

FRANKLIN PROPERTY MAINTENANCE CODE  
BOARD OF APPEALS HEARING  
Franklin Service & Supply  
August 22, 2017

Members Present: Douglas Baker, Mayor  
Donna Fletcher, Deputy Mayor  
James Johnson  
Samuel Lyons  
James Marshall

Members Excused: Michael Dulaney

In Attendance: Tracy Jamieson, City Manager  
Brian Spaid, Esq., City Solicitor  
Jim Wetzell, Deputy City Manager  
Charles Gibbons, Code Enforcement Officer  
Gregory J Merkel, Esquire, McFate & Merkel  
William Weller, Franklin Service & Supply  
Joseph A Borgia, Atlantic Properties (Pizza Hut representative)  
Darla Hawke, Recording Secretary

Mayor Baker began the Hearing at 7 PM by advising those in attendance that during the hearing, the City Solicitor, Brian Spaid, would serve as the City's legal counsel and answer any procedural or legal questions that may arise. Mr. Spaid then swore in those persons planning to offer testimony.

Mr. Gibbons began by introducing Mr. Borgia, Director of Construction & Maintenance for the Atlantic Development Corporation of Pennsylvania, the parent company of Atlantic Properties, who is the owner of the Pizza Hut property.

In response to Mr. Gibbons' questions, Mr. Borgia advised that he had been employed with the company since 1992, the year Pizza Hut was built. In 2014, the majority property owner, Mr. Robert P. Cadwell, told Mr. Borgia to approach the Code Enforcement Officer to discuss the water coming onto the Pizza Hut property from the Franklin Service and Supply property.

This past Spring, Mr. Borgia advised that he had talked with Mr. Weller, the owner of Franklin Service & Supply regarding this matter. In June or July of this year, Mr. Borgia then informed Mr. Gibbons that his company would be remodeling the Pizza Hut building on Atlantic Avenue and that Mr. Cadwell would not be happy about the water runoff situation. Mr. Borgia explained that the runoff is degrading the surface of the Pizza Hut property due to dirt, pebbles and stones ponding in the area between its parking lot and the Franklin Service &

Supply parking lot. He admitted that there has not been any financial damage. Mr. Borgia added that Mr. Cadwell wants the problem corrected, noting it is his understanding that stormwater cannot be shed onto an adjoining property.

Mr. Gibbons then asked Mr. Borgia to mark the location of the stormwater pipe and swale on an aerial photograph depicting both of the properties.

Mr. Gibbons then entered into evidence:

- Exhibit # 1: Photograph of Pizza Hut taken this date by Mr. Gibbons, which showed the swale in the Franklin Service & Supply paved area, the stormwater drain in the Pizza Hut parking lot, and the location of the downspout of the drain coming from the Franklin Service & Supply building.
- Exhibit #2: Photograph of Pizza Hut showing the barriers placed by Pizza Hut to prevent traffic going through their parking lot into its grassy area onto the Franklin Service & Supply parking lot.
- Exhibit #3: An older aerial photograph depicting the Pizza Hut property lines prior to the construction of the Crosby building.

Mr. Marshall ascertained that there had been no physical damage other than some debris washing onto the Pizza Hut property. He asked what the conversation consisted of between Mr. Borgia and Mr. Weller. Mr. Borgia advised they discussed what could be done with the rain leader coming off the gutter at Franklin Service & Supply and traveling underground through a 6-inch plastic pipe that was draining onto the Pizza Hut property. Mr. Borgia noted that Mr. Weller advised he would look into it, but Mr. Borgia never heard back.

Attorney Merkel to Mr. Borgia:

**Question:** Would you agree that the stormwater issues he testified to were an invasion of Mr. Cadwell's private use and enjoyment of the land.

**Answer:** Yes.

**Question:** With respect to this particular issue, is it correct to say that the stormwater issue you testified about does not affect the community at large?

**Answer:** I don't know.

Mr. Gibbons advised that, in the process of getting permits for the Pizza Hut remodeling job, Mr. Borgia informed him that the owner would want to talk to him about the runoff. Therefore, he asked Jeff Hawke, Wastewater Network Supervisor, to inspect the spill for his thoughts on where the gravel was coming from. According to Mr. Gibbons, it was Mr. Hawke's opinion that it would have to have come from the Franklin Service & Supply area because there was no other area in the vicinity with gravel. In June, Mr. Cadwell asked that an enforcement notice be issued to Franklin Service & Supply to resolve the situation.

Exhibit #4: Enforcement notice to Franklin Service and Supply, dated June 26, 2017.

Mr. Gibbons read a portion of Section 507.1 of the Franklin Property Maintenance Code, being, *“Drainage of roofs and paved areas, yard and courts, and other open areas on the premises shall not be discharged in a manner that creates a public nuisance.”* Mr. Gibbons noted that, in his opinion, a public nuisance does not have to be the general public, but could be just one person. This is a nuisance to the property owner, who cannot do anything with this property until the matter is resolved.

