May 2, 2017 questions in part this description and the legal nonconforming status of the Uses. We provide herein below a summary of our understanding of the law governing a non-conforming property under Chapter 185 of the Code of the Town of Dewey Beach (the “Zoning Code”) and Delaware law. As set forth below, the Property was and continues to be utilized for the Uses without meaningful interruption since before the Town’s incorporation on June 29, 1981.

Ed’s first opened as a joint venture among the Catts family and Ed Riggins, with Ed Riggins functioning as the primary operator of the business. From day one—well before the Town’s incorporation in 1981—Ed’s utilized an open-air barbecue pit and grill located in the parking lot on the Property. At that time, a mobile food trailer was located in the rear of the Property but it was removed shortly after Ed’s opened. With the exception of a soda machine, there was very little other equipment involved in the operation. Ed’s served directly from the grill and pit without seating or other accommodations. In the mid-1980s, Ed’s built its signature shack, set up picnic tables, and placed a portable toilet on the Property, but continued to use an outdoor charcoal grill for food preparation. It was not until the late-1980s that indoor cooking was even a possibility, when an indoor propane grill was placed in the shack. Consistently thereafter, and as recently as a few summers ago, Ed’s would return to its open-air roots and prepare food on outdoor grills whenever other equipment was unusable (which occurred frequently). As you are aware, all of the building improvements located on the Property were

destroyed by a fire on August 9, 2016, when a drunk driver crashed into the shack located on the Property.

Section 185-56 of the Zoning Code provides that “the lawful use of land or buildings existing at the effective date of this chapter may be continued although such use does not conform to the [Zoning Code].” The Town does not appear to dispute that the Property was actively used as a food service business that engaged in open-air barbecuing on the Property prior to enactment of the Zoning Code. The Town does dispute, however, whether the outdoor operation continued in such a way that preserved the nonconforming status of that use after the shack was built and the indoor grill was installed. As best we can tell, the Town believes that § 185-58 of the Zoning Code¹ operated at some point to terminate the legal nonconforming status of the outdoor food service. Based on the facts stated above and the law stated below, the Town must confirm the legal nonconforming status of the entirety of the Uses.

It is a well-settled zoning principle that the abandonment of a nonconforming use is more than a mere suspension of the use and requires the concurrence of an intention on the part of the owner to abandon or relinquish the use with an overt act, or failure to act, showing the consummation of that intention. 58 AM. JUR. ZONING § 153. A temporary cessation, even for a lengthy period, caused by circumstances over which a property owner had no control, has been held not to constitute proof of intent to abandon within the meaning of abandonment in zoning ordinance provisions. 4 RATHKOPH’S THE LAW OF ZONING AND PLANNING § 74:7 (4th ed.).² The

¹ Section 184-58 of the Zoning Code states that:

No building, land, or portion thereof which is used in whole or in part for a nonconforming use, that remains idle or unused for a continuous period of one year, whether or not the equipment or fixtures are removed, shall again be used, except in conformity with the regulations of the district in which such building or land is located, provided that if the building, land or any portion thereof becomes idle or unused due to a fire, storm, infestation or other peril not caused intentionally by the property owner, then such building, land or portion thereof may remain idle or unused for a continuous period of one year and six months, after which the use must conform to the regulations of the district in which such building or land is located if such building, land or portion thereof continues to remain idle or unused.

² See also *Hammond v. City of Chicago*, 139 Ad 98 (Ill. App.1st Dist. 1985) (discontinuance for more than one year during pendency of bankruptcy and foreclosure proceedings does not constitute intent to abandon use); see also *Metropolitan Development Com’n of Marion County v. Goodman*, 588 N.E.2d 1281 (Ind. Ct. App. 5th Dist. 1992) (nonuse of a nonconforming use will not constitute abandonment if the nonuse is result of financial inability of owner to continue in business); see also *Paul v. Selectmen of Scituate*, 17 N.E.2d 193 (Mass. Ct. App. 1938) (the right to a nonconforming use was not lost by two years of nonuse of premises, where the former owner went into bankruptcy, the property was sold, and the restaurant use was not attempted to be resumed until after the two-year period); see also *National Lumber Products Co. v. Ponzio*, 42 A.2d 753 (N.J. Sup. Ct. 1945) (retail lumber yard, operated as a nonconforming use for ten years, remained idle for about three years, after which a purchaser resumed use of the premises for the same business; it was held that closing down the business for three years did not constitute an abandonment or discontinuance of the permitted nonconforming use).

