05-1983-CD
DuBois Dutch LLC vs Sandy Twp.
Bd. Of Supervisors

DuBois Dutch vs Sandy Twp et al
2005-1983-CD

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS Appellee	:	APPLICATION FOR SUPERSEDEAS
vs.	:	Filed on Behalf of:
JOHN A. GUIDO Intervening Appellee	:	INTERVENING APPELLEE
	:	Counsel of Record for This Party:
	:	Anthony S. Guido, Esq. Supreme Court No. 05877 Hanak, Guido and Taladay P.O. Box 487 DuBois, PA 15801 814-371-7768

Date: 3-23-07

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAR 30 2007

Attest. William A. Shaw
Prothonotary/
Clerk of Courts

FILED
MAR 26 2007
William A. Shaw
Prothonotary/Clerk of Courts

cc Atty Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

APPLICATION FOR SUPERSEDEAS BY INTERVENING APPELLEE JOHN A. GUIDO, PENDING APPEAL

AND NOW, comes Intervening Appellee, John A. Guido, and by his attorneys Hanak, Guido and Taladay, respectfully petitions the Court pursuant to Pa. R.A.P. 1733(a) for the entry of an order of supersedeas and in support represents the following:

1. This action involves a land use appeal from the decision of the Township of Sandy which rejected the subdivision plan and accompanying request for modification which was filed by Appellant, DuBois Dutch.

2. With regard to said subdivision action and accompanying request for modification, this Court granted an evidentiary hearing and after said hearing, this Court entered an Order dated February 23, 2007, reversing the rejection of said subdivision plan and request for modification by the Township of Sandy.

3. John A. Guido, as an intervening defendant in the said subdivision action has appealed to the Commonwealth Court to No. 403 of 2007 the Order of this Court dated February 23, 2007, reversing the subject action of the Township of Sandy with regard to said subdivision plan and accompanying request for modification.

4. The principal issues involved is whether a subdivision of the larger property of which the optioned property is a part may be subdivided in accordance with the terms and conditions of the 1996 Sandy Township Zoning and 1997 Sandy Township Subdivision ordinances and whether the Township, on appeal this Court, has jurisdiction to modify the minimum lot size as mandated by the Township's Zoning Ordinance pursuant to a request for modification filed in conjunction with a subdivision plan.

5. Sub-section (d) of Section 11003-A of the PA Municipalities Planning Code (MPC) provides in part that if the appellants are seeking to prevent the use or development, the landowner who's use or development is in question may petition the Court to post bond as a condition for proceeding which an appeal. If after hearing the Court determines that the appeal is frivolous, it shall grant the petition for posting of bond.

6. In any event, Pa.R.A.P. 1733(b) covers this situation in that on an application for supersedeas the security shall be fixed by the Court at such sums only as will secure any damages for the use and detention of the property interest, the costs of the matter and costs of appeal.

7. In this action, the Plaintiff, DuBois Dutch, is in control and has full use of the subject property pursuant to said 1982 lease option and, in addition, upon conveyance of said property interest by Defendant, John A. Guido, to Plaintiff, DuBois Dutch, John A. Guido is entitled to a purchase price of $30,000 plus interest from March 1, 1999.

8. In this action, the use or development of the property is not being prevented since DuBois Dutch is in possession of the property in question and operates its restaurant business thereon. There is no evidence that DuBois Dutch has any further development plans at this time. Consequently, DuBois Dutch will not be prejudiced by or suffer damages if the requested supersedeas is granted.

9. The issues raised in this case are not frivolous since they involve serious jurisdictional issues as well as unique subdivision issues of first impression.

WHEREFORE, Intervening Appellee, John A. Guido, respectfully requests that this Court enter an Order that all further proceedings on the land use appeal in the above stated action be stayed pending the determination of the Commonwealth Court of Intervening Appellee's appeal.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Attorney for John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached Application for Supersedeas filed in the above captioned action, were served upon the following by United States First Class Mail, postage prepaid, deposited on the 23rd day of March, 2007, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

Toni M. Cherry, Esq.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Attorney for John A. Guido

Dated: 3-23-07

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

ORDER

AND NOW, this _____ day of _____, 2007, upon consideration of Intervening Appellee, John A. Guido's petition for supersedeas, it is hereby ORDERED that the petition is granted and that the appeal taken by the Intervening Appellee in the above case to the Commonwealth Court shall operate as a supersedeas.

By the Court,

_____
P.J.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	*	
and	*	
JOHN GUIDO, Intervening Appellee	*	

ORDER

NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

FILED 1CC Attys: T. Cherry Guido Kruk
MAR 29 2007
William A. Shaw
Prothonotary/Clerk of Courts

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAR 30 2007

Attest.

William A. Shaw
Prothonotary/
Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	: No. 05 - 1983 C.D.
vs.	: Type of Case: LAND USE APPEAL
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	: Type of Pleading: APPELLANT'S ANSWER TO APPLICATION FOR SUPERSEDEAS FILED BY INTERVENING APPELLEE
and	: Filed on Behalf of: DUBOIS DUTCH, LLC, Appellant
JOHN A. GUIDO, Intervening Appellee	: Counsel of Record for this Party: : TONI M. CHERRY, ESQ. : Supreme Court No.: 30205
	: GLEASON, CHERRY AND CHERRY, L.L.P. : Attorneys at Law : P. O. Box 505 : One North Franklin Street : DuBois, PA 15801
	: (814) 371-5800

COPY
FILED
APR 19 2007
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

APPELLANT'S ANSWER TO APPLICATION FOR SUPERSEDEAS FILED BY INTERVENING APPELLEE

TO THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT:

AND NOW, comes the Appellant, DUBOIS DUTCH, LLC, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and answers the Application for Supersedeas Filed by Intervening Appellee, JOHN A. GUIDO, pursuant to Pa.R.A.P. 1733 as follows:

1. ADMITTED.

2. ADMITTED.

3. ADMITTED.

4. DENIED. The issues to be considered by the Commonwealth Court and the standard of review is whether Your Honorable Court abused Its discretion or committed an error of law in deciding that a modification of the minimum lot size requirements of the current Sandy Township Subdivision and Land Use Ordinance was warranted under the circumstances of the case at hand. The Commonwealth Court has already decided in the case of Morris v. South Coventry Township Board of Supervisors, 836 A.2d 1015 (Pa.Cmwlth. 2003) that a township board of supervisors has jurisdiction under the Municipalities Planning Code as well as under the provisions of its own subdivision and land use ordinance to modify or waive any mandatory provision of its subdivision and land use ordinance so that substantial justice may be done as long as the modification is not in violation of the health, safety and welfare of its citizens.

5. ADMITTED in part and DENIED in part. While it is ADMITTED that Section 1003-A(d) of the Municipalities Planning Code found at 53 P.S. §11003-A allows Your Honorable Court to direct an appellant to post a bond in order to secure a stay of the use or development for which the appeal is taken, all other aspects of Paragraph 5 are DENIED. Specifically, it is DENIED that 53 P.S. §11003-A governs the trial court's actions on a petition for supersedeas in the case of an appeal from a decision by the trial court to the appellate court. On the contrary, the provisions of Section 1003-A of the Pennsylvania Municipalities Planning Code found at 53 P.S. §11003-A govern only the instance of an appeal to the trial court from either a decision of a zoning board or a decision of the governing body. It does not govern the situation of an appeal from the decision of the trial court. Consequently, Your Honorable Court never has to make a determination of whether or not the appeal is frivolous in order to require

the party taking the appeal to post bond. The provisions governing whether a supersedeas should be issued are governed in this case solely by the provisions of Pa.R.A.P. 1731, *et seq.* and Intervening Appellee is incorrect in citing to any other provisions of the Municipalities Planning Code.

6. ADMITTED in part and DENIED in part. It is ADMITTED that Pa.R.A.P. 1733(b) addresses the issuance of a supersedeas when the order of the trial court determines the disposition of the property in controversy as in real property actions. However, it is DENIED that Pa.R.A.P. 1733(b) is all inclusive. On the contrary, Your Honorable Court is granted wide discretion under Pa.R.A.P. 1733 as to the terms and conditions to be imposed and Your Honorable Court may require JOHN A. GUIDO to execute a deed to DUBOIS DUTCH and to deposit the same for safe-keeping in addition to requiring JOHN A. GUIDO to post bond. It is believed and therefore averred that DUBOIS DUTCH has and will continue to suffer damages for the use and detention of its property by JOHN A. GUIDO and that it has a claim for interest, costs of suit and the costs it will incur on appeal, including attorney's fees, all of which must be considered by Your Honorable Court in determining the appropriate security that JOHN A. GUIDO must post in order to secure a supersedeas pending appeal.

7. DENIED. On the contrary, DUBOIS DUTCH is not in control of the real estate nor does it have full use of the real estate because JOHN A. GUIDO has refused to convey legal title to the same to DUBOIS DUTCH. DUBOIS DUTCH does not receive the real estate taxes for the subject premises and continues to be subject to JOHN A. GUIDO in all matters involving said real estate. Moreover, although JOHN A. GUIDO is entitled to the purchase price of $30,000.00 upon conveyance, there is no Court Order entitling DUBOIS DUTCH to

keep any portion of that money in satisfaction of any damages it may suffer or in compensation for the costs of the matter and costs on appeal.

8. DENIED. On the contrary, the use and development of the real estate is being prevented during the pendency of the appeal because DUBOIS DUTCH is not the legal owner of its own land and cannot use or develop the property as it sees fit because it has no deed to the same. Consequently, DUBOIS DUTCH is greatly prejudiced by the actions taken by JOHN A. GUIDO in filing an appeal from Your Honorable Court's Final Order and it does suffer damages if the requested supersedeas is granted without forcing JOHN A. GUIDO to post bond and to execute and deposit a deed for the parcel of which DUBOIS DUTCH is the owner. By way of further answer, it is averred that it is an outrage for JOHN A. GUIDO to advise the Court that there is no evidence that DUBOIS DUTCH has any further development plans at this time. DUBOIS DUTCH has spent the last eight and a half years trying to get JOHN A. GUIDO to convey the subject premises to DUBOIS DUTCH and its use and development of its land has been prevented by JOHN A. GUIDO for that period of time.

9. DENIED. The issues raised by JOHN A. GUIDO on appeal are frivolous. They do not involve a jurisdictional issue because the Municipalities Planning Code clearly gives a municipality the right to modify or waive any mandatory provision of its subdivision and land use ordinance. The Commonwealth Court has already determined that a municipality has the jurisdiction to grant a modification or waiver in the case of Morris v. South Coventry Township Board of Supervisors, 838 A.2d 1015 (Pa.Cmwlth. 2003). Consequently, there is no new or overriding jurisdictional issue to be raised by JOHN A. GUIDO on appeal.

Furthermore, there is no unique subdivision issue raised in this case. The Supreme Court of Pennsylvania has already declared that DUBOIS DUTCH is the equitable owner of the subject premises and that the parties have already divided the property in fact. See Guido v. Township of Sandy, 880 A.2d 1220 (Pa. 2005). Moreover, the Supreme Court has already opined that both parties could make arguments in favor of modification. 880 A.2d at 1228-1229, n.17. Your Honorable Court has determined, for the reasons clearly set forth in Its Opinion, that modification should be granted and that subdivision approval should be given. The standard of review is whether Your Honorable Court abused Its discretion or committed an error of law. There is nothing unique about the standard of review to be applied in this case that would act to relieve JOHN A. GUIDO of his obligation to post security in order to be granted a supersedeas.

WHEREFORE, DUBOIS DUTCH, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., respectfully requests Your Honorable Court to deny the request of Intervening Appellee for a supersedeas unless and until Intervening Appellee is willing to execute a deed and deposit the same with the Prothonotary for safe-keeping and unless and until Intervening Appellee posts a bond or other sufficient security as determined by Your Honorable Court.

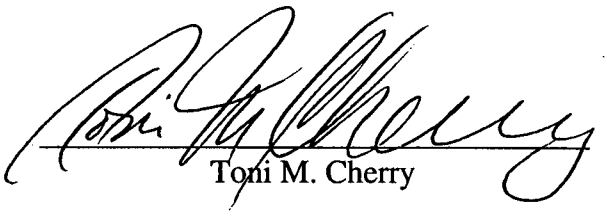
Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

VE RIFICATION

I, TONI M. CHERRY, ESQ., counsel for Appellant, verify that the information provided in the foregoing Answer to Application for Supersedeas Filed by Intervening Appellee is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.



Toni M. Cherry

DATED: April 18, 2007

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2007, a true and correct copy of Appellant's Answer to Application for Supersedeas Filed by Intervening Appellee was served upon the following persons by mailing the same to them by United States First Class Mail, postage prepaid, by depositing the same in the United States Post Office at DuBois, Pennsylvania, addressed as follows:

GREGORY M. KRUK, ESQ.
Ferraro, Kruk & Ferraro, LLP
Attorneys at Law
690 Main Street
Brockway, PA 15824
Attorney for Appellee

ANTHONY S. GUIDO, ESQ.
Hanak, Guido and Taladay
Attorneys at Law
P. O. Box 487
DuBois, PA 15801
Attorney for Intervening Appellee

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

Dated: April 18, 2007

CA

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS DUTCH, LLC, Appellant	:	CIVIL ACTION - AT LAW
	:	No. 05-1983 C.D.
vs.	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	**Praecipe to withdraw Application for Supersedeas**
and	:	Filed on behalf of:
JOHN A. GUIDO, Intervening Appellee	:	Intervening Appellee John A. Guido
	:	Counsel of Record for This Party:
	:	Anthony S. Guido, Esq. Supreme Court No. 05877 Hanak, Guido and Taladay P. O. Box 487 DuBois, PA 15801
	:	814-371-7768

Date: 4-24-07

COPY
FILED NO CC
m/10:20/01
APR 25 2007
GK
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

PRAECIPE TO AMEND CASE CAPTION

TO THE PROTHONOTARY:

Intervening Appellee hereby withdraws the Application for Supersedeas which he filed in the above entitled case.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esq.
Attorney for Intervening
Appellee John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC,
Appellant

vs.

No. 05-1983-CD

SANDY TOWNSHIP BOARD OF SUPERVISORS,
Appellee

vs.

JOHN A. GUIDO
Intervening Appellee

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAY 07 2007

Attest.

Prothonotary/
Clerk of Courts

AMENDED CERTIFICATE OF SERVICE
OF CONCISE STATEMENT OF MATTERS

I hereby certify that the true and correct copies of the Concise Statement of Matters filed in the above captioned action were served upon the following by United States First Class Mail, postage prepaid, deposited on the 21st day of March, 2007, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

Hon. Fredric J. Ammerman, President Judge
(814) 765-2641, Ext 1315
Clearfield County Courthouse
230 E. Market Street
Clearfield, PA 16830
(Trial Judge)

Toni M. Cherry, Esq.
Gleason, Cherry & Cherry, LLP
P.O. Box 505
DuBois, PA 15801
(Attorney for DuBois Dutch)

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824
(Attorney for Township of Sandy)

This amended Certificate is filed due to the fact that it was discovered that the original Certificate of Service filed on or about March 22, 2007, omitted to include as one of the parties served the trial judge, the Honorable Fredric J. Ammerman, President Judge. Attached hereto and marked Exhibit "A" is a copy of counsel's letter of March 21, 2007, showing copies to counsel of record whereby said Concise Statement of Matters complained of on appeal was served upon Judge Fredric J. Ammerman.

This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn fabrication to authorities, which provides that if I make knowingly false averments I may be subject to criminal penalties.

Hanak, Guido & Taladay

Anthony S. Guido, Esq.
Supreme Court No. 05877
Hanak, Guido and Taladay
Attorney for Appellant Guido
P.O. Box 487
DuBois, PA 15801
(814) 371-7768

HANAK, GUIDO and TALADAY
Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
S. Casey Bowers

Telephone: (814) 371-7768
Fax: (814) 371-1974

P.O. Box 487
DuBois, PA 15801

March 21, 2007

Hon. Fredric J. Ammerman
President Judge
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

Re: DuBois Dutch v. Sandy Twp v. John A. Guido
No. 05-1983 CD
Com. Ct Docket 403 CD 2007

Dear Judge Ammerman:

In accordance with your Order of March 15, 2007, as amended by Order of March 19, 2007, enclosed is the Concise Statement of Matters and attached Certificate of Service.

In addition, we have filed an original of the enclosed Concise Statement of Matters and Certificate of Service with the Prothonotary's office.

Thank you for your consideration.

Sincerely,

ANTHONY S. GUIDO
Temp. direct dial 814-371-6900
Temp. direct fax 814-371-6902

ASG:ks
Enclosure
cc: Toni M. Cherry, Esq.
Gregory M. Kruk, Esq.

Exhibit A

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Amended Certificate of Service for the Concise Statement of Matters filed in the above captioned action, were served as follows:

Service by hand-delivery, as follows:

Hon. Fredric J. Ammerman, President Judge
(814) 765-2641, Ext 1315
Clearfield County Courthouse
230 E. Market Street
Clearfield, PA 16830

Service by first class mail, addressed as follows:

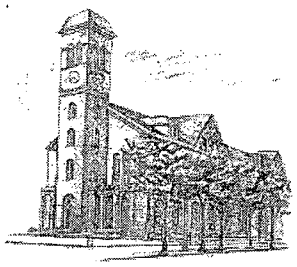
TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Hanak, Guido & Taladay

Attorneys for John A. Guido

Date: May 7, 2007



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

May 8, 2007

COPY

Commonwealth Court of Pennsylvania
Irvis Office Building
6th Floor, Room 624
Commonwealth Ave. & Walnut St.
Harrisburg, PA 17120

Re: DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido
No. 05-1983-CD
Commonwealth Court No. 403 CD 2007

Dear Prothonotary:

Enclosed you will find a supplement to the record previously appealed to your office. Please attach to the original record.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

FILED
2/10:45/01
MAY 08 2007

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
		****APPEAL MAILED TO COMMONWEALTH COURT APRIL 12, 2007****	
51	04/12/07	Letter to Commonwealth Court transferring appeal	01
52	04/12/07	Certified Mail Receipt	01
53	04/16/07	Domestic Return Receipt	01
54	04/19/07	Appellant's Answer to Application for Supersedeas filed by Intervening Appellee	08
55	04/25/07	Praecipe to Withdraw Application for Supersedeas	03
56	05/07/07	Amended Certificate of Service of Concise Statement of Matters	05
57	05/08/07	Letter, Re: Notification of mailing supplement to appeal to Commonwealth Court mailed to Toni M. Cherry, Esq.; Gregory M. Kruk, Esq.; and Anthony S. Guido, Esq. with certified copies of the docket sheet and the document listing required by Pa.R.A.P. 1931(c)	09

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	DATE OF FILING	NAME OF DOCUMENT	NO. OF PAGES
01	12/21/05	Notice of Appeal from Land Use Decisions	17
02	12/22/05	Certified Mail Receipt, Writ of Certiorari mailed by certified mail to Sandy Township Board of Supervisors	01
03	12/28/05	Domestic Return Receipt	01
04	12/28/05	Praecipe to Amend Case Caption	04
05	12/28/05	Notice of Intervention	03
06	01/13/06	Response to Writ of Certiorari (entire record from Sandy Township in this matter)	137
07	01/27/06	Motion to Dismiss Appeal of DuBois Dutch, LLC with Order of Court regarding scheduling, filed February 1, 2006	05
08	02/01/06	Certificate of Service, Motion to Dismiss Appeal of DuBois Dutch, LLC and Brief in Support of Motion	03
09	02/07/06	Certificate of Service, Re: Order of Court for Argument	02
10	03/17/06	Motion and Order scheduling argument	06
11	03/17/06	Certificate of Service, Motion	02
12	03/22/06	Certificate of Service, Re: Order of Court for argument	02
13	04/07/06	Motion to Present Additional Evidence	10
14	04/13/06	Order, Re: Motion to Dismiss Appeal withdrawn	02
15	04/13/06	Order, Re: argument on Motion to Present Additional Evidence scheduled	02
16	04/20/06	Motion to Dismiss Appeal of DuBois Dutch, LLC and Order scheduling argument	09
17	04/20/06	Certificate of Service, Motion	01
18	04/26/06	Certificate of Service, Order of Court for Argument on Motion to Dismiss Appeal	02
19	04/27/06	Answer to Motion to Present Additional Evidence	08
20	05/03/06	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC	09
21	05/04/06	Order, Re: Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal	02
22	06/07/06	Notice, Re: objections to transcripts	01
23	06/07/06	Transcript of Proceedings, Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal held May 3, 2006	Separate Cover
24	06/21/06	Opinion	04
25	07/03/06	Petition to Reconsider Order, or, In the Alternative, to Amend Order	18
26	07/14/06	Order, Re: Petition to Reconsider Order filed July 3, 2006, Dismissed	01
27	08/17/06	Order, Re: evidentiary hearing scheduled	01
28	10/03/06	Motion to Dismiss Notice of Appeal (copy—original missing from record)	12
29	10/05/06	Order, Re: briefs to be filed	01
30	11/06/06	Certificate of Service, brief on behalf of Intervening Appellee	02
31	12/05/06	Motion for Oral Argument	04
32	12/05/06	Order, Re: Motion for Oral Argument Denied	01
33	01/23/07	Notice, Re: objections to transcripts	01
34	01/23/07	Transcript of Proceedings, Evidentiary Hearing held October 3, 2006	Separate Cover
35	01/23/07	Transcript Exhibits Part One: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 1	Separate Cover
36	01/23/07	Transcript Exhibits Part Two: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 2	Separate Cover
37	01/23/07	Transcript Exhibits Part Three: Sandy Township Subdivision and Land Development Ordinance	Separate Cover

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
38	01/23/07	Transcript Exhibits Part Four: Zoning Ordinance for the Township of Sandy, June 1996	Separate Cover
39	02/13/07	Notice, Re: objections to transcript	01
40	02/13/07	Transcript of Proceedings, Argument on Appellant's Land Use Appeal held April 10, 2006	Separate Cover
41	02/26/07	Opinion and Order	40
42	03/02/07	Notice of Appeal to Commonwealth Court, Proof of Service, and Request for Transcript (no request for transcript has been made due to the fact that the complete transcript has been lodged of record)	08
43	03/05/07	Supplemental Proof of Service, Notice of Appeal	02
44	03/07/07	Commonwealth Court of Pennsylvania, Notice of Docketing Appeal and Notice to Counsel 403 CD 2007	02
45	03/16/07	Order, Re: John Guido to file concise statement	01
46	03/19/07	Order (Amended), Re: John Guido to file concise statement	01
47	03/22/07	Concise Statement of Matters	07
48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01
50	04/12/07	Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	07

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
04/12/2007	Letter to Commonwealth Court, Re: appeal mailed April 12, 2007.	Fredric Joseph Ammerman
	Certified Mail Receipt, addressed to Commonwealth Court of PA, filed.	Fredric Joseph Ammerman
04/16/2007	Domestic Return Receipt. Received on April 13, 2007. No CC	Fredric Joseph Ammerman
04/19/2007	Appellant's Answer to Application For Supersedeas Filed by Intervening Appellee, filed by s/ Toni M. Cherry, Esquire. 2CC Atty. T. Cherry	Fredric Joseph Ammerman
04/25/2007	Praecipe To Withdraw Application for Supersedeas, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
05/07/2007	Amended Certificate of Service of Concise Statement of Matters: copies of the Concise Statement of Matters were served upon Hon. Fredric J. Ammerman, Pres. Judge, Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire on March 21, 2007 by First Class Mail. Filed by s/ Anthony S. Guido, Esquire. 1CC to Atty.	Fredric Joseph Ammerman
05/08/2007	May 8, 2007, Supplement to Appeal Mailed to Commonwealth Court. May 8, 2007, Letters, Re: Notification of mailing supplement to appeal mailed to Toni M. Cherry, Esq.; Gregory M. Kruk, Esq.; and Anthony S. Guido, Esq. with certified copies of the docket sheet and document listing required by Pa.R.A.P. 1931 (c).	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAY 08 2007

Attest.

Prothonotary/
Clerk of Courts

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman
04/12/2007	April 12, 2007, Appeal mailed to Commonwealth Court. April 12, 2007, Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	Fredric Joseph Ammerman

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05-1983-CD Suppl. 1

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City, State, ZIP+4 Harrisburg, PA 17120

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05-1983-CD
Supplement 1

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MAY 09 2007
(6K)

William A. Shaw
Prothonotary/Clerk of Courts

FILED
MAY 09 2007
William A. Shaw
Prothonotary/Clerk of Courts

05-1983-CD

Supplement 1

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Irvis Office Building
6th Floor, Room 624
Commonwealth Ave. & Walnut St.
Harrisburg, PA 17120

Supplement 05-1983-CD

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MAY 14 2007

William A. Shaw
Prothonotary/Clerk of Courts

05-1983-CD

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dubois Dutch, LLC	:	
	:	
v.	:	
	:	
Sandy Township Board of Supervisors and John A. Guido	:	
	:	No. 403 C.D. 2007
Appeal of: John A. Guido	:	Argued: October 9, 2007

FILED no cc
m/12:42/01
DEC 31 2007
William A. Shaw
Prothonotary/Clerk of Courts

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION BY JUDGE COLINS **FILED: December 28, 2007**

John A. Guido appeals an order of the Court of Common Pleas of Clearfield County that reversed an order of the Sandy Township Board of Supervisors and granted a request filed by Dubois Dutch seeking (1) a modification of a requirement of the Township's subdivision ordinance (SALDO) and (2) subdivision approval for a tract of land in the township.[1]

This case presents a long and tortured history, which we will recite below. In 1982 Philip and Sherry Dieringer owned a 3.379-acre tract of land in the Township, hereinafter referred to as the Property. In that year, the Dieringers informally separated the tract into two parcels by virtue of a lease between the Dieringers and Harley Hotels. The lease granted to Harley Hotels the use of a

[1] Because the Board of Supervisors made no record of the proceedings before it, the trial court conducted a de novo review and accepted evidence offered only by Dubois Dutch.

2.605-acre portion of the Property upon which Harley Hotels operated a Dutch Pantry restaurant. The lease also contained a purchase option entitling the lessee to purchase the Dutch Pantry tract. On the remaining .772-acre parcel, the Dieringers operated a gas station and convenience store. Guido purchased the Property in 1986 for $110,000. The agreement of sale included a provision entitling Guido to receive payment of $30,000 upon the exercise of the lease option by the lessee of the restaurant parcel. At the time the Dieringers entered the lease with Harley Hotels, and continuing after their sale of the Property to Guido, the Township's 1964 zoning ordinance remained applicable to the approved uses in the C-H Commercial-Highway District in which the Property is located. During this period, both parcels comprising the Property satisfied the minimum lot size requirements of the ordinance. However, in 1996, the Township adopted a new zoning ordinance that changed the minimum lot sizes for this district to 45,000 square feet. Consequently, the smaller of the informally separated lots, being only 33,259 square feet in size, did not conform to the 1996 zoning ordinance.

In 1998 Dubois Dutch purchased the Dutch Pantry restaurant from Harley Hotels, and succeeded the latter as lessee in the lease agreement with Guido. Dubois Dutch attempted to exercise its purchase option in November 1998, before the expiration of the lease. Guido refused to convey the parcel for the espoused reason that he would not be able to continue his commercial use of the smaller remaining parcel under the new minimum size requirements of the ordinance. Dubois Dutch approached the Township's Planning Commission seeking formal subdivision of the Property in accordance with the lease terms. The Commission rejected the request.

Dubois Dutch then filed a specific performance action in the Court of Common Pleas of Clearfield County, seeking an order compelling Guido to complete the transfer of the property. In response, Guido contended that he could not comply with such a request because that action would violate the zoning ordinance. Guido contemporaneously filed an ejectment action against Dubois Dutch. In response to these pending matters, the trial court (1) directed Dubois Dutch to file a second request for subdivision approval with the Township, and (2) stayed all matters until the Township Planning Commission resolved the request for subdivision approval.

When Dubois Dutch submitted its renewed application with the Commission for subdivision approval, it asserted that formal sanction of the division was proper either because the 1982 lease option effectuated a subdivision of the property at the time the lease was signed, or that the exercise of the option resulted in an ownership of the land relating back to the 1982 lease execution. With the latter reasoning, Dubois Dutch suggested that the former zoning ordinance would apply, based on the relation-back theory such as would render the smaller residue lot a lawful nonconforming lot and use.

The Planning Commission approved Dubois Dutch's request, and Guido appealed to the Common Pleas Court. That Court, following a de novo hearing, affirmed the Commission's grant of subdivision approval, concluding (1) that the execution of the lease and Dubois Dutch's attempt to exercise the option effectuated a subdivision under the Pennsylvania Municipalities Planning Code (MPC)[2] and the previous zoning ordinance, and (2) that the smaller lot and its use as a gas station, constituted a permissible pre-existing non-conforming lot under

[2] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202.

the 1996 zoning ordinance. Guido appealed that decision to this Court, which reversed the trial court based upon its conclusion that the leasehold and option to purchase did not effect a subdivision of the property under the MPC or the previous ordinance and hence, the smaller lot could not constitute a pre-existing non-conforming lot upon Dubois Dutch's exercise of the option.

Dubois Dutch appealed this Court's decision to the Supreme Court, which limited the focus of the appeal to the question of "whether a leasehold interest in a parcel of land coupled with an option to purchase such land creates a property interest in the lessee-optionee sufficient to support a legally recognized subdivision of the property either at the time the lease and option were simultaneously executed or when the purchase option was exercised." *Guido v. Township of Sandy*, 584 Pa. 93, 95, 880 A.2d 1220, 1221 (2005).

In resolving this issue, the Supreme Court first quoted its decision in *Detwiler v. Capone*, 357 Pa. 495, 55 A.2d 380, 383 (1947), wherein that Court equated purchase options in leases to contracts for the sale of land, both of which constitute encumbrances on the land. When two parties enter a lease with an option to purchase, upon execution of the option, the courts regard the title (and ownership) as relating back to the date the lessor/optionor granted the option. In reliance upon *Detwiler*, our Supreme Court also noted that when a lessee/optionee verbally communicates to the lessor/optionor his or her intent to exercise the option, the lessor/lessee relationship terminates and that communication transforms the lease into a contract for sale. In summary, the Court concluded that "Dubois Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois Dutch effective June 16, 1982." *Guido*, 584 Pa. at 102, 880 A.2d at 1225.

After setting forth this well-accepted tenet, the Supreme Court, while agreeing that the potential right to exercise an option does not create a division in fact of a parcel, stated that the exercise of such an option does create a division-in-fact that relates back to the date of the agreement. However, as the Supreme Court noted, division-in-fact is a concept distinct from legal subdivision, i.e., one that is accomplished under a subdivision ordinance, and the exercise of the option could not, the Supreme Court opined, result in a legal subdivision.

The Supreme Court, citing the MPC, noted the manner in which compliance with a formal subdivision process furthers the goals of "protecting and promoting the safety and health of the public, accomplishing coordinated development, guiding the uses of land and structure, and preserving the Commonwealth natural resources. 53 P.S. §10105." 584 Pa. at 106, 880 A.2d at 1227. The Court reflected upon the observation that, had Dubois Dutch's predecessor in interest acted in a timely manner to exercise its option, the earlier subdivision ordinance would have applied, resulting in a division of the property that created two lots of sufficient size to satisfy the minimum lot size requirements of the earlier ordinance.

The Supreme Court then noted that the MPC and the Township's 1997 subdivision ordinance both contain "modification" provisions permitting property owners to seek relief from the application of a subdivision ordinance. Under Section 512.1 of the MPC, 53 P.S. §10512.1, the governing body or planning commission (as the case may be)

> may grant a modification of the requirements of one or more provisions [of the subdivision ordinance] if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be

contrary to the public interest and that the purpose and intent of the ordinance is observed.

Finally, the Supreme Court agreed with this Court's conclusion that Dubois Dutch's request of the Planning Commission to designate the property as a pre-existing non-conforming use did not constitute a tacit request for modification, but noted that the parties could seek subdivision approval under the modification provision and also proceed to complete litigation of Dubois Dutch's specific performance claim.

Following this opinion, Dubois Dutch filed a written request with the Township's Planning Commission for subdivision approval under the ordinance modification provision of the minimum lot size requirements based upon the division of the property that occurred, and related back to, the 1982 purchase-option agreement. Guido objected to Dubois Dutch's request, and also submitted his own request for subdivision approval --- one that he based upon a reconfiguration of the property lines. Guido's proposed subdivision required the taking of some of the property to which Dubois Dutch was entitled under the lease-option, thereby enlarging Guido's remaining tract. On November 21, 2005, the Planning Commission denied Dubois Dutch's request and granted Guido's. Dubois Dutch appealed those decisions to the trial court, and Guido intervened in Dubois Dutch's appeal.

The trial court conducted a de novo review of the Planning Commission's decision. At that hearing, Guido presented no evidence. The trial court reversed the Planning Commission's decisions by: (1) granting Dubois Dutch's request for modification and subdivision request, and waiving the minimum lot size requirements; (2) denying Guido's subdivision request; and (3)

directing that Dubois Dutch's subdivision plan be filed of record and that Guido's recorded subdivision plan be voided and stricken from the Clearfield County records. Guido filed an appeal of the trial court's decision that the Court now considers.

With regard to the trial court's grant of the modification request by Dubois Dutch, Guido raises three issues: (1) whether the trial court had subject matter jurisdiction to modify the minimum lot size requirements through the subdivision modification request; (2) whether the trial court erred in granting the request by failing to address the specific requirements of the modification provision; and (3) whether the trial court erred in not applying the doctrine of res judicata to preclude Dubois Dutch from initiating the modification request. Because the trial court did not address the res judicata issue, and because it could be dispositive, we will first address this issue.

Res judicata will preclude a court from considering a second identical application for relief, i.e. a variance. In order to apply, a litigant must establish the identity of four elements in the matter for which the relief is sought:

> (1) Identity of the thing sued for;
> (2) Identity of the cause of action;
> (3) Identity of persons and parties to the action; and
> (4) Identity of the quality in the persons for or against whom the claim is made.

City of Pittsburgh v. Zoning Board of Adjustment of the City of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989). However, in zoning matters, courts apply the rule

sparingly, perceiving the need for flexibility in land use matters to outweigh the burdens of repetitive litigation. *Price v. Bensalem Township Zoning Hearing Board*, 569 A.2d 1030, 1032 (1990). In *Price*, the Court also noted that res judicata will not bar a subsequent application when changes associated with the land itself are evident. The Court in *Price* concluded that, although an earlier application for a variance was res judicata as to a subsequent variance request, the doctrine did not bar a subsequent claim that the property was validly nonconforming as to the ordinance, even though the relief sought was the same.

Essentially, Guido argues that Dubois Dutch had the opportunity in the initial application for subdivision to include an alternative request for modification with that first request. Guido is correct in pointing out that Dubois Dutch initially filed for subdivision approval under the relation-back theory, which occurred in 1982 and Dubois Dutch argued only that this meant that the ordinance provisions applicable at that time were also binding. Dubois Dutch elected to submit a formal written application under the modification provision only after the Supreme Court confirmed that the 1997 ordinance applied. However, as in *Price*, although Dubois Dutch sought essentially the same relief, the manner of obtaining the relief, i.e., formal subdivision, arose under different forms of application. Although this is an admittedly close case, given the fact that there have been no material alterations to the land itself, we are inclined to conclude that the doctrine of res judicata does not apply under the present circumstances.

As to the remaining issues, which the trial court did address, we believe that the Honorable Fredric J. Ammerman of the Court of Common Pleas of Clearfield County ably and correctly resolved those questions. Accordingly, we

will affirm the trial court on the basis of his well-reasoned decision, which we hereto attach.

JAMES GARDNER COLINS, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dubois Dutch, LLC	:	
	:	
v.	:	
	:	
Sandy Township Board of Supervisors and John A. Guido	:	
	:	No. 403 C.D. 2007
Appeal of: John A. Guido	:	

ORDER

AND NOW, this 28th day of December 2007, the order of the Court of Common Pleas of Clearfield County is affirmed on the basis of the opinion of Judge Fredric J. Ammerman at No. 05-1983-CD, ___ Pa. D. & C.4th ___, filed February 23, 2007.

James G. Colins

JAMES GARDNER COLINS, Judge

FILED
DEC 31 2007
William A. Shaw
Prothonotary/Clerk of Courts

Certified from the Record

DEC 28 2007

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

05-1983-CD

Dubois Dutch, LLC	:	
	:	
v.	:	
	:	
Sandy Township Board of Supervisors and John A. Guido	:	
	:	No. 403 C.D. 2007
Appeal of: John A. Guido	:	

ORDER

AND NOW, this 14th day of January 2008, this Court's opinion filed December 28, 2007 is here amended as follows. The last sentence of the opinion shall state:

Accordingly, we will affirm the trial court on the basis of his well-reasoned decision.

James G. Colins

JAMES GARDNER COLINS, Senior Judge

FILED
JAN 16 2008
William A. Shaw
Prothonotary/Clerk of Courts

Certified from the Record
JAN 14 2008
and Order Exit

In the Commonwealth Court of Pennsylvania

2005-1983-CD

FILED

FEB 15 2008

William A. Shaw
Prothonotary/Clerk of Courts

Dubois Dutch, LLC
v.
Sandy Township Board of
Supervisors and John A. Guido

Appeal of: John A. Guido

No.: 403 CD 2007

ORDER

NOW, February 13, 2008, having considered appellant's application for reargument, and Dubois Dutch, LLC's answer, the application is denied.

BY THE COURT:

Bonnie B. Leadbetter

Bonnie Brigance Leadbetter,
President Judge

Certified from the Record

FEB 13 2008

and Order Exit

05-1983-CD

FILED

MAR 10 2008
m/ 12:30/
William A. Shaw
Prothonotary/Clerk of Courts

Supreme Court of Pennsylvania

Western District

March 7, 2008

John A. Vaskov, Esq.
Deputy Prothonotary
Patricia A. Nicola
Chief Clerk

801 City-County Building
Pittsburgh, PA 15219
412-565-2816
www.aopc.org

Mr. William A. Shaw
Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

RE: Dubois Dutch, LLC
v.
Sandy Township Board of Supervisors and John A. Guido

Petition of: John A. Guido
Commonwealth Docket Number - 403 CD 2007

Trial Court/Agency Dkt. Number: 05-1983-CD

No. 147 WAL 2008

Appeal Docket No.:

Date Petition for Allowance of Appeal Filed: March 7, 2008

Disposition:
Date:

Reargument/Reconsideration Disposition:
Reargument/Reconsideration
Disposition Date:

/dad

05-1983-CD

Supreme Court of Pennsylvania

Western District

August 8, 2008

John A. Vaskov, Esq.
Deputy Prothonotary
Patricia A. Nicola
Chief Clerk

801 City-County Building
Pittsburgh, PA 15219
412-565-2816
www.aopc.org

Mr. William A. Shaw
Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

RE: Dubois Dutch, LLC
v.
Sandy Township Board of Supervisors and John A. Guido

Petition of: John A. Guido
Commonwealth Docket Number - 403 CD 2007

Trial Court/Agency Dkt. Number: 05-1983-CD

No. 147 WAL 2008

Appeal Docket No.:

Date Petition for Allowance of Appeal Filed: March 7, 2008

Disposition: Order Denying Petition for Allowance of Appeal
Date: July 22, 2008

Reargument/Reconsideration Disposition:

Reargument/Reconsideration
Disposition Date:

/dad
Enclosure

FILED No CC
m/11:31 aBH
AUG 11 2008 GR

William A. Shaw
Prothonotary/Clerk of Courts

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

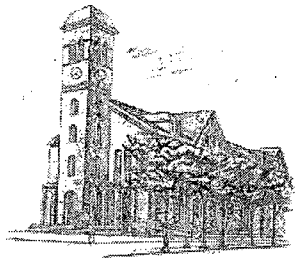
DUBOIS DUTCH, LLC	:	No. 147 WAL 2008
	:	
	:	Petition for Allowance of Appeal from the
v.	:	Order of the Commonwealth Court
	:	
	:	
TOWNSHIP OF SANDY AND JOHN A. GUIDO	:	
	:	
	:	
PETITION OF: JOHN A. GUIDO	:	

ORDER

PER CURIAM

AND NOW, this 22nd day of July 2008, the Petition for Allowance of Appeal is DENIED.

A True Copy John A. Vaskov
As of: July 22, 2008
Attest: John A. Vaskov
Deputy Prothonotary
Supreme Court of Pennsylvania



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

COPY

Fredric J. Ammerman, President Judge
Court of Common Pleas
230 E. Market Street
Clearfield, PA 16830

Toni M. Cherry, Esq.
PO Box 505
1 North Franklin Street
DuBois, PA 15801

Gregory M. Kruk, Esq.
690 Main Street
Brockway, PA 15824

Anthony S. Guido, Esq.
PO Box 487
DuBois, PA 15801

DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido

Court No. 05-1983-CD; Commonwealth Court No. 403 CD 2007

Dear Counsel:

Please be advised that a supplement to the above referenced record was forwarded to the Commonwealth Court of Pennsylvania on May 8, 2007. For a listing of what documents were included in this supplement, please see attached docket and document listing.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

FILED
10:24/cc
MAY 08 2007
William A. Shaw
Prothonotary/Clerk of Courts

#57

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
		****APPEAL MAILED TO COMMONWEALTH COURT APRIL 12, 2007****	
51	04/12/07	Letter to Commonwealth Court transferring appeal	01
52	04/12/07	Certified Mail Receipt	01
53	04/16/07	Domestic Return Receipt	01
54	04/19/07	Appellant's Answer to Application for Supersedeas filed by Intervening Appellee	08
55	04/25/07	Praecipe to Withdraw Application for Supersedeas	03
56	05/07/07	Amended Certificate of Service of Concise Statement of Matters	05

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
01	12/21/05	Notice of Appeal from Land Use Decisions	17
02	12/22/05	Certified Mail Receipt, Writ of Certiorari mailed by certified mail to Sandy Township Board of Supervisors	01
03	12/28/05	Domestic Return Receipt	01
04	12/28/05	Praecipe to Amend Case Caption	04
05	12/28/05	Notice of Intervention	03
06	01/13/06	Response to Writ of Certiorari (entire record from Sandy Township in this matter)	137
07	01/27/06	Motion to Dismiss Appeal of DuBois Dutch, LLC with Order of Court regarding scheduling, filed February 1, 2006	05
08	02/01/06	Certificate of Service, Motion to Dismiss Appeal of DuBois Dutch, LLC and Brief in Support of Motion	03
09	02/07/06	Certificate of Service, Re: Order of Court for Argument	02
10	03/17/06	Motion and Order scheduling argument	06
11	03/17/06	Certificate of Service, Motion	02
12	03/22/06	Certificate of Service, Re: Order of Court for argument	02
13	04/07/06	Motion to Present Additional Evidence	10
14	04/13/06	Order, Re: Motion to Dismiss Appeal withdrawn	02
15	04/13/06	Order, Re: argument on Motion to Present Additional Evidence scheduled	02
16	04/20/06	Motion to Dismiss Appeal of DuBois Dutch, LLC and Order scheduling argument	09
17	04/20/06	Certificate of Service, Motion	01
18	04/26/06	Certificate of Service, Order of Court for Argument on Motion to Dismiss Appeal	02
19	04/27/06	Answer to Motion to Present Additional Evidence	08
20	05/03/06	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC	09
21	05/04/06	Order, Re: Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal	02
22	06/07/06	Notice, Re: objections to transcripts	01
23	06/07/06	Transcript of Proceedings, Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal held May 3, 2006	Separate Cover
24	06/21/06	Opinion	04
25	07/03/06	Petition to Reconsider Order, or, In the Alternative, to Amend Order	18
26	07/14/06	Order, Re: Petition to Reconsider Order filed July 3, 2006, Dismissed	01
27	08/17/06	Order, Re: evidentiary hearing scheduled	01
28	10/03/06	Motion to Dismiss Notice of Appeal (copy—original missing from record)	12
29	10/05/06	Order, Re: briefs to be filed	01
30	11/06/06	Certificate of Service, brief on behalf of Intervening Appellee	02
31	12/05/06	Motion for Oral Argument	04
32	12/05/06	Order, Re: Motion for Oral Argument Denied	01
33	01/23/07	Notice, Re: objections to transcripts	01
34	01/23/07	Transcript of Proceedings, Evidentiary Hearing held October 3, 2006	Separate Cover
35	01/23/07	Transcript Exhibits Part One: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 1	Separate Cover
36	01/23/07	Transcript Exhibits Part Two: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 2	Separate Cover
37	01/23/07	Transcript Exhibits Part Three: Sandy Township Subdivision and Land Development Ordinance	Separate Cover

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
38	01/23/07	Transcript Exhibits Part Four: Zoning Ordinance for the Township of Sandy, June 1995	Separate Cover
39	02/13/07	Notice, Re: objections to transcript	01
40	02/13/07	Transcript of Proceedings, Argument on Appellant's Land Use Appeal held April 10, 2006	Separate Cover
41	02/26/07	Opinion and Order	40
42	03/02/07	Notice of Appeal to Commonwealth Court, Proof of Service, and Request for Transcript (no request for transcript has been made due to the fact that the complete transcript has been lodged of record)	08
43	03/05/07	Supplemental Proof of Service, Notice of Appeal	02
44	03/07/07	Commonwealth Court of Pennsylvania, Notice of Docketing Appeal and Notice to Counsel 403 CD 2007	02
45	03/16/07	Order, Re: John Guido to file concise statement	01
46	03/19/07	Order (Amended), Re: John Guido to file concise statement	01
47	03/22/07	Concise Statement of Matters	07
48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01
50	04/12/07	Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	07

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
04/12/2007	Letter to Commonwealth Court, Re: appeal mailed April 12, 2007.	Fredric Joseph Ammerman
	Certified Mail Receipt, addressed to Commonwealth Court of PA, filed.	Fredric Joseph Ammerman
04/16/2007	Domestic Return Receipt. Received on April 13, 2007. No CC	Fredric Joseph Ammerman
04/19/2007	Appellant's Answer to Application For Supersedeas Filed by Intervening Appellee, filed by s/ Toni M. Cherry, Esquire. 2CC Atty. T. Cherry	Fredric Joseph Ammerman
04/25/2007	Praecipe To Withdraw Application for Supersedeas, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
05/07/2007	Amended Certificate of Service of Concise Statement of Matters: copies of the Concise Statement of Matters were served upon Hon. Fredric J. Ammerman, Pres. Judge, Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire on March 21, 2007 by First Class Mail. Filed by s/ Anthony S. Guido, Esquire. 1CC to Atty.	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAY 08 2007

Attest.

William L. Ammerman
Prothonotary/
Clerk of Courts

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Civil Other

Date	Selected Items	Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman
04/12/2007	April 12, 2007, Appeal mailed to Commonwealth Court. April 12, 2007, Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	Fredric Joseph Ammerman

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

AMENDED CERTIFICATE OF SERVICE
OF CONCISE STATEMENT OF MATTERS

I hereby certify that the true and correct copies of the Concise Statement of Matters filed in the above captioned action were served upon the following by United States First Class Mail, postage prepaid, deposited on the 21st day of March, 2007, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

Hon. Fredric J. Ammerman, President Judge
(814) 765-2641, Ext 1315
Clearfield County Courthouse
230 E. Market Street
Clearfield, PA 16830
(Trial Judge)

Toni M. Cherry, Esq.
Gleason, Cherry & Cherry, LLP
P.O. Box 505
DuBois, PA 15801
(Attorney for DuBois Dutch)

FILED
MAY 07 2007
0/2:35/cc
William A. Shaw
Prothonotary/Clerk of Courts
1 cert to Atty

#56

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824
(Attorney for Township of Sandy)

This amended Certificate is filed due to the fact that it was discovered that the original Certificate of Service filed on or about March 22, 2007, omitted to include as one of the parties served the trial judge, the Honorable Fredric J. Ammerman, President Judge. Attached hereto and marked Exhibit "A" is a copy of counsel's letter of March 21, 2007, showing copies to counsel of record whereby said Concise Statement of Matters complained of on appeal was served upon Judge Fredric J. Ammerman.

This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn fabrication to authorities, which provides that if I make knowingly false averments I may be subject to criminal penalties.

Hanak, Guido & Taladay

Anthony S. Guido, Esq.
Supreme Court No. 05877
Hanak, Guido and Taladay
Attorney for Appellant Guido
P.O. Box 487
DuBois, PA 15801
(814) 371-7768

HANAK, GUIDO and TALADAY
Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
S. Casey Bowers

Telephone: (814) 371-7768
Fax: (814) 371-1974

P.O. Box 487
DuBois, PA 15801

March 21, 2007

Hon. Fredric J. Ammerman
President Judge
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

Re: DuBois Dutch v. Sandy Twp v. John A. Guido
No. 05-1983 CD
Com. Ct Docket 403 CD 2007

Dear Judge Ammerman:

In accordance with your Order of March 15, 2007, as amended by Order of March 19, 2007, enclosed is the Concise Statement of Matters and attached Certificate of Service.

In addition, we have filed an original of the enclosed Concise Statement of Matters and Certificate of Service with the Prothonotary's office.

Thank you for your consideration.

Sincerely,

ANTHONY S. GUIDO
Temp. direct dial 814-371-6900
Temp. direct fax 814-371-6902

ASG:ks
Enclosure
cc: Toni M. Cherry, Esq.
Gregory M. Kruk, Esq.

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Amended Certificate of Service for the Concise Statement of Matters filed in the above captioned action, were served as follows:

Service by hand-delivery, as follows:

Hon. Fredric J. Ammerman, President Judge
(814) 765-2641, Ext 1315
Clearfield County Courthouse
230 E. Market Street
Clearfield, PA 16830

Service by first class mail, addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Hanak, Guido & Taladay

Attorneys for John A. Guido

Date: May 7, 2007

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify on this the 24th day of April, 2007, a true and correct copy of Intervening Appellee's Praecipe to withdraw application for supersedeas in the above matter was mailed, via United States First Class Mail, to:

Toni M. Cherry, Esq.
Gleason, Cherry & Cherry, LLP
P.O. Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esq.
Attorney for Intervening
Appellee John A. Guido

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	: No. 05 - 1983 C.D.
	: Type of Case: LAND USE APPEAL
vs.	:
	: Type of Pleading: APPELLANT'S ANSWER
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	: TO APPLICATION FOR SUPERSEDEAS : FILED BY INTERVENING APPELLEE
	: Filed on Behalf of: DUBOIS DUTCH, LLC, : Appellant
and	:
	: Counsel of Record for this Party:
JOHN A. GUIDO, Intervening Appellee	: : TONI M. CHERRY, ESQ.
	: Supreme Court No.: 30205
	:
	: GLEASON, CHERRY AND CHERRY, L.L.P.
	: Attorneys at Law
	: P. O. Box 505
	: One North Franklin Street
	: DuBois, PA 15801
	:
	: (814) 371-5800

FILED
0/10:2031 2cc
APR 19 2007 Atty T. Cherry
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

APPELLANT'S ANSWER TO APPLICATION FOR SUPERSEDEAS FILED BY INTERVENING APPELLEE

TO THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT:

AND NOW, comes the Appellant, DUBOIS DUTCH, LLC, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and answers the Application for Supersedeas Filed by Intervening Appellee, JOHN A. GUIDO, pursuant to Pa.R.A.P. 1733 as follows:

1. ADMITTED.

2. ADMITTED.

3. ADMITTED.

4. DENIED. The issues to be considered by the Commonwealth Court and the standard of review is whether Your Honorable Court abused Its discretion or committed an error of law in deciding that a modification of the minimum lot size requirements of the current Sandy Township Subdivision and Land Use Ordinance was warranted under the circumstances of the case at hand. The Commonwealth Court has already decided in the case of Morris v. South Coventry Township Board of Supervisors, 836 A.2d 1015 (Pa.Cmwlth. 2003) that a township board of supervisors has jurisdiction under the Municipalities Planning Code as well as under the provisions of its own subdivision and land use ordinance to modify or waive any mandatory provision of its subdivision and land use ordinance so that substantial justice may be done as long as the modification is not in violation of the health, safety and welfare of its citizens.

5. ADMITTED in part and DENIED in part. While it is ADMITTED that Section 1003-A(d) of the Municipalities Planning Code found at 53 P.S. §11003-A allows Your Honorable Court to direct an appellant to post a bond in order to secure a stay of the use or development for which the appeal is taken, all other aspects of Paragraph 5 are DENIED. Specifically, it is DENIED that 53 P.S. §11003-A governs the trial court's actions on a petition for supersedeas in the case of an appeal from a decision by the trial court to the appellate court. On the contrary, the provisions of Section 1003-A of the Pennsylvania Municipalities Planning Code found at 53 P.S. §11003-A govern only the instance of an appeal to the trial court from either a decision of a zoning board or a decision of the governing body. It does not govern the situation of an appeal from the decision of the trial court. Consequently, Your Honorable Court never has to make a determination of whether or not the appeal is frivolous in order to require

the party taking the appeal to post bond. The provisions governing whether a supersedeas should be issued are governed in this case solely by the provisions of Pa.R.A.P. 1731, *et seq.* and Intervening Appellee is incorrect in citing to any other provisions of the Municipalities Planning Code.

6. ADMITTED in part and DENIED in part. It is ADMITTED that Pa.R.A.P. 1733(b) addresses the issuance of a supersedeas when the order of the trial court determines the disposition of the property in controversy as in real property actions. However, it is DENIED that Pa.R.A.P. 1733(b) is all inclusive. On the contrary, Your Honorable Court is granted wide discretion under Pa.R.A.P. 1733 as to the terms and conditions to be imposed and Your Honorable Court may require JOHN A. GUIDO to execute a deed to DUBOIS DUTCH and to deposit the same for safe-keeping in addition to requiring JOHN A. GUIDO to post bond. It is believed and therefore averred that DUBOIS DUTCH has and will continue to suffer damages for the use and detention of its property by JOHN A. GUIDO and that it has a claim for interest, costs of suit and the costs it will incur on appeal, including attorney's fees, all of which must be considered by Your Honorable Court in determining the appropriate security that JOHN A. GUIDO must post in order to secure a supersedeas pending appeal.

7. DENIED. On the contrary, DUBOIS DUTCH is not in control of the real estate nor does it have full use of the real estate because JOHN A. GUIDO has refused to convey legal title to the same to DUBOIS DUTCH. DUBOIS DUTCH does not receive the real estate taxes for the subject premises and continues to be subject to JOHN A. GUIDO in all matters involving said real estate. Moreover, although JOHN A. GUIDO is entitled to the purchase price of $30,000.00 upon conveyance, there is no Court Order entitling DUBOIS DUTCH to

keep any portion of that money in satisfaction of any damages it may suffer or in compensation for the costs of the matter and costs on appeal.

8. DENIED. On the contrary, the use and development of the real estate is being prevented during the pendency of the appeal because DUBOIS DUTCH is not the legal owner of its own land and cannot use or develop the property as it sees fit because it has no deed to the same. Consequently, DUBOIS DUTCH is greatly prejudiced by the actions taken by JOHN A. GUIDO in filing an appeal from Your Honorable Court's Final Order and it does suffer damages if the requested supersedeas is granted without forcing JOHN A. GUIDO to post bond and to execute and deposit a deed for the parcel of which DUBOIS DUTCH is the owner. By way of further answer, it is averred that it is an outrage for JOHN A. GUIDO to advise the Court that there is no evidence that DUBOIS DUTCH has any further development plans at this time. DUBOIS DUTCH has spent the last eight and a half years trying to get JOHN A. GUIDO to convey the subject premises to DUBOIS DUTCH and its use and development of its land has been prevented by JOHN A. GUIDO for that period of time.

9. DENIED. The issues raised by JOHN A. GUIDO on appeal are frivolous. They do not involve a jurisdictional issue because the Municipalities Planning Code clearly gives a municipality the right to modify or waive any mandatory provision of its subdivision and land use ordinance. The Commonwealth Court has already determined that a municipality has the jurisdiction to grant a modification or waiver in the case of Morris v. South Coventry Township Board of Supervisors, 838 A.2d 1015 (Pa.Cmwlth. 2003). Consequently, there is no new or overriding jurisdictional issue to be raised by JOHN A. GUIDO on appeal.

Furthermore, there is no unique subdivision issue raised in this case. The Supreme Court of Pennsylvania has already declared that DUBOIS DUTCH is the equitable owner of the subject premises and that the parties have already divided the property in fact. See Guido v. Township of Sandy, 880 A.2d 1220 (Pa. 2005). Moreover, the Supreme Court has already opined that both parties could make arguments in favor of modification. 880 A.2d at 1228-1229, n.17. Your Honorable Court has determined, for the reasons clearly set forth in Its Opinion, that modification should be granted and that subdivision approval should be given. The standard of review is whether Your Honorable Court abused Its discretion or committed an error of law. There is nothing unique about the standard of review to be applied in this case that would act to relieve JOHN A. GUIDO of his obligation to post security in order to be granted a supersedeas.

WHEREFORE, DUBOIS DUTCH, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., respectfully requests Your Honorable Court to deny the request of Intervening Appellee for a supersedeas unless and until Intervening Appellee is willing to execute a deed and deposit the same with the Prothonotary for safe-keeping and unless and until Intervening Appellee posts a bond or other sufficient security as determined by Your Honorable Court.

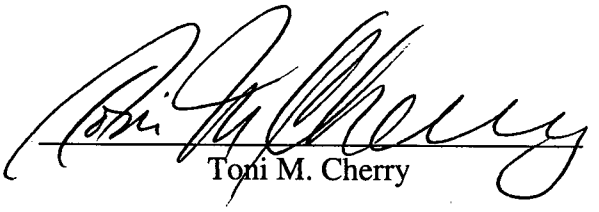
Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

VE RIFICATION

I, TONI M. CHERRY, ESQ., counsel for Appellant, verify that the information provided in the foregoing Answer to Application for Supersedeas Filed by Intervening Appellee is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.



Toni M. Cherry

DATED: April 18, 2007

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2007, a true and correct copy of Appellant's Answer to Application for Supersedeas Filed by Intervening Appellee was served upon the following persons by mailing the same to them by United States First Class Mail, postage prepaid, by depositing the same in the United States Post Office at DuBois, Pennsylvania, addressed as follows:

GREGORY M. KRUK, ESQ.
Ferraro, Kruk & Ferraro, LLP
Attorneys at Law
690 Main Street
Brockway, PA 15824
Attorney for Appellee

ANTHONY S. GUIDO, ESQ.
Hanak, Guido and Taladay
Attorneys at Law
P. O. Box 487
DuBois, PA 15801
Attorney for Intervening Appellee

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

Dated: April 18, 2007

05-1983-CD

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Commonwealth Court of PA
Irvis Office Building
6th Floor, Room 624
Commonwealth Ave. & Walnut St.
Harrisburg, PA 17120

05-1983-CD

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) APR 13 2007 C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7005 3110 0004 1814 3932

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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m/10:20 BY
APR 16 2007
GK

William A. Shaw
Prothonotary/Clerk of Courts

453

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Prothonotary/Clerk of Courts

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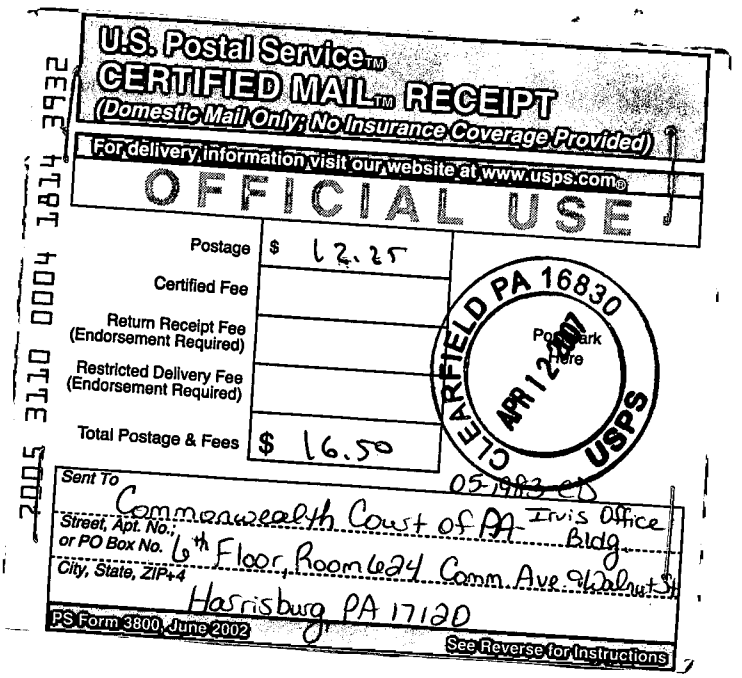
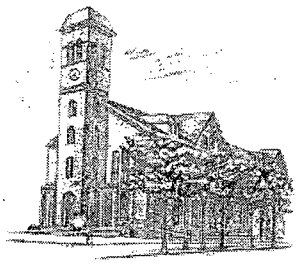
William A. Shaw

Prothonotary/Clerk of Courts

GR

2005 - 1983-CD





Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

April 12, 2007

Commonwealth Court of Pennsylvania
Irvis Office Building
6th Floor, Room 624
Commonwealth Ave. & Walnut St.
Harrisburg, PA 17120

COPY

Re: DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido
No. 05-1983-CD
Commonwealth Court No. 403 CD 2007

Dear Prothonotary:

Enclosed you will find the above referenced complete record appealed to your office. Please also find enclosed seven items transmitted under separate cover.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

FILED
01:10:29 BH
APR 12 2007
William A. Shaw
Prothonotary/Clerk of Courts

(451)

FILED
APR 12 2007
William A. Shaw
Prothonotary/Clerk of Courts

March 5, 2007

RE: Dubois Dutch LLC v. Sandy Twp Bd. of Spvrs (Guido)
No.: 403 CD 2007
Agency Docket Number: No. 05-1983 C.D.
Filed Date: March 2, 2007

FILED NO CC
m/10:53 AM
MAR 07 2007
William A. Shaw
Prothonotary/Clerk of Courts

Notice of Docketing Appeal

A Notice of Appeal from an order of your court has been docketed in the Commonwealth Court of Pennsylvania. The Commonwealth Court docket number must be on all correspondence and documents filed with the court.

Under Chapter 19 of the Pennsylvania Rules of Appellate Procedure, the Notice of Appeal has the effect of directing the Court to transmit the certified record in the matter to the Prothonotary of the Commonwealth Court.

The complete record, including the opinion of the trial judge, should be forwarded to the Commonwealth Court within forty (40) days of the date of filing of the Notice of Appeal. Do not transmit a partial record.

Pa.R.A.P. 1921 to 1933 provides the standards for preparation, certification and transmission of the record.

The address to which the Court is to transmit the record is set forth on Page 2 of this notice.

Notice to Counsel

A copy of this notice is being sent to all parties or their counsel indicated on the proof of service accompanying the Notice of Appeal. The appearance of all counsel has been entered on the record in the Commonwealth Court. Counsel has thirty (30) days from the date of filing of the Notice of Appeal to file a praecipe to withdraw their appearance pursuant to Pa. R.A.P. 907 (b):

Appellant or Appellant's attorney should review the record of the trial court, in order to insure that it is complete, prior to certification to this Court. (Note: A copy of the Zoning Ordinance must accompany records in Zoning Appeal cases).

The addresses to which you are to transmit documents to this Court are set forth on Page 2 of this Notice.

If you have special needs, please contact this court in writing as soon as possible.

Attorney Name	Party Name	Party Type
Toni M. Cherry, Esq.	DuBois Dutch, LLC	Appellee
Anthony S. Guido, Esq.	John A. Guido	Appellant
Gregory M. Kruk, Esq.	Sandy Township Board of Supervisors	Appellee

13 APR 2007 13 23
RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA

Address all written communications to:

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Irvis Office Building
Harrisburg, PA 17120
(717) 255-1650

Filings may be made in person at the following address (except on Saturdays, Sundays and holidays observed by Pennsylvania Courts) between 9:00 a.m. and 4:00 p.m.

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Sixth Floor
Irvis Office Building
Harrisburg, PA 17120
(717) 255-1650

Pleadings and similar papers (but not paperbooks or certified records) may also be filed in person only at:

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Filing Office
Suite 990
The Widener Building
One South Penn Square
Philadelphia, PA 19107
(215) 560-5742

The hours of the Philadelphia Filing Office are 9:00 a.m. to 4:00 p.m.

Under Pa.R.A.P. 3702, writs or other process issuing out of the Comonwealth Court shall exit only from the Harrisburg Office.

CERTIFICATE AND TRANSMITTAL OF RECORD UNDER PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1931(C)

To the Prothonotary of the Appellate Court to which the within matter has been appealed:

THE UNDERSIGNED, Clerk (or Prothonotary) of the court of Common Pleas of Clearfield County, the said Court being a court of record, does hereby certify that annexed hereto is a true and correct copy of the whole and entire record, including an opinion of the Court as required by Pa. R.A.P. 1925, the original papers and exhibits, if any, on file, the transcript of the proceeding, if any, and the docket entries in the following matter:

05-1983-CD

DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John Guido

In compliance with Pa. R.A.P. 1931 (c).

The documents compromising the record have been numbered from **No. 1 to No.** 50, and attached hereto as Exhibit A is a list of the documents correspondingly numbered and identified with reasonable definiteness, including with respect to each document, the number of pages compromising the document.

The date on which the record had been transmitted to the Appellate Court is April 12, 2007.

Prothonotary/Clerk of Courts

(seal)

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Civil Other

Date		Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Civil Other

Date		Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman
04/12/2007	April 12, 2007, Appeal mailed to Commonwealth Court. April 12, 2007, Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

APR 12 2007

Attest.

William L. Shaw
Prothonotary/
Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
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05	12/28/05	Notice of Intervention	03
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08	02/01/06	Certificate of Service, Motion to Dismiss Appeal of DuBois Dutch, LLC and Brief in Support of Motion	03
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12	03/22/06	Certificate of Service, Re: Order of Court for argument	02
13	04/07/06	Motion to Present Additional Evidence	10
14	04/13/06	Order, Re: Motion to Dismiss Appeal withdrawn	02
15	04/13/06	Order, Re: argument on Motion to Present Additional Evidence scheduled	02
16	04/20/06	Motion to Dismiss Appeal of DuBois Dutch, LLC and Order scheduling argument	09
17	04/20/06	Certificate of Service, Motion	01
18	04/26/06	Certificate of Service, Order of Court for Argument on Motion to Dismiss Appeal	02
19	04/27/06	Answer to Motion to Present Additional Evidence	08
20	05/03/06	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC	09
21	05/04/06	Order, Re: Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal	02
22	06/07/06	Notice, Re: objections to transcripts	01
23	06/07/06	Transcript of Proceedings, Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal held May 3, 2006	Separate Cover
24	06/21/06	Opinion	04
25	07/03/06	Petition to Reconsider Order, or, In the Alternative, to Amend Order	18
26	07/14/06	Order, Re: Petition to Reconsider Order filed July 3, 2006, Dismissed	01
27	08/17/06	Order, Re: evidentiary hearing scheduled	01
28	10/03/06	Motion to Dismiss Notice of Appeal (copy—original missing from record)	12
29	10/05/06	Order, Re: briefs to be filed	01
30	11/06/06	Certificate of Service, brief on behalf of Intervening Appellee	02
31	12/05/06	Motion for Oral Argument	04
32	12/05/06	Order, Re: Motion for Oral Argument Denied	01
33	01/23/07	Notice, Re: objections to transcripts	01
34	01/23/07	Transcript of Proceedings, Evidentiary Hearing held October 3, 2006	Separate Cover
35	01/23/07	Transcript Exhibits Part One: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 1	Separate Cover
36	01/23/07	Transcript Exhibits Part Two: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 2	Separate Cover
37	01/23/07	Transcript Exhibits Part Three: Sandy Township Subdivision and Land Development Ordinance	Separate Cover

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

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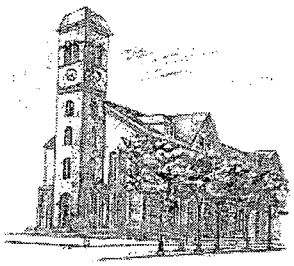
41	02/26/07	Opinion and Order	40
42	03/02/07	Notice of Appeal to Commonwealth Court, Proof of Service, and Request for Transcript (no request for transcript has been made due to the fact that the complete transcript has been lodged of record)	08
43	03/05/07	Supplemental Proof of Service, Notice of Appeal	02
44	03/07/07	Commonwealth Court of Pennsylvania, Notice of Docketing Appeal and Notice to Counsel 403 CD 2007	02
45	03/16/07	Order, Re: John Guido to file concise statement	01
46	03/19/07	Order (Amended), Re: John Guido to file concise statement	01
47	03/22/07	Concise Statement of Matters	07
48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01
50	04/12/07	Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	07



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

COPY

Fredric J. Ammerman, President Judge
Court of Common Pleas
230 E. Market Street
Clearfield, PA 16830

Toni M. Cherry, Esq.
PO Box 505
1 North Franklin Street
DuBois, PA 15801

Gregory M. Kruk, Esq.
690 Main Street
Brockway, PA 15824

Anthony S. Guido, Esq.
PO Box 487
DuBois, PA 15801

DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido

Court No. 05-1983-CD; Commonwealth Court No. 403 CD 2007

Dear Counsel:

Please be advised that the above referenced record was forwarded to the Commonwealth Court of Pennsylvania on April 12, 2007.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

FILED
APR 12 2007
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

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48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

APR 12 2007

Attest. William L. Clearfield
Prothonotary/
Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	*	
and	*	
JOHN GUIDO, Intervening Appellee	*	

ORDER

NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

FILED
03:34 01
MAR 29 2007
William A. Shaw
Prothonotary/Clerk of Courts

ICC Attys:
T. Cherry
Guido
Krug

#49

DATE: 3/29/07

____ You are responsible for serving all appropriate parties.

__X__ The Prothonotary's office has provided service to the following parties:

____ Plaintiff(s) __X__ Plaintiff(s) Attorney ____ Other

____ Defendant(s) __X__ Defendant(s) Attorney

____ Special Instructions:

FILED
MAR 29 2007
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS Appellee	:	APPLICATION FOR SUPERSEDEAS
vs.	:	Filed on Behalf of:
JOHN A. GUIDO Intervening Appellee	:	INTERVENING APPELLEE
	:	Counsel of Record for This Party:
	:	Anthony S. Guido, Esq. Supreme Court No. 05877 Hanak, Guido and Taladay P.O. Box 487 DuBois, PA 15801 814-371-7768

Date: 3-23-07

FILED 1cc Atty Guido
m/8:54/bl
MAR 26 2007
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

APPLICATION FOR SUPERSEDEAS BY INTERVENING APPELLEE JOHN A. GUIDO, PENDING APPEAL

AND NOW, comes Intervening Appellee, John A. Guido, and by his attorneys Hanak, Guido and Taladay, respectfully petitions the Court pursuant to Pa. R.A.P. 1733(a) for the entry of an order of supersedeas and in support represents the following:

1. This action involves a land use appeal from the decision of the Township of Sandy which rejected the subdivision plan and accompanying request for modification which was filed by Appellant, DuBois Dutch.

2. With regard to said subdivision action and accompanying request for modification, this Court granted an evidentiary hearing and after said hearing, this Court entered an Order dated February 23, 2007, reversing the rejection of said subdivision plan and request for modification by the Township of Sandy.

3. John A. Guido, as an intervening defendant in the said subdivision action has appealed to the Commonwealth Court to No. 403 of 2007 the Order of this Court dated February 23, 2007, reversing the subject action of the Township of Sandy with regard to said subdivision plan and accompanying request for modification.

4. The principal issues involved is whether a subdivision of the larger property of which the optioned property is a part may be subdivided in accordance with the terms and conditions of the 1996 Sandy Township Zoning and 1997 Sandy Township Subdivision ordinances and whether the Township, on appeal this Court, has jurisdiction to modify the minimum lot size as mandated by the Township's Zoning Ordinance pursuant to a request for modification filed in conjunction with a subdivision plan.

5. Sub-section (d) of Section 11003-A of the PA Municipalities Planning Code (MPC) provides in part that if the appellants are seeking to prevent the use or development, the landowner who's use or development is in question may petition the Court to post bond as a condition for proceeding which an appeal. If after hearing the Court determines that the appeal is frivolous, it shall grant the petition for posting of bond.

6. In any event, Pa.R.A.P. 1733(b) covers this situation in that on an application for supersedeas the security shall be fixed by the Court at such sums only as will secure any damages for the use and detention of the property interest, the costs of the matter and costs of appeal.

7. In this action, the Plaintiff, DuBois Dutch, is in control and has full use of the subject property pursuant to said 1982 lease option and, in addition, upon conveyance of said property interest by Defendant, John A. Guido, to Plaintiff, DuBois Dutch, John A. Guido is entitled to a purchase price of $30,000 plus interest from March 1, 1999.

8. In this action, the use or development of the property is not being prevented since DuBois Dutch is in possession of the property in question and operates its restaurant business thereon. There is no evidence that DuBois Dutch has any further development plans at this time. Consequently, DuBois Dutch will not be prejudiced by or suffer damages if the requested supersedeas is granted.

9. The issues raised in this case are not frivolous since they involve serious jurisdictional issues as well as unique subdivision issues of first impression.

WHEREFORE, Intervening Appellee, John A. Guido, respectfully requests that this Court enter an Order that all further proceedings on the land use appeal in the above stated action be stayed pending the determination of the Commonwealth Court of Intervening Appellee's appeal.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Attorney for John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached Application for Supersedeas filed in the above captioned action, were served upon the following by United States First Class Mail, postage prepaid, deposited on the 23rd day of March, 2007, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

Toni M. Cherry, Esq.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Attorney for John A. Guido

Dated: 3-23-07

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

ORDER

AND NOW, this _____ day of _____, 2007, upon consideration of Intervening Appellee, John A. Guido's petition for supersedeas, it is hereby ORDERED that the petition is granted and that the appeal taken by the Intervening Appellee in the above case to the Commonwealth Court shall operate as a supersedeas.

By the Court,

_____
P.J.

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS Appellee	:	CONCISE STATEMENT OF MATTERS
vs.	:	Filed on Behalf of:
JOHN A. GUIDO Intervening Appellee	:	INTERVENING APPELLEE
	:	Counsel of Record for This Party:
	:	Anthony S. Guido, Esq. Supreme Court No. 05877 Hanak, Guido and Taladay P.O. Box 487 DuBois, PA 15801 814-371-7768

Date: 3-21-07

FILED
MAR 22 2007
M/10:30/WAS
William A. Shaw
Prothonotary/Clerk of Courts
NO C/C

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL IN ACCORDANCE WITH PA.R.A.P. 1925(b)

AND NOW, comes Intervening Appellee, John A. Guido, and by his attorneys, Hanak, Guido and Taladay, files the Statement of Matters Complained of on Appeal in accordance with Order of this Court dated March 15, 2007, as amended by Order dated March 19, 2007, and in accordance with Pa. R.A.P. 1925(b) as follows:

1. DuBois Dutch, LLC subdivision plan and accompanying Request for Modification

(A) This Court committed an error of law in ruling that the governing body, Sandy Township, and on appeal this Court had subject matter jurisdiction

to modify the minimum lot size requirements as mandated by the Township Zoning Ordinance pursuant to a request for modification in subdivision plan proceedings.

(B) This Court erred in ruling that a request for modification may be approved in absence of evidence of record that the request meets the mandates of the MPC and the Township's subdivision ordinance governing requests for modification and the attendant hardship factors that must exist which are as follows:

> (1) physical circumstances or conditions of the land to be subdivided which prevent strict conformity with provisions of the ordinance; and
>
> (2) the authorization of a modification may be necessary to enable the reasonable use of the property;
>
> (3) the modification must not be contrary to the public interest and that the purpose of the subdivision ordinance is observed; and
>
> (4) the request is the minimum modification necessary.

(C) This Court erred in ruling that the required hardship requirements of a request for modification pursuant to a subdivision plan may be based in principal part on the fact that "the granting of the request merely formalizes and legalizes the division that has already occurred in this case as a result of actions of both parties' (this Court's opinion p.16) and that "DuBois Dutch has a hardship if modification is not granted because it cannot compel Guido to transfer title without a valid subdivision" (this Court's opinion p. 14).

(D) This Court erred in failing to consider in its Opinion and Order of February 23, 2007, each of the requirements for approval of a request for modification as mandated by the Sandy Township Subdivision Ordinance.

(E) The subdivision plan and accompanying request for modification should have been dismissed by this Court on the basis of the legal principle of res judicata which issue this Court failed to address in its Opinion and Order of February 23, 2007. DuBois Dutch could have included a request for modification pursuant to its subdivision plan based on the allegation that the undersized lot was a non-conforming lot pre-existing the 1996 amended Zoning Ordinance and 1997 amended Subdivision Ordinance of Sandy Township, which allegation was rejected by the Commonwealth Court in the case of *Guido vs. Sandy Township, et al*, 809 A.2d 1036 (Pa Cmnwlth 2002,) affirmed by the Supreme Court (36 WAP 2003).

(F) This Court erred in refusing to dismiss the subdivision plan of DuBois Dutch and the accompanying request for modification due to the fact that DuBois Dutch did not meet its legal burden of proving each element required by the Sandy Township Subdivision Ordinance for approving a request for modification.

(G) This Court erred in ruling that private interests prevail over public interests in the enforcement of Sandy Township land use ordinances under the circumstances of this case.

(H) This Court erred in not granting Guido's motion to dismiss DuBois Dutch's appeal of the rejection of said plan and request for modification by

Sandy Township due to the fact that the notice of appeal did not set forth grounds on which DuBois Dutch relied in that DuBois Dutch did not set forth any facts as to how the plan and request for modification met the elements required by the Sandy Township Subdivision Ordinance as a condition for granting a modification in violation of sub-section(a) of Section 11003-A of the MPC (53 P.S.A. 11003-A).

(I) This Court erred in ruling that the relation back principle pursuant to an exercise of an option to purchase in effect locks in the intervening changes in land use regulations contrary to the ruling of the Commonwealth Court in the case of *Guido vs. Sandy Township, et al*, 809 A.2d 1036 (Pa Cmnwlth 2002,) affirmed by the Supreme Court (36 WAP 2003).

2. Guido Subdivision Plan

(A) This Court erred in ruling that a subdivision plan which meets all of the requirements of the Township Zoning and Subdivision Ordinances and all other pertinent regulations must be rejected on the basis that the plan incorporates a portion of the property subject to DuBois Dutch's lease option and thereby constitutes an unauthorized taking of title to a portion of the optioned property in violation of the Pennsylvania and United States Constitutions.

(B) In rejecting the Guido Subdivision plan, this Court erred in failing to comply with Sub-Section(2) of Section 10508 of the MPC (52 P.S.A. 10508) which mandates that if the application (for subdivision approval) is not approved as filed the decision shall specify the defects found in the application and shall

describe the requirements which have not been met and shall in each case, cite the provisions of the statute or ordinance relied upon. In this Court's Opinion and Order of February 23, 2007, this Court failed to specify the defects found in the application; failed to describe the requirements which have not been met; and failed to cite the provision of the statute or ordinance relied upon. Consequently, this Court erred in rejecting said plan.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Attorneys for John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached Concise Statement of Matters filed in the above captioned action, were served upon the following by United States First Class Mail, postage prepaid, deposited on the 21st day of March, 2007, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Hanak, Guido & Taladay

Attorneys for John A. Guido

Date: 3-21-07

FILED

MAR 19 2007

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	*	
and	*	
JOHN GUIDO, Intervening Appellee	*	

ORDER

NOW, this 19th day of March, 2007, this Court's Order of March 15, 2007 is amended to read as follows: The Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925(b) of the Rules of Appellate Procedure.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC,	*	
Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS,	*	
Appellee	*	
and	*	
JOHN GUIDO,	*	
Intervening Appellee	*	

ORDER

NOW, this 15th day of March, 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925(b) of the Rules of Appellate Procedure.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

FILED
02:34 BH
MAR 16 2007
LM

William A. Shaw
Prothonotary/Clerk of Courts

1 CC Atty T. Cherry
G. Krug
A. Guido

#45

FILED

MAR 16 2007

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 3/16/07

____ You are responsible for serving all appropriate parties.

__X__ The Prothonotary's office has provided service to the following parties:

____ Plaintiff(s) __X__ Plaintiff(s) Attorney ____ Other

____ Defendant(s) __X__ Defendant(s) Attorney

____ Special Instructions:

Commonwealth Court of Pennsylvania
www.aopc.org

March 5, 2007

RE: Dubois Dutch LLC v. Sandy Twp Bd. of Spvrs (Guido)
No.: 403 CD 2007
Agency Docket Number: No. 05-1983 C.D.
Filed Date: March 2, 2007

FILED NO CC
10:10:53 am
MAR 07 2007
William A. Shaw
Prothonotary/Clerk of Courts

Notice of Docketing Appeal

A Notice of Appeal from an order of your court has been docketed in the Commonwealth Court of Pennsylvania. The Commonwealth Court docket number must be on all correspondence and documents filed with the court.

Under Chapter 19 of the Pennsylvania Rules of Appellate Procedure, the Notice of Appeal has the effect of directing the Court to transmit the certified record in the matter to the Prothonotary of the Commonwealth Court.

The complete record, including the opinion of the trial judge, should be forwarded to the Commonwealth Court within forty (40) days of the date of filing of the Notice of Appeal. Do not transmit a partial record.

Pa.R.A.P. 1921 to 1933 provides the standards for preparation, certification and transmission of the record.

The address to which the Court is to transmit the record is set forth on Page 2 of this notice.

Notice to Counsel

A copy of this notice is being sent to all parties or their counsel indicated on the proof of service accompanying the Notice of Appeal. The appearance of all counsel has been entered on the record in the Commonwealth Court. Counsel has thirty (30) days from the date of filing of the Notice of Appeal to file a praecipe to withdraw their appearance pursuant to Pa. R.A.P. 907 (b).

Appellant or Appellant's attorney should review the record of the trial court, in order to insure that it is complete, prior to certification to this Court. (Note: A copy of the Zoning Ordinance must accompany records in Zoning Appeal cases).

The addresses to which you are to transmit documents to this Court are set forth on Page 2 of this Notice.

If you have special needs, please contact this court in writing as soon as possible.

Attorney Name	Party Name	Party Type
Toni M. Cherry, Esq.	DuBois Dutch, LLC	Appellee
Anthony S. Guido, Esq.	John A. Guido	Appellant
Gregory M. Kruk, Esq.	Sandy Township Board of Supervisors	Appellee

Address all written communications to:

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Irvis Office Building
Harrisburg, PA 17120
(717) 255-1650

Filings may be made in person at the following address (except on Saturdays, Sundays and holidays observed by Pennsylvania Courts) between 9:00 a.m. and 4:00 p.m.