Mr. Marshall asked Mr. Gibbons, during his conversation with Mr. Weller, what was his response to fixing the problem. Mr. Gibbons was not sure if he spoke with Mr. Weller or his attorney, but the gist of it was, they were willing to move the downspout line along the back of the property, but it was too costly to fix the swale and parking lot. Mr. Marshall asked if there was a lip around the parking lot to prevent water runoff. Mr. Gibbons advised there was not. Mr. Marshall asked who’s responsibility was it to fix the problem. Mr. Gibbons advised it would be the property owner.

Attorney Merkel asked how this matter came to Mr. Gibbons’ attention. Mr. Gibbons advised it came from Mr. Borgia. Mr. Merkel asked if he had discussed the matter with anyone else. Mr. Gibbons advised he had discussed it with Mr. Hawke and Crosby’s Property Manager. When asked if he had been contacted by the general public in regards to this matter. Mr. Gibbons advised that he had not.

Attorney Merkel then questioned Mr. Gibbons on the bulleted points of his enforcement letter.

Bullet #1 *Ground surface water from paved areas runs onto the adjoining property causing erosion and gravel and dirt to run onto the lower adjoining property.*

**Question:** Would you contend that this is an interference with the right common to the general public? Does it affect the population in general?

**Answer:** I wouldn’t think so.

Bullet #2 *Roof drain water has been directed, via a plastic pipe, to run onto the adjoining property causing ponding, erosion and a nuisance.*

**Question:** Would you agree that this allegation does not interfere with the right common of the general public?

**Answer:** I wouldn’t think so.

**Question:** It would specifically be the owners of the adjacent property, correct?

**Answer:** Yes.

Bullet #3 *Said erosion has caused gravel and dirt to run directly into the storm water system of the City of Franklin.*

**Question:** Have you witnessed that occurring?

**Answer:** Yes.

**Question:** Gravel and dirt running in there?

**Answer:** Yes.

**Question:** On what occasions?

**Answer:** Earlier this year when we had a lot of rain; during the first meeting I had with Pizza Hut regarding their renovations.

**Question:** Is it your opinion that, that caused a significant interference with the storm system?

**Answer:** I have no opinion on it.

Bullet #4 *Said erosion of gravel and dirt has caused gravel and dirt to collect in the lower adjoining property of another causing a nuisance.*

**Question:** Would you, with respect to this allegation- does this interfere with the right common to the general public?

**Answer:** No.

Mayor Baker asked Mr. Gibbons where he found the definition of public nuisance. Mr. Gibbons explained that there is no definition in the City's Property Maintenance Code. In his opinion, it can be one person, one neighbor, one property or property owner. He does not feel it has to be the general public.

Attorney Merkel disagreed with Mr. Gibbons' assessment.

Mrs. Jamieson asked who owns and maintains the stormwater line in question. Mr. Gibbons noted that he did not know, but, according to Mr. Hawke, it exits into the City's stormwater line on Atlantic Avenue by a lateral from the property. Mrs. Jamieson stated that, normally the City stormwater lines are the ultimate responsibility of Terry Ruditis, Street Department Supervisor. However, since the spill is on the Pizza Hut property, it would not fall under the City's jurisdiction, unless it was installed by the City.

Attorney Merkel asked who owned the actual storm sewer on the Pizza Hut property. Mrs. Jamieson said she did not know. Mr. Merkel asked if the developer was required to put it in. Mr. Gibbons responded, "No."

Attorney Merkel reminded the Board that the issue is whether or not there has been a violation of Section 507.1 of the Franklin Property Maintenance Code. He read Section 507.1 again, stressing the words "public nuisance." Attorney Merkel informed the Board that there is a distinction between a "private" and "public" nuisance, being:

*A private nuisance requires an invasion of another's interest in the private use and enjoyment of his or her land. Thus in evaluating private nuisance claims, the key*

*question is whether one person has impaired another's private right and use to the enjoyment of their land.*

*A public nuisance, on the other hand, is an "unreasonable interference with a right common to the general public." A public nuisance is an inconvenience or troublesome event that annoys a whole community in general; not merely some particular person and produces no greater injury to one person than to another. A public nuisance does not exist unless a private nuisance exists and affects the community at large, not merely the complaining parties.*

In answer to Attorney Merkel's questions, Mr. Weller informed the Board that he has been President of Franklin Service & Supply since 1988-1990 and has been employed there since 1969. Franklin Service & Supply is the owner of 119 Grant Street, the property issued the citation. He showed the property lines and slope on the aerial map and advised that the building had been there since 2004 and the lot has been a dirt parking lot since 1940. He noted that the lot was paved three years ago at the same time Crosby's was constructed and that the water that runs down to the swale has not changed since before the lot was paved.

