

**BOARD OF ZONING AND BUILDING APPEALS
CITY OF GAHANNA, OHIO**

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BY: *J. Van Meter*
clerk

SKILKEN GOLD REAL ESTATE DEVELOPMENT, :
:
Appellant, :
:
v. :
:
CITY OF GAHANNA, OHIO :
PLANNING COMMISSION, :
:
Appellee. :

Re: CU-0009-2022

Statement of Appeal

Skilken Gold Real Estate Development (“Skilken Gold”), by and through the undersigned counsel, hereby appeals the decision of the Gahanna Planning Commission’s improper denial of Skilken Gold’s Conditional Use Application on November 2, 2022. As set forth in the attached memorandum of support, Skilken Gold’s development is a conditionally permitted use that easily satisfies the Zoning Code’s criteria. The Planning Commission’s decision was improper and contrary to the City’s professional staff’s findings. Pursuant to Zoning Code § 147.03, an affidavit listing the names and addresses of all property owners contiguous to or directly across the street from the subject property are enclosed.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

s/ Joseph R. Miller

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MEMORANDUM IN SUPPORT

I. Background

This appeal concerns the improper denial of a conditionally permitted use for vacant property (the “Property”) that is located near the southwest corner of the round-about between Morse Road and Johnstown Road. The Property consists of three separate parcels (025011244, 025011243, and 025011226), that total 4.19 acres in size, and is zoned within the Neighborhood Commercial District. The Property is surrounded by numerous businesses, including the High Bank Distillery, Donato’s Pizza, Beauty Barn Salons, 1837 Wine & Spirits Emporium, The Barn at Rocky Fork, The Goddard School of Gahanna, and Growing Solutions Garden Center. Due to its unique orientation, size, and location between Morse Road and Johnstown Road, the Property has been unsuccessfully marketed for development for more than eight years and remains vacant.

Skilken Gold seeks to develop the property with a Sheetz that will be a one-stop shop for food, beverage, and fuel (the “Development”). The Development will provide made-to-order restaurant quality food available in-store and a drive-thru. The Development will have eight fuel pumps capable of serving sixteen vehicles. This particular Development is not designed to accommodate semi-truck diesel fueling. Skilken Gold worked with the City’s staff to design the Development in a manner that complies with the Zoning Code and is compatible with the local area. Skilken Gold filed an application for conditional use approval (“Application”), along with applications for other approvals related to the Development’s final development plan. The City’s professional zoning staff reviewed Skilken Gold’s applications and recommended approval of the conditional use, correctly concluding that the “[c]onditional use criteria is met”:

Request Summary

- Staff recommends approval of the conditional use
- Conditional use criteria is met

(Staff Presentation at Slide 26.)

The Planning Commission conducted a hearing on the Application on November 2, 2022. During the hearing, the Commission ignored the plain terms of the Zoning Code, the City's Zoning Staff's findings and conclusions, and arbitrarily denied the Application.¹ The Commission's decision was contrary to law and must be reversed.

II. Law and Argument

A. **The Planning Commission was required to approve the Application because it easily satisfied the plain terms of the Zoning Code.**

There can be no real debate that the Development satisfies the criteria for a permitted conditional use of the Property. Under the plain terms of the Zoning Code, the Planning Commission did not have discretion to deny the application:

The Planning Commission **shall approve** an application for a conditional use if the following four conditions are met:

- (1) The proposed use is a conditional use of the zoning district and the applicable development standards established in this Zoning Ordinance are met.
- (2) The proposed development is in accord with appropriate plans for the area.
- (3) The proposed development will not have undesirable effects on the surrounding area.
- (4) The proposed development will be in keeping with the existing land use character and physical development potential of the area.

Zoning Code §1169.04(a) (Emphasis added.); *see also Nunamaker v. Bd. of Zoning Appeals*, 2 Ohio St. 3d 115, 116 n.1, 443 N.E.2d 172, 174 (1982) (A conditional use is “a species of administrative permission which allows a property owner to put his property to a use which the regulations expressly permit under conditions specified in the zoning regulations.”).

