

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CARL SHULTZ d/b/a VALLEY BEVERAGE,	:	NO. 13 – 02,297
Appellant	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
ZONING HEARING BOARD OF WOLF	:	
TOWNSHIP,	:	
Appellee	:	
	:	
WOLF TOWNSHIP,	:	
Intervenor	:	Land Use Appeal

OPINION AND ORDER

Before the court is Appellant’s appeal of the decision of the Zoning Hearing Board of Wolf Township, which upheld the Zoning Officer’s denial of Appellant’s application for a zoning permit. The certified record of proceedings before the Board was filed February 3, 2014. The parties agreed that no further evidence was necessary and that the matter could be decided on the record below. Briefs were filed January 21, February 10 and February 18, 2014, and argument was heard March 17, 2014.

Appellant operates a licensed wholesale/retail beer distributorship¹ as a permitted use in the General Commercial Zoning District of Wolf Township. He filed a zoning application with the Township Zoning Officer requesting a permit to locate a portable propane filling station on the premises. The application was denied because the Zoning Officer determined that the portable propane refilling station was a second principal use of Appellant’s property and thus violated

¹ See Appellant’s Brief at p. 1. Appellant also contends he does *not* operate a beer distributorship, but a “retail business establishment that sells commodities, only one of which happens to be beer.” See Appellant’s Reply

Section 27 - 403 of the Township's zoning ordinance. The Zoning Board similarly concluded that the station would be a second principal use and thus, prohibited. Appellant now contends the Board abused its discretion and committed an error of law in so finding. He also argues that the zoning ordinance is preempted by the Pennsylvania Propane and Liquefied Petroleum Gas Act insofar as it purports to regulate the location and operation of propane containers.

It is undisputed that Appellant's beer distributorship is a permitted principal use under Section 27 – 306 of the Township Zoning Ordinance, specifically a “retail business establishment”. The dispute centers on whether selling/refilling portable propane tanks would be merely incidental to that use or, as found by the Zoning Officer, a second principal use, which would be prohibited by Section 27 – 403.²

The principal use of “retail business establishment” is defined by the Zoning Ordinance at Section 27 – 1602 as “a place of business engaged in selling goods and merchandise to the general public for personal or household use and rendering services incidental to the sale of such goods.” Section 27 - 306 lists as a “permitted accessory use” a “use customarily incidental to an approved, principal use”. The Zoning Hearing Board found that the sale of propane is not customarily sold at beer distributorships, that a beer distributorship could be sustained as a separate principal use without the sale of propane (obviously), and that a propane refilling station could be sustained as a separate principal use

Brief to Brief of Appellee Wolf Township Zoning Hearing Board at p. 2. The distinction is of no moment for purposes of describing in general terms the nature of Appellant's principal use.

² “Every principal building hereinafter erected shall be located on a lot as defined. There shall not be more than one principal use and/or structure and its accessory structures on one lot, except in the case of multi-family housing developments, mobile home parks, or other approved land developments.”

without the sale of beer.³ The Board thus asserts that the refilling station does not fall within the definition of a permitted accessory use, and it must therefore be a second principal use. This argument fails to consider the third possibility, however, which is the ordinance's own inclusion of "services incidental" to the sale of goods, permitted in its own right, without reference to the "accessory use" analysis.

The court finds nothing in the Board's findings and conclusions which would support a determination that the sale of propane and the refilling of propane tanks would NOT be the sale of merchandise and a service incidental to that sale. As Appellant contends, propane is clearly merchandise, and the court has no qualms in finding that, based on the nature of propane, refilling a propane tank is a service incidental to the sale of the propane.

The Township argues nevertheless that the court should not view the sale of propane as simply the sale of merchandise because "a distinct structure, located separate and apart from the existing beer distributorship is required".⁴ The record indicates that the proposed refilling station consists of a 1000 gallon above ground LP storage tank, valves and refill pumps which are surrounded by a ten foot square chain link fence, all of which is bordered on two sides by concrete barriers. None of the equipment/fencing or barriers is attached to the ground or any building and all of it is portable. In defining "structure", the Zoning Ordinance includes a gas or liquid storage tank, but only for flood plain management purposes. Appellant thus argues that the refilling station is *not* a structure under the ordinance. As the Board did not base its decision on the issue,

³ Appellant disputes this finding.

⁴ See Brief of Intervenor at p. 6.

however, but focused on only the “use” issue, the court finds it unnecessary to address the argument.

Finally, Appellant’s argument that the Zoning Ordinance is preempted by the Pennsylvania Propane and Liquefied Petroleum Gas Act also need not be addressed as that argument is based on the denial of the permit. The court will direct the Board to issue the permit and thus, the argument is moot.

While the court must give great weight and deference to the Board’s interpretation of its own ordinance, the Board’s failure to even address the “merchandise/incidental services” issue requires this court to find that the Board committed an error of law. Appellant is entitled to the requested permit and his appeal will be upheld.

ORDER

AND NOW, this 2nd day of April 2014, for the foregoing reasons, the decision of the Wolf Township Zoning Hearing Board is hereby REVERSED. The Board is directed to issue the requested permit to Appellant within thirty (30) days of this date.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Scott T. Williams, Esq.
J. Howard Langdon, Esq.
J. Michael Wiley, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson