

CLARE M DORSEY

vs.

BOROUGH COUNCIL OF CONSHOHOCKEN BOROUGH

NO. 2017-28840

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: CATHERINE M HARPER, Esq., ID: 34568

Self-Represented (Pro Se) Litigant

Class Action Suit Yes No

MDJ Appeal Yes No

Money Damages Requested

Commencement of Action:

Amount in Controversy:

Notice of Appeal

Case Type and Code

Civil Appeals:

Other

Other: LAND USE APPEAL

Supreme Court of Pennsylvania

Court of Common Pleas Civil Cover Sheet

MONTGOMERY County

<i>For Prothonotary Use Only:</i>	
Docket No:	

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:	
<input type="checkbox"/> Complaint	<input type="checkbox"/> Writ of Summons
<input type="checkbox"/> Transfer from Another Jurisdiction	<input type="checkbox"/> Petition
	<input checked="" type="checkbox"/> Land Use Appeal
	<input type="checkbox"/> Declaration of Taking
Lead Plaintiff's Name: Clare M. Dorsey, et al	Lead Defendant's Name: Borough Council of Conshohocken Borough
Are money damages requested? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Dollar Amount Requested: <input type="checkbox"/> within arbitration limits (check one) <input type="checkbox"/> outside arbitration limits
Is this a <i>Class Action Suit</i> ? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Is this an <i>MDJ Appeal</i> ? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Name of Plaintiff/Appellant's Attorney: Catherine M. Harper, Esquire	
<input type="checkbox"/> Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)	

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

<p>TORT (do not include Mass Tort)</p> <input type="checkbox"/> Intentional <input type="checkbox"/> Malicious Prosecution <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Nuisance <input type="checkbox"/> Premises Liability <input type="checkbox"/> Product Liability (does not include mass tort) <input type="checkbox"/> Slander/Libel/ Defamation <input type="checkbox"/> Other: _____ _____	<p>CONTRACT (do not include Judgments)</p> <input type="checkbox"/> Buyer Plaintiff <input type="checkbox"/> Debt Collection: Credit Card <input type="checkbox"/> Debt Collection: Other _____ _____ <input type="checkbox"/> Employment Dispute: Discrimination <input type="checkbox"/> Employment Dispute: Other _____ _____ <input type="checkbox"/> Other: _____ _____	<p>CIVIL APPEALS</p> Administrative Agencies <input type="checkbox"/> Board of Assessment <input type="checkbox"/> Board of Elections <input type="checkbox"/> Dept. of Transportation <input type="checkbox"/> Statutory Appeal: Other _____ _____ <input type="checkbox"/> Zoning Board <input checked="" type="checkbox"/> Other: Land Use Appeal _____ _____
<p>MASS TORT</p> <input type="checkbox"/> Asbestos <input type="checkbox"/> Tobacco <input type="checkbox"/> Toxic Tort - DES <input type="checkbox"/> Toxic Tort - Implant <input type="checkbox"/> Toxic Waste <input type="checkbox"/> Other: _____ _____	<p>REAL PROPERTY</p> <input type="checkbox"/> Ejectment <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Ground Rent <input type="checkbox"/> Landlord/Tenant Dispute <input type="checkbox"/> Mortgage Foreclosure: Residential <input type="checkbox"/> Mortgage Foreclosure: Commercial <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Other: _____ _____	<p>MISCELLANEOUS</p> <input type="checkbox"/> Common Law/Statutory Arbitration <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Mandamus <input type="checkbox"/> Non-Domestic Relations Restraining Order <input type="checkbox"/> Quo Warranto <input type="checkbox"/> Replevin <input type="checkbox"/> Other: _____ _____
<p>PROFESSIONAL LIABILITY</p> <input type="checkbox"/> Dental <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional: _____ _____		

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APPEAL FROM THE ENACTMENT OF A LAND : COURT OF COMMON PLEAS
USE ORDINANCE NO. 08-2017 BY THE : MONTGOMERY COUNTY, PA
BOROUGH COUNCIL OF CONSHOHOCKEN : CIVIL DIVISION - LAW
BOROUGH ON NOVEMBER 15, 2017 :
INVOLVING FAYETTE STREET AND 11TH : NO.
AVENUE AFFECTING PROPERTY OWNED BY :
PROVCO PINEVILLE FAYETTE, L.P. :
BY: :
CLARE M. DORSEY :
19 E. 11TH AVENUE, CONSHOCKEN, PA 19428 :
and :
KRIS J. WALLER :
100 E. 10TH AVENUE, CONSHOCKEN, PA 19428 :
and :
LISA RHODES :
1108 FAYETTE STREET, CONSHOHOCKEN, PA 19428 :
and : LAND USE APPEAL
FAMIRA INVESTMENTS :
1018 FAYETTE STREET, CONSHOHOCKEN, PA 19428 :

NOTICE OF LAND USE APPEAL

Petitioners, Clare M. Dorsey, Kris J. Waller, Lisa Rhodes, and Famira Investments, by their attorneys Zarwin Baum and Timoney Knox, LLP, hereby appeal from the enactment of Ordinance No. 08-2017 by the Borough Council of Conshohocken Borough on November 15, 2017, and in support thereof states the following:

1. Petitioner Clare M. Dorsey is an adult individual who owns real estate at 19 E. 11th Avenue in the Borough of Conshohocken as her home, in proximity to the property affected by Zoning Ordinance No. 08-2017 for property located at 1109 and 1119 Fayette Street and 1201 Butler Pike.

2. Petitioner Kris J. Waller is an adult individual who owns a home at 100 E. 10th Avenue in the Borough of Conshohocken who is affected by Zoning Ordinance No. 08-2017 and in close proximity to property located at 1109 and 1119 Fayette Street and 1201 Butler Pike.

3. Petitioner Lisa Rhodes is an adult individual who owns a property at 1108 Fayette Street in the Borough of Conshohocken which she uses as her home and is affected by Zoning Ordinance No. 08-2017 in close proximity to the property located at 1109 and 1119 Fayette Street and 1201 Butler Pike.

4. Famira Investments, a Pennsylvania limited liability company that owns real estate at 1018 Fayette Street in the Borough of Conshohocken and is affected by Zoning Ordinance No. 08-2017 and is in close proximity to the property located at 1109 and 1119 Fayette Street and 1201 Butler Pike.

5. All of your Petitioners/Appellants are jointly and severally aggrieved persons because the enactment of Ordinance 08-2017 will have a detrimental effect on their use and enjoyment of their own properties in the vicinity of the Provco Property and will result in high

traffic use of the Provco Property which is incompatible with the residential uses in the neighborhood.

6. Provco Pineville Fayette, LP, equitable owner of properties located at 1109, 1119 Fayette Street and 1201 Butler Pike, ("Provco Property") after losing an Application for a variance to the Conshohocken Borough Zoning Hearing Board in order to use the property as a convenience retail food market including 10 gas pumps under a canopy and a 4,736 square foot Wawa convenience store, filed an Application on or about June 29, 2017 requesting that Conshohocken Borough enact a Zoning Ordinance "text" amendment to allow a convenience store including the sale of fuel, ATM and lottery sales under certain circumstances in the R-O Residential Office District in the Borough of Conshohocken. Attached hereto as Exhibit "A" is a copy of the Zoning Hearing Board Decision, and as Exhibit "B" a copy of the Application filed by Provco Pineville Fayette, LP for the "text" amendment.

7. The purpose of the Borough of Conshohocken Residential Office District (R-O), according to the Zoning Ordinance, "is to encourage the retention and preservation of existing Victorian and early 20th century residences by permitting residential uses and conditionally allowing limited office conversions. Furthermore, it is the intent of this part to maintain the existing residential streetscape of Upper Fayette Street through regulations that allow these conversions only when front facade and porches are preserved and if building additions and parking areas are not constructed in front yards." Section 27-1201 of the codified ordinances of the Borough of Conshohocken in Chapter 27 "Zoning."