Superior Court of the State of Delaware recently affirmed its reliance on these common law principles in *Hamm v. City of Wilmington Zoning Board of Adjustment*, 2010 WL 547413 (Del. Super. Feb. 17, 2010). In *Hamm*, the Superior Court held that the burden of proof was on the City of Wilmington to affirmatively prove abandonment and the Court further held that abandonment must be proven by an affirmative intent to permanently cease the nonconforming use. *Id.*

We are aware that § 185-58 of the Zoning Code does not require that the Uses be abandoned and instead merely requires that they be “unused” or “idle.” The Town, however, cannot interpret this provision to divest a property owner of his right to a nonconforming use without some showing that the use was intentionally abandoned by the owner or that the termination of the use was within the control of the owner. Such an interpretation would violate the general principle that zoning ordinances are to be strictly construed in favor of the property owner. *See generally Hamm*, 2010 WL 547413 (suggesting that Delaware law requires actual intent to abandon); RATHKOPF’S THE LAW OF ZONING AND PLANNING § 74:7. Moreover, such an interpretation would result in an unconstitutional taking in violation of an owner's rights under the Delaware and U.S. Constitutions.

Many jurisdictions hold that the application of zoning prohibitions against nonconforming uses without consideration of a property owners' intent is invalid. The prevailing view of courts is that the word discontinuance is equivalent, when used in the zoning ordinance with reference to nonconforming uses, to abandonment. 56 A.L.R. 3d Art 14, § 3. For example, Courts conclude that “to discontinue, to cease, or to abandon are synonymous and the party opposed to the use must prove intent to abandon.” *See City of Glendale v. Aldabbagh*, 939 P.2d 418, 420 (Ariz. 1997) (citing *Board of Zoning Adjustment for Lanett v. Boykin*, 92 So.2d 906, 909 (Ala. 1957); *Pappas v. Zoning Board of Adjustment for Philadelphia*, 589 A.2d 675, 677 (Pa. 1991).

Other jurisdictions require intent to abandon plus an act or failure to act which evinces such intent. For example, in *Boles v. City of Chattanooga*, 892 S.W.2d 416 (Tenn. Ct. App. 1994), the Court determined that the term “discontinued” or words of similar import, as utilized in zoning ordinances with specific time limitations, should be construed to include an element of intent, combined with some act – or failure to act – indicative of abandonment. *Id.* at 422. The *Boles* Court reasoned that “[t]o hold that a nonconforming use can be cut off automatically by time limits on discontinuance, regardless of the reason for that discontinuance, strikes us as intrinsically unfair.” *Id.* “Such a holding also seems contrary to the underlying concern for private property rights” *Id.* Therefore, the Court in *Boles* held that the term “discontinued” did not apply to bar a nonconforming use if the discontinuance of such use is purely involuntary. *Id.* at 422. It is likely that Delaware will follow the precedent of these cases. *See New Castle County v. Harvey*, 315 A.2d 616, 619 (Del. Ch. 1974) (“In my opinion, the exception must be interpreted so as to guarantee that zoning will not take from an owner property rights which he



already legally possessed, because to do otherwise would be confiscatory and thus, in all probability, unconstitutional."). As a result, the Zoning Code must be interpreted with deference to the actual intent of the owner, while taking into the account the historical uses made of the Property. It is clear that the Town's initial assessment of the status of the Uses does not that, and must be reconsidered.

The legal nonconforming status of the Uses of the Property has not been abandoned at any point in the history of Ed's, and there is no evidence of any facts sufficient for the Town to determine that any abandonment of the owner's right to use the Property for a food service business that was operated entirely outdoors has occurred. To the contrary, the Town's May 2, 2017 letter was prompted by my client's application for a business license to continue the Uses at the Property. For these reasons, I respectfully request that you, as the Town Building Official, immediately confirm the legal nonconforming status of the Uses of the Property.

I look forward to your prompt response.

Very truly yours,

Glenn C. Mandalas

GCM/acb

cc: Rusty Catts (W & C Catts Family Limited Partnership)