¹ The Commission did not reach Skilken Gold's other applications related to its final development plan.

Because each of the four criteria is easily satisfied here, under the Zoning Code and Ohio Zoning law, the Application must be approved. *See* Zoning Code §1169.04(a), *Nunamaker v. Bd. of Zoning Appeals*, 2 Ohio St. 3d at 116.

1. Gas service stations and drive-in eating places (drive-thrus) are conditionally permitted uses within the Neighborhood Commercial District.

As the City's zoning staff correctly concluded, there can be no dispute that the Development and its drive-in food service are conditionally permitted uses within the Neighborhood Commercial District. Z.C. § 1153.02(b) (permitting "gasoline service stations" and "drive-in" eating facilities).

2. The Development is in accord with the Land Use Plan's commercial use of the Property.

The Land Use Plan recognizes that this site's unique location along two major arterial roadways makes it well suited for Community Commercial development. Gahanna Land Use Plan, 81, at Figure 5-11. Consequently, the Land Use Plan prescribes the Property be developed with "medium to large scale commercial uses adjacent to primary arterials that serve the larger community or regional area." *Id.* at 60 (emphasis added). The Property is also located in the North Gateway Focus Area which encourages a dynamic mix of integrated uses that increase connectivity between uses. The Development's gasoline fuel service along with its food and beverage services will serve the larger community and regional area and therefore fits easily within the broad range of commercial uses for this property. The Development likewise connects nearby commercial and residential uses alike by providing essential fuel, food, and beverage services to their users.

3. The Development will not have undesirable effects on the surrounding area.

As the City's professional zoning staff correctly concluded, the Development "will not have undesirable effects" on the surrounding area. There is no direct evidence to the contrary.

Under Ohio Law, “evidence” for purposes of adjudicating an application for a conditional use “should be direct evidence, which is more than speculation or opinion.” *Falling v. Butler County Bd. of Zoning Appeals*, 1998 WL 42225 at *3 (citation omitted). **Specific direct evidence** is required to deny a conditional use application. *See id.* at *4. Thus, opinions or unsupported contentions have no weight. *Id.* at *3; *Hindu Soc’y of Greater Cincinnati v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. Clermont, No. CA2018-11-081, 2019-Ohio-2494, ¶ 29 (holding that speculation and opinion could not be considered because “legal matters are determined by facts, not beliefs or desires”). Yet, members of the Planning Commission improperly acted upon unfounded fears and speculation that the Development could impact residents in the area as a result of the anticipated 24-7 hours of operation. There is no evidence whatsoever that hours of operation of food and beverage or fuel services throughout the day imposes any detrimental impact on the surrounding area. Consequently, the Planning Commission’s denial was entirely improper.

4. The Development will be in keeping with the existing land use character and physical development potential of the area.

Likewise, the City’s professional zoning staff also correctly determined that the Development “will be in keeping of the existing land use character of the area.” The Property is surrounded by commercial businesses, is intended to be a commercial development under the Land Use Plan, and sits between two busy thoroughfares. The Development is an ideal commercial use that serves and will connect nearby residential and adjacent commercial uses. In short, the Development is certainly “in keeping” with the land use character and physical development potential in this area of the City.

B. While the Development satisfies the Zoning Code's plain criteria, any ambiguities must be resolved in Skilken Gold's favor.

As set forth above, the Development fulfills each criteria set forth in Zoning Code §1169.04(a). To the extent there is any ambiguity in the Zoning Code's criteria, the ambiguity must be resolved in *favor* of Skilken Gold's use of the Property.