8. The Ordinance itself permits, for the first time, "a convenience retail food store including sale of fuel, ATM and lottery sales," on properties "last occupied or used as a nonconforming commercial use, provided the property does not contain a Victorian or early 20th century residential structure." Ordinance 08-2017.

9. The proposed Ordinance was submitted to the Borough Planning Commission and the Montgomery County Planning Commission, and both the Montgomery County Planning Commission (September 7, 2017) and the Conshohocken Borough Planning Commission (September 14, 2017) recommended against making the zoning text change.

10. The Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. §10101 *et seq.*, provides in Section 609, "Enactment of Zoning Ordinance Amendments," as follows:

Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice, and pursuant to mailed notice and electronic notice to an owner of tract or parcel of land located within a municipality or an owner of mineral rights in a tract or parcel of land within the municipality, who has made a timely request in order with Section 109. In addition, if the proposed amendment involves a zoning map change, notice of said public hearing shall be conspicuously posted by the municipality at points deemed sufficient by the municipality along the tract to notify potentially interested citizens. The affected tract or area shall be posted at least one week prior to the date of the hearing. 53 P.S. §10609(b)(1).

11. The Municipalities Planning Code further provides, "In addition to the requirement that notice be posted under Clause (1), where the proposed amendment involves a zoning map change, notice of the public hearing shall be mailed by the municipality at least 30 days prior to the date of the hearing by First Class Mail to all addresses to which real estate bills are sent for all real property located within the area being rezoned, as evidenced by tax records within the possession of the municipality. The notice shall include the location, date and time of the public hearing. A good faith effort and substantial compliance shall satisfy the requirements of this subsection." 53 P.S. §10609(b)(2)(i). The Borough did not comply with the notice requirements of the MPC.

12. Conshohocken Borough Council ("CBC") failed to follow the procedural mandates of §27-503 of the Conshohocken Borough Zoning Code where it was not until its

October 18, 2017 meeting that it decided to hold a public hearing on voting on the enactment of the proposed Ordinance 08-2017.

13. At this October 18, 2017 meeting, the CBC voted for the first time to hold a public hearing on voting on the enactment of the proposed Ordinance 08-2017.

14. The passage of Ordinance 08-2017 is *void ab initio* where it failed to follow the express language of §28-503 B. where Provco's Application for the Amendment was not referred to the Conshohocken Borough Planning Commission for a period of 30 days **prior to the hearing to allow it its review and comment. (Emphasis supplied)**. No hearing on the proposed amendment was authorized until the CBC vote on October 18, 2017. Therefore, there was no referral for the 30 day period prior to the public hearing.

15. The passage of Ordinance 08-2017 is *void ab initio* where it failed to follow the express language of §27-503 C. where Provco's Application for the Amendment was not referred to the Montgomery County Planning Commission for a period of 30 days **prior to the hearing to allow for its review and comment. (Emphasis supplied)**. No hearing on the proposed amendment was authorized until the CBC vote on October 18, 2017. Therefore, there was no referral for the 30 day period prior to the public hearing.

16. A public hearing was held on November 15, 2017 at which the CBC did not allow presentation of any expert witnesses on behalf of your Petitioners and others. Following "public comment," the CBC immediately by a vote of 4-3 passed Ordinance No. 08-2017. A copy of Ordinance No. 08-2017 as approved is attached as Exhibit "C". Thereafter, on the same night, the Borough Council of Conshohocken Borough approved the land development application of Provco Pineville Fayette, LP for land development of the site as a retail convenience store (Wawa) with gas pumps in accordance with the newly enacted Ordinance.

17. The enactment of Ordinance No. 08-2017 is void *ab initio* for failure to comply with the notice requirement of the Municipalities Planning Code, specifically, including, a failure to post the property in accordance with the requirement for a rezoning, or notify those people in the area being rezoned in sufficient time before the hearing to ensure that they could be heard on the subject of the Ordinance since the Text Amendment was actually a "map change," or "spot" rezoning.