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Room 624
Sixth Floor
Irvis Office Building
Harrisburg, PA 17120
(717) 255-1650

Pleadings and similar papers (but not paperbooks or certified records) may also be filed in person only at:

Office of the Chief Clerk
Commonwealth Court of Pennsylvania
Filing Office
Suite 990
The Widener Building
One South Penn Square
Philadelphia, PA 19107
(215) 560-5742

The hours of the Philadelphia Filing Office are 9:00 a.m. to 4:00 p.m.

Under Pa.R.A.P. 3702, writs or other process issuing out of the Comonwealth Court shall exit only from the Harrisburg Office.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

FILED 1cc Atty Guido
02:14/BY
MAR 05 2007 1cc Comm.
Court 3151/07
William A. Shaw
Prothonotary/Clerk of Courts

SUPPLEMENTAL PROOF OF SERVICE
NOTICE OF APPEAL

The undersigned attorney for Intervening Appellee, John A. Guido, hereby certifies that I am this day serving copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon the following named persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Service by Hand-delivery as follows:

Daniel J. Nelson
Court Administrator (814) 765-2641, Ext 5982
Clearfield County Courthouse
230 East Market Street, Suite 228
Clearfield, PA 16830

I hereby understand that any false statements herein are made subject to penalties of 18 Pa. Con. Stat. Ann. §4904 (relating to unsworn falsification to authorities.

#43

Please Note - The complete transcript has been lodged of record on January 23, 2007.

HANAK, GUIDO and TALADAY

By _____
Matthew B. Taladay
Supreme Ct No. 49663
P. O. Box 487
DuBois, PA 15801
814-371-7768
Attorneys for Intervening
Appellee John A. Guido

Dated: March 5, 2007

Please note this Certificate was filed by Matthew B. Taladay of the law firm of Hanak, Guido and Taladay on behalf of Anthony S. Guido, Esquire, Supreme Court No. 05877, who is unable to sign due to the fact that at this time he is out of state. Anthony S. Guido, Supreme Ct. No. 05877, will be handling this appeal from this point forward.

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS DUTCH, LLC, Appellant	:	CIVIL ACTION - AT LAW
	:	No. 05-1983 C.D.
vs.	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	**Notice of Appeal**
and	:	Filed on behalf of:
	:	Intervening Appellee John A. Guido
JOHN A. GUIDO, Intervening Appellee	:	
	:	Counsel of Record for This Party:
	:	Anthony S. Guido, Esq. Supreme Court No. 05877 Hanak, Guido and Taladay P. O. Box 487 DuBois, PA 15801
	:	814-371-7768

Date: March 2, 2007

FILED
0/2:00 cm
MAR 02 2007
William A. Shaw
Prothonotary/Clerk of Courts

$85.00 Atty
2 cc Atty 1 Copy to Commonwealth Paid

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

NOTICE OF APPEAL

TO THE PROTHONOTARY:

Notice is hereby given that John A. Guido, Intervening Appellee, in the above entitled case hereby appeals to the Commonwealth Court of Pennsylvania from the Order entered in this matter on February 23, 2007. This Order has been entered in the docket as evidenced by the attached copy of the docket entry.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____

Matthew B. Taladay
Supreme Ct No. 49663
Attorney for Intervening
Appellee John A. Guido
P. O. Box 487
DuBois, PA 15801
814-371-7768

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Certified Mail Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC. from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Civil Other

Date		Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to dismiss appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman

User: BHUDSON

I hereby certify this to be a true and attested copy of the original statement filed in this case.

FEB 26 2007

William L. Shaw
Prothonotary/
Clerk of Courts

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA. Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

PROOF OF SERVICE
NOTICE OF APPEAL

The undersigned attorney for Intervening Appellee, John A. Guido, hereby certifies that I am this day serving copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Proof of Service upon the following named persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Service by First Class Mail addressed as follows:

Toni M. Cherry, Esquire (814) 371-5800
Gleason, Cherry & Cherry, LLP
P.O. Box 505
DuBois, PA 15801
(Counsel for DuBois Dutch)

Gregory M. Kruk, Esquire (814) 268-2202
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824
(Counsel for Sandy Township Board of Supervisors)

Hon. Fredric J. Ammerman, President Judge
(814) 765-2641, Ext 1315
Clearfield County Courthouse
230 E. Market Street
Clearfield, PA 16830

Official Court Reporter (814) 765-2641
Clearfield County Courthouse
230 East Market Street, Suite 228
Clearfield, PA 16830

I hereby understand that any false statements herein are made subject to penalties of 18 Pa. Con. Stat. Ann. §4904 (relating to unsworn falsification to authorities.

HANAK, GUIDO and TALADAY

By _____
Matthew B. Taladay
Supreme Ct No. 49663
P. O. Box 487
DuBois, PA 15801
814-371-7768
Attorneys for Intervening
Appellee John A. Guido

Dated: March 2, 2007

Please note this Certificate was filed by Matthew B. Taladay of the law firm of Hanak, Guido and Taladay on behalf of Anthony S. Guido, Esquire, Supreme Court No. 05877, who is unable to sign due to the fact that at this time he is out of state. Anthony S. Guido, Supreme Ct. No. 05877, will be handling this appeal from this point forward.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

REQUEST FOR TRANSCRIPT

No request for transcript has been made due to the fact that the complete transcript has been lodged of record.

HANAK, GUIDO and TALADAY

By _____
Matthew B. Taladay
Supreme Ct No. 4966
Attorney for Intervening
Appellee John A. Guido
Supreme Court No. 05877
P. O. Box 487
DuBois, PA 15801
814-371-7768

Dated: March 2, 2007

FILED

MAR 02 2007

William A. Shaw
Prothonotary/Clerk of Courts

OPINION

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	*	
and	*	
JOHN GUIDO, Intervening Appellee	*	

FILED 1cc Atty: T. Cherry Kruk Guido
02:04 PM
FEB 23 2007
William A. Shaw
Prothonotary/Clerk of Courts
1 CC - Law Library
GR

OPINION and ORDER

Intervening Appellee, John A. Guido, (hereinafter referred to as "Guido") purchased a 3.37 acre parcel of ground located along Route 219 North in Sandy Township, Clearfield County, Pennsylvania, from Phillip J. Dieringer and Sherry S. Dieringer by deed dated December 19, 1986, and recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 1130, page 150. (Appellant's Exhibit 1b, p. 286a) The transfer was subject to a certain lease between Phillip J. Dieringer, as Lessor and Harley Hotels, Inc., as Lessee, dated July 7, 1982, Memorandum of which was recorded in the Office of the Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No. 843, page 79. (Appellant's Exhibit 1b, pp. 287a, 297a-323a)

At the time of Guido's purchase, Harley Hotels, Inc., was operating a Dutch Pantry restaurant on 2.605 acres of the 3.37 acre parcel while the Dieringers operated a gasoline service station on the remaining acreage. The 1982 lease also gave Harley Hotels, Inc., an option to purchase the 2.605 acre restaurant parcel before the expiration of the 1982 lease scheduled for February 29, 1999. (Appellant's Exhibit 1b, p. 305a, paragraph 9)

A building permit for the restaurant had actually been issued to Hospitality Motor Inns, Inc., predecessor in title to Harley Hotels, Inc., on October 28, 1970, by Sandy Township. (Appellant's Exhibit 1b, p. 327a) Hospitality Motor Inns, Inc., then had to construct its own sanitary sewer plant (Appellant's Exhibit 1b, p. 342a) before constructing the restaurant which it completed in 1971.

Harley Hotels, Inc., sold the Dutch Pantry restaurant to Appellant, DuBois Dutch, LLC (hereinafter referred to as "DuBois Dutch"). By Assignment and Assumption of Lease dated July 5, 1998, and recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 1951, page 453, assigned all of its right, title and interest in the lease and option to DuBois Dutch, LLC. (Appellant's Exhibit 1b, pp. 329a-330a)

By letter dated July 6, 1998, addressed to both Harley Hotels, Inc., and DuBois Dutch, LLC, John A. Guido consented to the assignment of the lease to DuBois Dutch and specifically acknowledged that DuBois Dutch would have all of the rights and privileges under the lease. This included the right to exercise the purchase option for the property upon which the Dutch Pantry restaurant was located. (Appellant's Exhibit 1b, p. 290a)

On June 19, 1996, before DuBois Dutch acquired the restaurant parcel and before the 1982 lease's expiration, Sandy Township repealed its 1964 zoning ordinance which applied when the 1982 lease and option were executed and adopted a new zoning ordinance which required a minimum lot size of 45,000 square feet in the C-H-Commercial-Highway District, the zoning district where the subject property is located. The DuBois Dutch parcel met the new lot size requirements but the piece remaining to Guido did not since it totaled only 32,910 square feet. (See survey map, Appellant's

Exhibit 2.) Both parcels met the minimum lot size requirement set forth in the 1964 Zoning Ordinance.

On November 16, 1998, DuBois Dutch gave notice to Guido that it was exercising its option to purchase the subject premises pursuant to the terms of Paragraph 9 of the June 16, 1982, lease. (Appellant's Exhibit 1b, p. 331a) Immediately thereafter, Guido responded that he would not agree to a subdivision and refused to convey the restaurant parcel to DuBois Dutch on the basis that he would be left with an undersized lot that he felt would be commercially useless.

On November 28, 1998, DuBois Dutch sought formal subdivision approval from the Sandy Township Planning Commission. Guido appeared and objected to the grant of such subdivision approval and, accordingly, the Planning Commission recommended rejection of the subdivision request. DuBois Dutch thereafter withdrew its request and on February 12, 1999, filed a Complaint in Specific Performance against Guido before the Court of Common Pleas of Clearfield County to No. 99 - 160 C.D. This action requested the Court to order Guido to secure subdivision approval from Sandy Township; release the 2.605 acres from a lien of mortgage held by S&T Bank and direct that Guido be made to convey the premises that were the subject of the option. As a defense to the specific performance action, Guido asserted that he could not perform because subdivision of the property would violate the lot size requirements of the 1996 Zoning Ordinance.

Guido thereafter filed an Ejectment Action to No 99 - 263 C.D. on March 10, 1999, seeking possession of the restaurant parcel free of any claim by DuBois Dutch on the basis that the lease between the parties had expired on February 29, 1999, and could not be renewed and DuBois Dutch was holding over illegally. The Complaint filed

in that case made no mention of the fact that DuBois Dutch had exercised its option to purchase the property on November 16, 1998, prior to the expiration of the lease and that John A. Guido had refused to cooperate with DuBois Dutch in securing a subdivision and was refusing to convey the premises. DuBois Dutch filed Preliminary Objections to that Ejectment Complaint, raising the pendency of the prior action for specific performance filed on February 12, 1999, to No. 99 - 160 C.D., and Guido's Answer, New Matter and Counterclaim thereto raising a claim for ejectment.

On May 17, 1999, following argument, then Clearfield County President Judge John K. Reilly, Jr.[1] stayed both actions pending a decision by the Sandy Township Board of Supervisors. The Court directed DuBois Dutch to apply once again to the Township for subdivision approval on the basis that the lot of John A. Guido was a non-conforming lot that was divided prior to the enactment of the 1996 Ordinance. Pursuant to the Trial Court's direction, DuBois Dutch filed for subdivision approval with Sandy Township on the basis of two arguments. First, that the 1982 lease and option effected a *per se* lawful subdivision at its inception; or secondly, that once DuBois Dutch exercised the option, its ownership interest reverted back to 1982, making the property held in separate ownership by the two entities at that time and since both lots would have been lawful under the terms of the 1964 Ordinance in effect in 1982, Guido's lot should be allowed to continue as a non-conforming lot allowable under the 1996 Ordinance. The Board of Supervisors of Sandy Township agreed that the Township had always recognized the property as two separate parcels and had always treated the property as two separate parcels. (Appellant's Exhibit 1a, p. 6) and did unanimously grant subdivision approval.

---

[1] Judge Reilly assumed senior status in January, 2004.

On August 3, 1999, Guido filed an appeal from the Township's grant of subdivision approval to No. 99 - 867 C.D., and on June 13, 2000, the Trial Court held a *de novo* hearing. President Judge Reilly held that the creation of the 1982 lease and option and the exercise of the option by DuBois Dutch constituted a subdivision of the property under the Municipalities Planning Code (hereinafter referred to as "MPC") as of the date of the June 16, 1982, lease granting the option. The Trial Court found that when DuBois Dutch exercised its option to purchase the property, its equitable title related back to the date of the creation of the option. Consequently, the Trial Court found that the minimum lot size requirements contained in the 1964 Subdivision Ordinance governed and that DuBois Dutch's request for subdivision approval was a tacit request for modification of the requirements of the 1996 Zoning Ordinance.

The Trial Court further found that the Guido lot was a nonconforming lot under the 1996 Zoning Ordinance and not subject to the minimum lot size requirements imposed by that Ordinance. The Court entered an order approving the subdivision application of DuBois Dutch and Guido timely appealed that decision to the Commonwealth Court.

By a two to one vote, the Commonwealth Court found that a leasehold interest coupled with an option to purchase does not create a legal subdivision of the property and, therefore, DuBois Dutch could not "lock-in" the gas station parcel as a pre-existing nonconforming lot by exercising its option to purchase a portion of the property after the 1996 Zoning Ordinance took effect. The majority found that no legal subdivision had taken place prior to the enactment of the 1996 Ordinance because no formal request for subdivision approval had been made by either party prior to the effective date of the Ordinance. Therefore, the only remedy available to DuBois Dutch was a request for

modification of the provisions of the 1996 Ordinance that could not be met by the Guido lot. Because Section 512 of the MPC requires that modification requests be in writing and DuBois Dutch had failed to make the required written request for modification, the Commonwealth Court found that the Trial Court erred in approving the subdivision application and reversed the Trial Court.

DuBois Dutch filed a Petition for Reargument which the Commonwealth Court denied. On January 2, 2003, DuBois Dutch filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania and by Order dated August 27, 2003, the Supreme Court granted the appeal limited to the following issue:

> [W]hether a leasehold interest in a parcel of land coupled with an option to purchase such land creates a property interest in the lessee-optionee sufficient to support a legally recognized subdivision of the property either at the time the lease and option were simultaneously executed or when the purchase option was exercised.
>
> *Guido v. Township of Sandy*, 880 A.2d 1220, 1221 (Pa. 2005).

In Its decision in *Guido v. Township of Sandy*, the Supreme Court noted "that Dubois [sic] Dutch's status as optionee in the Restaurant Parcel conferred upon it a 'substantial interest in the land' that, upon exercise of the Option, made it owner *ab initio* of the Restaurant Parcel." 880 A.2d at 1225. "Accordingly, Dubois [sic] Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois [sic] Dutch effective June 16, 1982." 880 A.2d at 1225. Thus, the Supreme Court concluded that the property was divided-in-fact as of 1982 (880 A.2d at 1226) but declared that this division-in-fact does not impel governmentally sanctioned subdivision. Because no formal request had been made prior to the time that the 1996 ordinance took effect, the requirements of that ordinance had to be met or else a written request for modification had to be made. 880

A.2d at 1229. The Supreme Court then "[left] the parties with the opportunity to seek further relief pursuant to the modification procedure established by the MPC and Sandy Township and/or to complete the underlying litigation seeking specific performance, consistently with [the Supreme Court's] decision." 880 A.2d at 1229.

Pursuant to the Pennsylvania Supreme Court's suggestion, DuBois Dutch filed a written request for modification of the "minimum lot requirements" of the Sandy Township ordinance and requested the Township's formal subdivision approval of the restaurant parcel and the gas station parcel that had already been divided-in-fact by the parties as of 1982 through the exercise of the option. Guido filed an objection to those requests and also filed his own subdivision request based on a re-drawing of the boundary lines between the restaurant parcel and the gas station parcel. This re-drawing was accomplished by taking some of the land belonging to DuBois Dutch and grafting it onto the Guido parcel in an attempt to have the Guido parcel meet the minimum lot size requirement. The Township denied the request for modification and subdivision approval presented by DuBois Dutch and approved the Guido request for subdivision on November 21, 2005. DuBois Dutch timely filed a Notice of Appeal from those decisions to the above-captioned term and number requesting the Court of Common Pleas to overturn both, take testimony in the case, approve the request for modification and grant subdivision approval to DuBois Dutch.

Guido, as titled landowner, filed a Notice to Intervene as allowed by Section 1004-A of the MPC (53 P.S. §11004-A). Thereafter, Guido filed a (second)[2] Motion to Dismiss claiming that the Court lacked jurisdiction to hear an appeal from the Township Supervisors' refusal to grant DuBois Dutch's modification request on the grounds that

[2] Guido had voluntarily withdrawn his first Motion to Dismiss.

the request for modification was actually a request for a variance. Guido claimed that because variances can only be granted by the Zoning Hearing Board, the Board of Supervisors had no right to entertain the request and as such the Court cannot hear an appeal from their decision. Argument was heard on the Motion on May 3, 2006, and an Opinion and Order was issued on June 21, 2006 denying the Motion to Dismiss.