Attorney Merkel entered the following exhibits into evidence:

Exhibit A: A photograph taken from the Pizza Hut parking lot showing its drain, the three cement blocks to block traffic, the back of the Crosby Building and a truck parked in the Franklin Service & Supply lot. The photograph had been taken this morning by Attorney Merkel, under Mr. Weller's supervision.

Attorney Merkel questioned Mr. Weller:

**Question:** Does this photograph depict sand or gravel on the parking lot.

**Answer:** No.

Exhibit B: A photograph taken from the Franklin Service & Supply parking lot looking down towards Pizza Hut at the swale, which showed just a little bit of erosion. The photograph was taken this morning by Attorney Merkel, under Mr. Weller's supervision.

Attorney Merkel to Mr. Weller:

**Question:** Was this gravel area always graded in that manner?

**Answer:** No. Originally, our lot ended and that lot came out and dropped about 3 feet straight down and went to the Pizza Hut parking lot. Three years ago, when the Crosby building was built, it was graded to a much slighter slope in an effort to cleanup the area. Nothing has been done to the property since.

**Question:** Has water been flowing from your property onto that property for the last three years?

**Answer:** Yes.

**Question:** Is this the extent of the damage that's been done to this property in the last three years?

**Answer:** Yes.

Attorney Merkel then noted that, during the hard rain today, there was no gravel noticed on the Pizza Hut property.

Mr. Marshall asked Mr. Weller if any thought had been given to putting a lip around the parking lots when they were paved to help prevent water runoff. Mr. Weller answered, "no." Mr. Marshall asked if an engineer was involved when the parking lot was paved. Mr. Weller answered, "no" and explained that Bruce Smeal had been the contractor and the Labor & Industry guidelines were met at the time the building was constructed in 2004.

#### CLOSING

Attorney Merkel:

Franklin Service & Supply was cited under Section 507.1 of the Franklin Property Maintenance Code, which states "*Drainage of roofs and paved areas, yard and courts, and other open areas on the premises shall not be discharged in a manner that creates a public nuisance.*" He reiterated Mr. Gibbons' responses to the four allegations in the citation, with #3 the most likely to constitute a public nuisance. However, in his opinion, it does not rise to that level. Pennsylvania courts have adopted Section 821.b of the Restatement of Torts, which dictate the elements of a claim for public nuisance. That section provides, "*A public nuisance is an unreasonable interference with a right common to the general public. Circumstances that disdain a holding that an interference with a public right is unreasonable include the following...*" So it's whether the conduct involves a significant interference *with the public health, the public safety, the public peace, the public comfort or the public convenience.* There has been no evidence that this is any significant interference with the stormwater system or the Pizza Hut property that's been submitted. Allegations point away from this being a public nuisance.

Attorney Merkel asked that the Board find that no violations of the Property Maintenance Code has occurred for the reasons stated, and to reverse the decision of the Code Enforcement Officer, Mr. Gibbons.

#### CLOSING

Mr. Gibbons:

Mr. Gibbons explained that the International Property Code, adopted by the City of Franklin, does not include a definition for "public nuisance." Many of the complaints he receives come from neighbors whether it be a garbage issue, a high grass issue or a stormwater management issue. Under the City's Property Maintenance Code, the only section applicable is

Section 507.1. It is certainly a nuisance to the property owner and he feels that the “intent of the law” is clear; that it is not talking about water running onto a public sidewalk or street.

Attorney Spaid:

Mr. Spaid agreed with what Mr. Merkel cited that, in 2016, the Supreme Court of Pennsylvania defined a public nuisance in a case regarding a zoning issue. Also, in 2014, it defined a public nuisance in the same exact scenario that we have here, which is called Riparian Water Rights. *When you have a private landowner being interfered from water runoff by another landowner, it's a private dispute.* Pizza Hut does have legal recourse against Franklin Service & Supply. They can file a lawsuit; but he would not recommend that this body become involved in private disputes of water runoff from one person's property to another. He reiterated that this is a private land dispute and does not meet the definition of a public nuisance.

Therefore, it would be his recommendation that the Board reverse the decision of the Code Enforcement Officer and grant the appeal from Franklin Service & Supply for the reasons stated.

**Resolution No. 116** - Mayor Baker moved and Mr. Lyons seconded a motion to grant the appeal from Franklin Service and Supply. Motion passed unanimously.

Mr. Borgia advised that they deal with stormwater management all the time and to them, this is a Stormwater Management Code Violation. Attorney Spaid explained that the Stormwater Management Code was adopted only a couple years ago and was then added to the zoning ordinance. Mr. Borgia asked if the Crosby project had to have a stormwater management plan? Attorney Spaid said, “Yes. Under today's codes, as they stand right now, what was done with that storm drain would not be allowed. The problem is it was constructed before the code.”

Attorney Spaid explained to Mr. Borgia that a letter will be sent to Pizza Hut explaining the decision of the Board.

**ADJOURNMENT**

There being no further business to come before the Board of Appeals at this time, the meeting was adjourned at 8:15 PM.

Respectfully submitted,

Darla Hawke, Recording Secretary