Under Ohio law, “[i]f ambiguity exists, [in a zoning measure] courts must strictly construe restrictions on the use of real property in favor of the property owner.” *Bierlein v. Grandview Heights Bd. of Zoning Appeals*, 10th Dist. Franklin No. 18AP-874, 2020-Ohio-1395, ¶¶ 22-23, 153 N.E.3d 817, 825. Because such restrictions must be strictly construed, “the scope of the restrictions cannot be extended to include limitations not clearly prescribed.” *Saunders v. Clark County Zoning Dept.*, 66 Ohio St.2d 259, 261 (1981). Here, if Zoning Code §1169.04(a) criteria are in any way unclear or ambiguous, they must be construed in favor of Skilken Gold and the Conditional Use Application must be approved.

III. Conclusion

For the foregoing reasons, the Planning Commission's decision should be overruled, the Conditional Use Application should be approved, and Skilken Gold should be permitted to proceed with its Development of this challenging Property.

Respectfully submitted,

s/ Joseph R. Miller

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Christopher L. Ingram (0086325)

Elizabeth S. Alexander (0096401)

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Counsel for Applicant/Appellant

AFFIDAVIT OF MICHAEL SHANNON

STATE OF OHIO

COUNTY OF FRANKLIN, SS:

I, Michael Shannon, having been duly cautioned and sworn, state the following facts:

1. I am over the age of eighteen and competent to testify to the facts contained in this affidavit.

2. I make this affidavit based upon personal knowledge and for the purpose of submitting an application for appeal to the City of Gahanna Board of Zoning and Building Appeals regarding Parcel Nos. 025011244, 025011243, and 025011226 (the "Property").

3. Attached hereto as **Exhibit A** is a true and accurate list of the names and addresses of all property owners contiguous to, and directly across the street from the Property, as appearing on the Franklin County Auditor's current tax list.

Further affiant sayeth naught.



Michael Shannon

Sworn and subscribed before me, the undersigned notary public, by Michael Shannon on the 2nd day of December, 2022.



CHRISTOPHER L. INGRAM, *Attorney At Law*
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.



Notary Public

EXHIBIT A

| ownername1 | ownername2 | owneraddress1 | owneraddress2 |
|----------------------------|------------------|--------------------------|------------------------|
| NEW ALBANY CO LLC | | PO BOX 490 | NEW ALBANY OH 43054 |
| NEW ALBANY CO LLC | | PO BOX 490 | NEW ALBANY OH 43054 |
| NEW ALBANY CO LLC | | 8000 WALTON PKWY STE 120 | NEW ALBANY OH 43054 |
| ROGERS MARKET LIMITED | | 250 CIVIC CENTER DR #500 | COLUMBUS OH 43215 |
| DOERSAM EDWARD J | | PO BOX 30874 | COLUMBUS OH 43230-0874 |
| K C REAL PROPERTY | INVESTMENTS LLC | P O BOX 30765 | GAHANNA OH 43230 |
| TONY JIMMIE | TONY DARLENE | 4722 E JOHNSTON RD | COLUMBUS OH 43230 |
| ALBANY GLEN LLC | | 250 E BROAD ST STE 1100 | COLUMBUS OH 43215 |
| JOHNSON JESSE A | JOHNSON EMILY D | 4701 E JOHNSTOWN RD | COLUMBUS OH 43230 |
| PARK REALTY OF GAHANNA LLC | | 5177 RED OAK LANE | DUBLIN OH 43016 |
| TONY DARLENE J | | 4722 JOHNSTOWN RD | COLUMBUS OH 43230 |
| ROGERS MARKET LIMITED | | 250 CIVIC CENTER DR #500 | COLUMBUS OH 43215 |
| PARK REALTY OF GAHANNA LLC | | 5177 RED OAK LANE | DUBLIN OH 43016 |
| PARK REALTY OF GAHANNA LLC | | 5177 RED OAK LANE | DUBLIN OH 43016 |
| MESSMER JOSEPH M | | 4704 JOHNSTOWN RD | GAHANNA OHIO 43230 |
| JEFFERSON TOWNSHIP TRS | *DAGUE CEMETERY* | 6545 HAVENS RD | BLACKLICK OH 43004 |