A hearing *de novo* on request of DuBois Dutch for modification and subdivision approval as well as its' objections to the grant of the Guido subdivision was held on October 3, 2006. DuBois Dutch presented evidence and exhibits. Guido presented no evidence, and the record was closed after the Court incorporated as part of the record the Reproduced Record sent to the Supreme Court and the record made at No. 99 - 867 C.D.

Whether to allow the presentation of additional evidence in a land use appeal is a matter within the discretion of the trial Court. *Crystal Forest Associates, LP v. Buckingham Township Supervisors,* 872 A.2d 206 (Pa.Cmwlth. 2005), reargument denied. Where, as in the instant case, the trial court takes additional evidence because no record was made before the Township Supervisors, the trial court must determine the case *de novo*, making its own findings of fact based on the record. (*Mitchell v. Zoning Hearing Board of the Borough of Mount Penn*, 838 A.2d 819 (Pa.Cmwlth. 2003, reargument denied) "In a land use appeal, the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal." Section 1006-A(a) of the MPC, 53 P.S. §11006-A(a).

The issues in the case are as follows:

I. Whether Appellant is entitled to the grant of its' request for modification and approval of a subdivision based on the division in fact of the parcels as a result of its exercise of the option.

II. Whether Appellant is entitled to have the sub-division request of Guido denied.

Section 512.1 of the Pennsylvania Municipalities Planning Code authorizes the governing body of a municipality to grant a modification of the requirements of one or more of the provisions of its Subdivision and Land Development Ordinance if the "literal enforcement will exact undue hardship because of the peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the Ordinance is observed." 53 P.S. §10512.1. That same section of the MPC requires that the request for modification be in writing and accompany and be part of the application for subdivision and that the request set forth "the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary ...". 53 P.S. §10512.1(b).

Section 1004 of Sandy Township's Subdivision and Land Development Ordinance adopts the language of Section 512.1 of the MPC to authorize the Board of Township Supervisors to grant a modification of the requirements of one or more provisions of the Subdivision and Land Development Ordinance if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question. (Appellant's Exhibit 4, Section 1004, p. 57)

In the case at hand, Appellant duly requested in writing that the requirement of Section 611 of the Sandy Township Subdivision and Land Development Ordinance

requiring that lots comply with the minimum requirements of the Sandy Township Zoning Ordinance be waived and the minimum lot size and setbacks be modified to comport with the lot sizes and side yard setbacks currently in existence for both lots. That request was denied by the Township Board of Supervisors. The Board, through its attorney, admitted on the record that the request for modification would have been granted had Guido, as the record owner of the land, consented to the same. However, because he would not agree to the grant of the modification request, the request was denied and subdivision approval in accordance with the modification was also denied. This Court does not believe that Guido's objections to the modification request are controlling as to whether modification should be granted.

Guido is a vendor who does not wish to honor his obligations under the terms of a contract of sale. However, our appellate courts have held that a vendor cannot avoid an otherwise legal transaction where the illegality of performance is caused by the vendor's failure to obtain approval of a proposed subdivision. *Holden v. Kay*, 601 A.2d 453 (Pa.Cmwlth. 1991); *Messina v. Silberstein*, 364 Pa.Super.Ct. 586, 528 A.2d 959 (1987), Petition for Allowance of Appeal denied, 518 Pa. 619, 541 A.2d 746 (1988).

The Supreme Court of Pennsylvania has previously declared "that Dubois [sic] Dutch's status as optionee in the Restaurant Parcel conferred upon it a 'substantial interest in the land' that, upon exercise of the Option, made it owner *ab initio* of the Restaurant Parcel". *Guido v. Township of Sandy*, 880 A.2d 1220, 1225 (Pa. 2005). "Accordingly, Dubois [sic] Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois [sic] Dutch effective June 16, 1982". 880 A.2d at 1225.

The Supreme Court concluded that:

> [W]hen Dubois [sic] Dutch attempted to exercise the Option in 1998, Pennsylvania law related the transaction back to 1982 and recognized it as a conveyance, as of 1982, of the Restaurant Parcel. Thus, logic dictates that the property must have been divided-in-fact as of the effective date of that sale. 880 A.2d at 1226 ...
>
> However, just as the exercise of the Option passed equitable title to the optionee effective as of the date of the inception of the Option, so *must* it have effectuated division-in-fact of the Property without which the idea that equitable title was then conveyed would be incoherent. 880 A.2d at 1227.

Thus, the "peculiar conditions" of the land in question that make it unreasonable and a hardship for the requirements of the 1997 Subdivision Ordinance to be literally enforced have been at least recognized by the Supreme Court of Pennsylvania. This property has already been divided-in-fact by the parties themselves and that division dates back to 1982 by finding of the Supreme Court. DuBois Dutch is the equitable owner of the 2.605 acre restaurant parcel and John Guido holds that property in trust for DuBois Dutch. 880 A.2d at 1225.

The Pennsylvania Municipalities Planning Code defines a "landowner" as:

> The legal or beneficial owner or owners of land including the holder of an option or contract to purchase (whether or not such option or contract is subject to any condition), a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land.

DuBois Dutch as the beneficial owner or optionee became a landowner under the Municipalities Planning Code and acquired its proprietary interest in the land as a result of a contract with the optionor, John Guido.

Guido contends in his brief that *In re Michener's Appeal*, 382 Pa. 401, 115 A.2d 367 (1955) warrants the disregarding of the option agreement and the property rights created in DuBois Dutch as a result of that option agreement by contending that the

private contract between DuBois Dutch and Guido should not enter into the enforcement by a municipality of its zoning regulations. However, this Court believes that the decision in *Michener* cannot be read to hold that the substantial interest in land held by DuBois Dutch as the equitable owner may be taken away by zoning regulations. Zoning principles regulate the use of one's land. Zoning regulations do not regulate the ownership of that land. "The use and ownership of property are distinct and separate." *Wanamaker v. Philadelphia School District*, 441 Pa. 567, 572, 274 A.2d 524, 526 (1971). "Zoning ordinances regulate usage and not method of ownership. If a use is permitted, a municipality may not regulate the manner of ownership of the legal estate." (citations omitted) *Dublin Properties v. Board of Commissioners of Upper Dublin Township*, 21 Pa.Cmwlth. 54, 57, n.3, 342 A.2d 821, 822, n. 3 (1975).

The Supreme Court rejected Guido's argument that land subdivision ordinances and zoning ordinances could be used to deprive DuBois Dutch of its ownership rights in the 2.605 acres:

> These cases say nothing about the antecedent proposition that, upon exercise, the Option vested title to the parcel in Dubois [sic] Dutch as of June 16, 1982, notwithstanding the consequences of any subsequent zoning regulation on either party's use or enjoyment of that property. Although this result undeniably complicates zoning issues - this case being one example - *Spencer*, *Detwiler*, and *Powell* leave no room for doubt as to the legal status, or the legally effective date of inception, of Dubois [sic] Dutch's title to the property once it exercised the Option.
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> *Guido v. Township of Sandy*, 880 A.2d at 1226.

At the trial of the subdivision appeal in this case filed to No. 99 - 867 C.D., John A. Guido admitted that throughout the time of his ownership of the larger parcel, the property that was the subject of the leasehold/optioned interest and his remaining land were maintained as separate properties. (Appellant's Exhibit 1b, p. 415a) Likewise, his

predecessor in title, Phillip James Dieringer, admitted on cross-examination that when he bought the land in 1982, he was aware that he was taking it subject to the rights of the Dutch Pantry restaurant in the land that had existed since the early 1970s. (Appellant's Exhibit 1b, p. 421a) Mr. Dieringer confirmed that at no time after he purchased the property in 1982 did he ever consider that he had a right to enter upon the leasehold premises occupied by the Dutch Pantry restaurant and to use it as his own despite the fact that he was the legal title owner. (Appellant's Exhibit 1b, p. 430a)

When Sandy Township approved the initial request for subdivision on July 7, 1999, it admitted that the parties have always treated these properties as two separate parcels and "the Township always recognized it as two (2) separate parcels". (Appellant's Exhibit 1a, p. 6a) Indeed, both parcels are fully developed and separate businesses have been conducted thereon for well over 35 years. There are separate gas lines, sewer lines, water lines and electric and telephone lines to both parcels. The size and dimensions of the land remaining to each party upon the grant of modification and subdivision approval is exactly what each party bargained for when each purchased his interest in the property. John Guido bought his gas station business and the land on which it was located subject to a lease with option to purchase that fully described the 2.605 acres that he would have to transfer to the owner of the restaurant upon its exercise of the option. The amount and dimension of the land remaining to him after the exercise of the option was described at length in metes and bounds in the Memorandum of Lease that was recorded in the courthouse prior to the time of his purchase. The exercise of the option by DuBois Dutch gives him no more nor less than the exact benefit of his bargain. Nothing that DuBois Dutch did deprives Guido of any interest he had in his land.

While it is true that Sandy Township modified its Zoning Ordinance in the meantime to enlarge the lot size requirement in a Commercial-Highway District from 10,000 square feet to 45,000 square feet, Guido's use of the parcel predated the amendment of the Ordinance and by law, his use must be allowed to continue based on the reality that a division-in-fact has already occurred. His use of the property as a service station is allowed under the new Zoning Ordinance and he continues to enjoy the opportunity of changing that use to any use allowed under the Zoning Ordinance if he does not want to continue to operate a service station.

The Supreme Court saw no impediment to either party in this case filing a modification request and declared that arguments could be made by both parties in favor of modification. (880 A.2d at 1228-1229, n. 17) DuBois Dutch has a hardship if modification is not granted because it cannot compel Guido to transfer title without a valid subdivision. Guido suffers a hardship if modification is not granted because he cannot comply with his legal obligations to convey the premises to DuBois Dutch until and unless subdivision approval is granted.

The Supreme Court recognized that Sandy Township really has no reason not to grant the modification request because the properties are fully developed and have been in operation for years in conformance with the municipality's comprehensive development plan; street, curb and walkway provisions; water and sewer requirements; and flooding abatement measures. 880 A.2d at 1227-1228.

Guido argues that if the modification request is granted, the only legal defense he has to his refusal to convey the premises to DuBois Dutch will be removed and he will be left with a substandard lot. That is not the law. The size of his lot will be no different now than if a subdivision request had been made and granted prior to 1997. Once the

modification is granted and the requirement that the subdivision conform to the lot size and setback requirements of the Zoning Ordinance waived, Guido's lot becomes a non-conforming lot and he can use it for any lawful purpose despite its size.

There are buildings on both lots and no structural changes are contemplated. No building permit is required for either site because the buildings already exist. The streets are already paved and the Township has been providing separate water and sewer services to these two parcels from the beginning. There is no change in the services demanded from the Township as a result of granting formal approval to the modification and the subdivision request. There will be no added burden to public utilities or roadways nor any adverse effect upon the health, welfare or safety of the community.

Here the granting of subdivision approval simply confirms a development plan that was in existence prior to the promulgation of the pertinent zoning regulations in Sandy Township. The granting of the approval to DuBois Dutch does not aggravate any pollution problem nor impose any additional burden upon the services of the community. Consequently, it cannot be argued that the granting of subdivision approval for a division of land that already is in existence is prohibited by either the MPC or the Sandy Township Subdivision and Land Development Ordinance.

Sandy Township's own ordinance allows the modification of the standards set forth in Article 6 to permit the reasonable utilization of the property while securing substantial compliance with the intent and purpose of the Township's regulations where strict compliance with the standards is clearly impractical due to site conditions. In the case at bar, the conditions of this site do not allow strict compliance with the lot size and setback standards because the parties have already divided the land into two different

parcels owned by two different people. The sovereignty of the MPC and the Township's ordinances are preserved because a formal modification request has been made. The granting of that request is not only allowed but anticipated under the language of the MPC and the Township's own ordinances. The granting of the request merely formalizes and legalizes the division that has already occurred in this case as a result of actions of both parties.

This Court believes that DuBois Dutch is entitled to have the Court grant the modification request, waive the requirements of Section 611A. and grant subdivision approval as shown in the survey map entered into evidence as Appellant's Exhibit 2 which was drawn based on the descriptions of the property set forth in the lease/option agreement.

Consistent with the Court's ruling that DuBois Dutch is entitled to modification, the subdivision request of Guido which was approved by Sandy Township must be denied. The right to own property is a right so fundamental that it is protected by the United States Constitution as well as the Pennsylvania Constitution. DuBois Dutch has been declared by the Supreme Court of Pennsylvania to be the equitable owner of the entire 2.605 acre parcel. Those rights cannot be ignored nor can they be taken away without compensation.

The request by Guido to subdivide the parcel in a manner that takes from DuBois Dutch some of its land and conveys it to Guido without the agreement of DuBois Dutch constitutes a prohibited unconstitutional taking of Appellant's property.

Guido holds the 2.605 acres in trust for DuBois Dutch and is obligated by law to convey the same to DuBois Dutch upon its request. Guido cannot control any portion of the 2.605 acres because it is not his property despite the fact that he is record title

holder. Guido cannot come before a municipality or this Court to request a subdivision that takes land owned by someone else without the owner's permission. By the same token, this Court cannot approve a subdivision request that divides the subject parcel into any other configuration than the one described in the lease/option agreement.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC,	*	
Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS,	*	
Appellee	*	
and	*	
JOHN GUIDO,	*	
Intervening Appellee	*	

ORDER

NOW, this 23rd day of February, 2007, under the power granted to this Court by Section 1006-A of the Pennsylvania Municipalities Planning Code at 53 P.S. §11006-A and in accordance with the authority of Section 512.1 of the Pennsylvania Municipalities Planning Code at 53 P.S. §10512.1 and Sections 601 and 1004 of the Sandy Township Subdivision and Land Development Ordinance enacted May 21, 1997, it is hereby ORDERED AND DECREED that:

1. The 3.379 acre parcel of ground presently titled in the name of John A. Guido and subject to an option for conveyance of a 2.605 acre portion thereof was divided in fact into the Restaurant Parcel and the Gas Station Parcel effective June 16, 1982, at the time that DuBois Dutch, LLC exercised its option to purchase the Restaurant Parcel on November 16, 1998;
2. The division-in-fact of the subject premises in accordance with the descriptions of the subject properties contained in the Lease/Option Agreement of June 16, 1982, resulted in the Gas Station Parcel being unable to comply with the minimum requirements of the Sandy Township Zoning Ordinance preventing subdivision approval under the Sandy Township Subdivision and Land Development Ordinance enacted May 21, 1997, without modification of the

standards imposed by the Sandy Township Subdivision and Land Development Ordinance;

3. Strict compliance with the standards of the Sandy Township Subdivision and Land Development Ordinance are clearly impractical due to site conditions resulting from the prior division-in-fact of the parcels into a Restaurant Parcel and a Gas Station Parcel and thus modification of the minimum lot size and width requirements as well as side setback building lines to permit the continued reasonable utilization of the Gas Station Parcel as it has been used since the effective date of the division-in-fact of the properties;
4. A waiver of the requirement that both parcels meet the minimum lot requirements of the Sandy Township Zoning Ordinance will still secure substantial compliance with the intent and purpose of the Sandy Township Subdivision and Land Development Ordinance and will not adversely affect the public health, safety and general welfare because both parcels are fully developed and a modification of the lot size and building setback line requirements will place no further burden upon the services of Sandy Township since all streets, curbs, parking lots and walkways are already constructed and all water, sewer and utility lines are in place;
5. The provisions of Section 611A of the Sandy Township Subdivision and Land Development Ordinance requiring that lots shall comply with the minimum requirements of the Sandy Township Zoning Ordinance are hereby waived;
6. The request of DuBois Dutch, LLC to grant formal subdivision approval of the division-in-fact of the Restaurant Parcel and the Gas Station Parcel in accordance with the descriptions contained in the Lease/Option Agreement dated June 16, 1982, is hereby approved and DuBois Dutch, LLC is directed

to record the subdivision plan prepared by Alexander & Associates, Inc., from the descriptions contained in the Lease/Option Agreement of June 16, 1982, and entered of record in this case as Appellant's Exhibit 2 in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, forthwith; and

7. The subdivision request of John A. Guido is denied and the subdivision plan recorded by him on December 7, 2005, in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, as Instrument No. 200521182, is hereby voided and the Register and Recorder of Deeds of Clearfield County is instructed to mark the plan, index and any other docketing or record system where such instrument is referenced accordingly.