18. In addition to the foregoing, the enactment of the Zoning Amendment also violates specific provision of the Borough of Conshohocken's Zoning Ordinance, particularly Section 27-502, "Application for Amendment," in that the Zoning Ordinance requires that the Applicant supply "A plan or map showing the extent of the area to be rezoned or districts to be affected, streets bounding and intersecting the area, land use and zoning classification of abutting districts, and photographs of the area to be rezoned and abutting areas," and that information was not supplied with the Application and not required to be supplied by Borough Council.

19. Section 27-502 requires other information from the Applicant which was not supplied, and as a result therefore, the adoption of the Ordinance violated the Borough of Conshohocken's own Zoning Code.

20. In addition, as required by both the Municipalities Planning Code and the Borough Code of Ordinances, the Borough Solicitor was to have published either a full text of the proposed Zoning Amendment or "a reasonably detailed summary prepared by the Borough Solicitor," to inform the public of the nature of the proposed zoning amendment. Attached hereto as Exhibit "D" is a true and correct copy of the summary legal notice which does not adequately detail for the purpose of informing the public that the proposed text amendment applied to only one property and would permit a convenience store previously rejected by the Borough's Zoning Hearing Board.

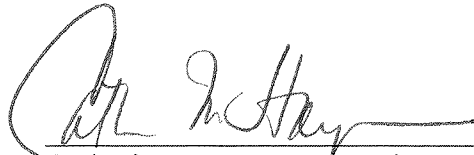
21. Pursuant to Conshohocken Ordinance 27-504(3), notice of the zoning amendment hearing was to have been mailed to persons who had registered for this notice and the Borough failed to adhere to its own Ordinance and failed to mail notice as required and therefore the amendment was not validly adopted and should be ruled void *ab initio*.

22. Pursuant to Conshohocken Ordinance 27-504(4), conspicuous perimeter posting of the affected tract was required if the proposed amendment involves a Zoning Map change. Although labeled a "text amendment," the proposed amendment actually effectuates a zoning map change for the Provco Property which substantially changes the character of the property in relation to the other properties in the R-O Residential District that are not eligible for development as a convenience retail food store including the sale of fuel, ATM and lottery sales.

23. Therefore, Ordinance No. 08-2017 is *void ab initio* where there was no perimeter posting of the Provco Property which was singled out by its terms for special legislative treatment as required by Conshohocken Ordinance 27-504(4).

WHEREFORE, your Appellants/Petitioners respectfully request that this Court will invalidate the Borough of Conshohocken Ordinance No. 08-2017 due to procedural defects in its enactment, and award such other relief as the Court deems necessary and appropriate.

Respectfully submitted,



Catherine M. Harper, Esquire
Gary A. DeVito, Esquire
Stephen G. Pollock, Esquire
Attorneys for Appellants/Petitioners

Dated: 12-14-17

VERIFICATION

I, Clare M. Dorsey hereby verify that I am a Petitioner, and I make this Verification and state that the facts set forth in the attached Land Use Appeal from Enactment of Ordinance No. 08-2017 by Conshohocken Borough Council, are true and correct to the best of my knowledge, information and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Date: 12/14/17

Clare M Dorsey
Clare M. Dorsey

VERIFICATION

I, Kris J. Waller hereby verify that I am a Petitioner, and I make this Verification and state that the facts set forth in the attached Land Use Appeal from Enactment of Ordinance No. 08-2017 by Conshohocken Borough Council, are true and correct to the best of my knowledge, information and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Date: 12/14/17



Kris J. Waller

VERIFICATION

I, Julian Miraglia, Managing Member of Famira Investments, a Pennsylvania Limited Liability Company, hereby verify that I am a Petitioner, and I make this Verification and state that the facts set forth in the attached Land Use Appeal from Enactment of Ordinance No. 08-2017 by Conshohocken Borough Council, are true and correct to the best of my knowledge, information and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Famira Investments, a Pennsylvania Limited Liability Company

Date: 14 Dec 17

By: Julian Miraglia
Julian Miraglia, Managing Member