BY THE COURT

FREDRIC J. AMMERMAN
President Judge

FILED

FEB 23 2007

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 2/23/07

___ You are responsible for serving all appropriate parties.

__X__ The Prothonotary's office has provided service to the following parties:

___ Plaintiff(s) __X__ Plaintiff(s) Attorney ___ Other

___ Defendant(s) __X__ Defendant(s) Attorney

___ Special Instructions:

COPY

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Plaintiff	*	No. 99-160-CD
vs.	*	IN SPECIFIC PERFORMANCE
JOHN A. GUIDO, Defendant	*	
JOHN A. GUIDO, Plaintiff	*	No. 99-263-CD
vs.	*	IN EJECTMENT
DU BOIS DUTCH, LLC, Defendant	*	

FILED (GK) Orig. to
FEB 23 2007 99-160
William A. Shaw
Prothonotary/Clerk of Courts
2cc Attys: T. Cherry
A. Guido
1cc Law Library

OPINION and ORDER

John A. Guido (hereinafter referred to as "Guido") purchased a 3.37 acre parcel of ground located along Route 219 North in Sandy Township, Clearfield County, Pennsylvania, from Phillip J. Dieringer and Sherry S. Dieringer by deed dated December 19, 1986, and recorded in Deed Book Vol. 1130, page 150. (DuBois Dutch Exhibit 1b, p. 286a) The transfer was subject to a certain Lease between Phillip J. Dieringer, as Lessor and Harley Hotels, Inc., as Lessee, dated July 7, 1982, Memorandum of which was recorded in Deed Book No. 843, page 79. (DuBois Dutch Exhibit 1b, pp. 287a, 297a-323a). The 1982 Lease also gave to Harley Hotels, Inc., an option to purchase the 2.605 acre Restaurant Parcel before the expiration of the final term of the 1982 Lease scheduled for February 29, 1999. (DuBois Dutch Exhibit 1b, p.305a, paragraph 9).

At the time of Guido's purchase, Harley Hotels, Inc., was operating a Dutch Pantry restaurant on 2.605 acres (hereinafter referred to as the "Restaurant Parcel") of the 3.37 acre parcel and the Dieringers operated a gasoline service station on the remaining acreage (hereinafter referred to as the "Service Station Parcel"). Guido

actually operated the Service Station after his purchase of the premises from Dieringer for the consideration of $110,000.00 (DuBois Dutch Exhibit 1b, p. 286a) and continued to operate the same until several years ago when he testified that he closed down the business for reasons that would have nothing to do with the case at hand. This price of $110,000.00 included the right to receive $30,000.00 for the sale of the Restaurant Parcel in the event that the option was exercised in accordance with the terms set forth in the July 1982 Lease.

A building permit for the restaurant had actually been issued to Hospitality Motor Inns, Inc., predecessor in title to Harley Hotels, Inc., on October 28, 1970, by Sandy Township. (DuBois Dutch Exhibit 1b, p. 327a) Hospitality Motor Inns, Inc., then had to construct its own sanitary sewer plant (DuBois Dutch Exhibit 1b, p. 342a) before constructing the restaurant which it completed sometime in 1971. The restaurant has been in continuous operation at the site from 1971 through to the present.

Harley Hotels, Inc. sold the Dutch Pantry restaurant to DuBois Dutch, LLC (hereinafter referred to as "DuBois Dutch") and by Assignment and Assumption of Lease dated July 5, 1998, and recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 1951, page 453, assigned all of its right, title and interest in the Lease and option to DuBois Dutch. (DuBois Dutch Exhibit 1b, pp. 329a-330a) The Assignment and Assumption references the Memorandum of Lease dated July 7, 1982, and recites the deed book number and page where it is recorded in Clearfield County. (DuBois Dutch Exhibit 1b, p. 329a).

By letter dated July 6, 1998, addressed to both Harley Hotels, Inc., and DuBois Dutch, LLC, John A. Guido consented to the assignment of the Lease to DuBois Dutch and specifically acknowledged that DuBois Dutch would have all of the rights and

privileges under the Lease. This included the right to exercise the purchase option for the property upon which the Dutch Pantry restaurant was located. (DuBois Dutch Exhibit 3).

By letter dated July 7, 1998, addressed to DuBois Dutch's lawyer, the attorney for John A. Guido[1] confirmed that the Lease with Harley Hotels was in full force and effect and that there were no defaults under the terms of the Lease. In addition, Mr. Guido's lawyer indicated that if subdivision were to take place, the property remaining to Mr. Guido would not comply with the mandates of the current ordinance but that he hoped Sandy Township would view his situation as a pre-existing condition and would grant approval on that basis. (DuBois Dutch Exhibit 4).

The situation to which Mr. Guido referred in the aforementioned letter occurred on June 19, 1996, before DuBois Dutch acquired the restaurant parcel and before the 1982 Lease's expiration, when Sandy Township repealed its 1964 zoning ordinance which applied when the 1982 Lease was executed and the option was granted. On that date in 1996, Sandy Township adopted a new zoning ordinance which increased the minimum lot size of property in the C-H Commercial-Highway District from 10,000 square feet to 45,000 square feet. (*See* Joint Exhibit 3, p. 23). The subject properties are located in this zoning district.

The DuBois Dutch parcel met the new lot size requirements but the piece remaining to Guido did not since it totaled only 32,910 square feet. (*See* survey map, DuBois Dutch Exhibit 2). Both parcels met the minimum lot size requirement set forth in the 1964 Zoning Ordinance in effect when the 1982 Lease was executed and the option was granted.

[1] John A. Guido is represented in this matter by his Father, Anthony F. Guido, Esq.

On November 16, 1998, DuBois Dutch gave notice to Guido that it was exercising its option to purchase the subject premises pursuant to the terms of Paragraph 9 of the June 16, 1982, Lease. (DuBois Dutch Exhibit 6). Guido received the notice on November 17, 1998, and immediately responded that he would not agree to a subdivision and would not convey the Restaurant Parcel to DuBois Dutch on the basis that he would be left with an undersized lot that he felt would be commercially useless. (DuBois Dutch Exhibit 7). On November 28, 1998, DuBois Dutch requested a recommendation of formal subdivision approval from the Sandy Township Planning Commission. Guido, through his lawyer, appeared and objected to the grant of such subdivision approval. (See Guido Exhibit D). Accordingly, the Planning Commission recommended rejection of the subdivision request.

By letter dated January 27, 1999, Guido advised DuBois Dutch that its Lease would expire at midnight on February 28, 1999, and that it was to vacate the premises prior to the expiration of the Lease on that date unless DuBois Dutch was willing to negotiate a settlement of the subdivision issue that would give John Guido more land. (DuBois Dutch Exhibit 8).

On February 12, 1999, prior to the expiration of the Lease term, DuBois Dutch filed a Complaint in Specific Performance against Guido with this Court to 99-160-CD. The Complaint requested that the Court order Guido to secure subdivision approval from Sandy Township release the 2.605 acres from a lien of mortgage held by S&T Bank and direct Guido to convey the premises that were the subject of the exercised option.

As a defense to the specific performance action, Guido asserted that he could not perform because subdivision of the property would violate the lot size requirements

of the 1996 Zoning Ordinance. He thereafter filed an Ejectment Action to No. 99-263-CD on March 10, 1999, seeking possession of the Restaurant Parcel free of any claim by DuBois Dutch on the basis that the Lease between the parties had expired on February 29, 1999; could not be renewed; and that DuBois Dutch was holding over illegally. DuBois Dutch filed Preliminary Objections to that Ejectment Complaint, raising the pendency of the prior action for specific performance filed on February 12, 1999, to No. 99-160-CD, and Guido's Answer, New Matter and Counterclaim thereto raising a claim for ejectment

On May 17, 1999, following argument, the Clearfield County Trial Court[2] stayed both actions pending a decision by the Sandy Township Board of Supervisors. The Court directed DuBois Dutch to again apply to the Township for subdivision approval on the basis that the lot of John A. Guido was a non-conforming lot that was divided prior to the enactment of the 1996 Ordinance as a result of DuBois Dutch's exercise of the option. DuBois Dutch then filed for subdivision approval with Sandy Township on the basis of two arguments. First, that the 1982 Lease and option effected a *per se* lawful subdivision at its inception. Second, that once DuBois Dutch exercised the option, its ownership interest reverted back to 1982, thereby making the property held in separate ownership by the two entities at that time. Since both lots would have been lawful under the terms of the 1964 Ordinance in effect in 1982, Guido's lot should be allowed to continue as a non-conforming lot allowable under the 1996 Ordinance. The Board of Supervisors of Sandy Township agreed that the Township had always recognized the property as two separate parcels and had always treated the property as two separate pieces (DuBois Dutch Exhibit 1a, p. 6) and did unanimously grant subdivision approval.

[2] The case had been assigned to former Clearfield County President Judge John K. Reilly, Jr. Judge Reilly assumed senior status in January, 2004.

On August 3, 1999, Guido filed an appeal from the Township's grant of subdivision approval to No. 99-867-CD, and on June 13, 2000, the Trial Court held a *de novo* hearing. President Judge John K. Reilly, Jr., held that the creation of the 1982 Lease and option and the exercise of the option by DuBois Dutch constituted a subdivision of the property under the Municipalities Planning Code (hereinafter referred to as "MPC") as of the date of the June 16, 1982, Lease granting the option. The Trial Court found that when DuBois Dutch exercised its option to purchase the property, its equitable title related back to the date of the creation of the option. Consequently, the Trial Court found that the minimum lot size requirements contained in the 1964 Subdivision Ordinance governed and that DuBois Dutch's request for subdivision approval was a "tacit request" for modification of the requirements of the 1996 Zoning Ordinance. The Trial Court further found that the Guido parcel was a nonconforming lot under the 1996 Zoning Ordinance and not subject to the minimum lot size requirements imposed by that Ordinance. The Trial Court entered an Order approving the subdivision application of DuBois Dutch and Guido timely appealed that decision to the Commonwealth Court.

By a two to one vote, the Commonwealth Court found that a leasehold interest coupled with an option to purchase does not create a legal subdivision of the property and, therefore, DuBois Dutch could not "lock-in" the gas station parcel as a pre-existing nonconforming lot by exercising its option to purchase a portion of the property after the 1996 Zoning Ordinance took effect. The majority found that no legal subdivision had taken place prior to the enactment of the 1996 Ordinance because no formal request for subdivision approval had been made by either party prior to the effective date of the Ordinance. Therefore, the only remedy available to DuBois Dutch was a request for

modification of the provisions of the 1996 Ordinance that could not be met by the Guido lot. Because Section 512 of the MPC requires that modification requests be in writing and DuBois Dutch had failed to make the required written request for modification, the Commonwealth Court found that the Trial Court erred in approving the subdivision application and reversed the Trial Court.

DuBois Dutch filed a Petition for Reargument which the Commonwealth Court denied. On January 2, 2003, DuBois Dutch filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania and by Order dated August 27, 2003, the Supreme Court granted the appeal limited to the following issue:

> [W]hether a leasehold interest in a parcel of land coupled with an option to purchase such land creates a property interest in the lessee-optionee sufficient to support a legally recognized subdivision of the property either at the time the lease and option were simultaneously executed or when the purchase option was exercised.
>
> Guido v. Township of Sandy, 880 A.2d 1220, 1221 (Pa. 2005).

In its decision the Supreme Court noted "that Dubois [sic] Dutch's status as optionee in the Restaurant Parcel conferred upon it a 'substantial interest in the land' that, upon exercise of the Option, made it owner *ab initio* of the Restaurant Parcel." 880 A.2d at 1225. "Accordingly, Dubois [sic] Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois [sic] Dutch effective June 16, 1982." 880 A.2d at 1225. Thus, the Supreme Court concluded that the property was divided-in-fact as of 1982 but declared that this subdivision-in-fact does not require governmentally sanctioned subdivision. Because no formal request had been made prior to the time that the 1996 ordinance took effect, the requirements of that ordinance had to be met or else a written request for modification had to be made. The Supreme Court then "[left] the parties with the

opportunity to seek further relief pursuant to the modification procedure established by the MPC and Sandy Township and/or to complete the underlying litigation seeking specific performance, consistently with [the Supreme Court's] decision." 880 A.2d at 1229.

DuBois Dutch thereafter filed a written request for modification of the "minimum lot requirements" of the Sandy Township ordinance and requested the Township's formal subdivision approval of the restaurant parcel and the gas station parcel that had already been divided-in-fact by the parties as of 1982 through the exercise of the option. Guido filed an objection to those requests and did file his own subdivision request based on a re-drawing of the boundary lines between the restaurant parcel and the gas station parcel by taking some of the land belonging to DuBois Dutch and grafting it onto the Guido parcel. The Township denied the request for modification and subdivision approval presented by DuBois Dutch and approved the Guido request for subdivision on November 21, 2005. DuBois Dutch timely filed a Notice of Appeal from those decisions requesting the Trial Court to overturn both actions by the Township, take testimony and approve the request for modification and grant subdivision approval to DuBois Dutch.

A hearing *de novo* on DuBois Dutch's request for modification and subdivision approval as well as its objections to the grant of the Guido subdivision was held before the Court of Common Pleas of Clearfield County, Pennsylvania, on October 3, 2006. Briefs were submitted by both parties in accordance with the schedule issued by this Court. The Opinion in that case was filed with the Prothonotary on the same day as this Opinion. As this Court recognizes that any appeal of the modification case will go to the Commonwealth Court, and any appeal in the case at bar will go to the Superior Court, a copy of the Opinion in the modification case (05-1983-CD) is attached to this Opinion.

As previously noted, the Supreme Court also indicated that in addition to the modification procedure established by the MPC and Sandy Township, DuBois Dutch could complete the underlying litigation seeking specific performance. Consequently, this Court, sitting in equity, did consolidate the specific performance action and the ejectment action for trial, which was held on October 23 and 24, 2006.

The issues to be determined in this case are as follows:

1. Whether DuBois Dutch is entitled to a grant of a specific performance with a directive to John A. Guido to obtain subdivision approval, release the 2.605 acres from lien of mortgage and convey the premises to DuBois Dutch?

2. Whether DuBois Dutch's failure to pay rent or taxes subsequent to John A. Guido's repudiation of the contract can provide Guido with a defense to the specific performance action or support an action in ejectment?

As part of DuBois Dutch's purchase of the Dutch Pantry restaurant from Harley Hotels, Inc., it sought to succeed Harley Hotels, Inc., as the lessee under the Lease from Phillip J. Dieringer dated July 7, 1982, which was then held by John A. Guido as the lessor. Prior to the time that the Assignment and Assumption of Lease was recorded in Clearfield County, the evidence shows DuBois Dutch sought the written approval of John A. Guido to the Assignment of Harley Hotels' rights in the Lease to DuBois Dutch. More importantly, DuBois Dutch sought and received from John A. Guido assurance that it could exercise the option contained in the Lease giving it the right to purchase the land on which the restaurant was being operated for the sum of $30,000.00, the same as Harley Hotels could have done during its term as tenant. That assurance was given to DuBois Dutch by John A. Guido in his letter dated July 6, 1998. (*See* DuBois Dutch Exhibit 3). Thereafter the Assignment and Assumption of Lease

was recorded of record and the transfer of the restaurant property to DuBois Dutch, LLC complete.

In a letter issued July 7, 1998, Mr. Guido's lawyer again confirmed to DuBois Dutch's lawyer that the subject lease was in full force and effect and that there were no defaults under the terms of the Lease. He also advised that "It [would] be necessary to file and obtain subdivision approval to subdivide the property into two parcels as provided for in the Lease when [DuBois Dutch] exercises the option to purchase its portion of that property." Although noting, "That if the overall property is separated into the two properties, the retained portion of my son will not comply with the mandates of the ordinance", he felt that . . . "the Sandy Township Zoning and Planning Commissioners will view this situation as a pre-existing condition and will grant approval on that basis." (*See* DuBois Dutch Exhibit 4).

DuBois Dutch's President and sole shareholder, Gregory Ley, provided credible testimony at trial which established that he contacted John Guido's lawyer in preparation for exercising the option and securing title to the property and was advised in October of 1998 to contact a surveyor by the name of "Bucky Alexander" and to secure a survey. He followed the instructions of John Guido's lawyer and also caused a title search to be performed on the property. After that was completed, DuBois Dutch gave notice to John A. Guido that it was exercising its option to purchase the property by letter dated November 16, 1998. (*See* DuBois Dutch Exhibit 6). Contained in that letter was the suggestion that closing take place on December 23, 1998, and a request that John Guido make the appropriate arrangements to have the Restaurant Parcel released from the lien of a mortgage that John A. Guido gave to S&T Bank which had been discovered as a result of the title search. (*See* DuBois Dutch Exhibit 12). DuBois

Dutch further advised in that letter that it was ready, willing and able to pay the purchase price and to do all things which may be required under the Lease on its part to consummate the purchase.

In accordance with the terms of Paragraph 11 of the Lease, DuBois Dutch had already procured a preliminary title report and had notified Guido that there was an encumbrance affecting the leased property in the form of Mr. Guido's mortgage. Mr. Guido was requested to take action to cause the Restaurant Parcel to be released from the mortgage on the records of Clearfield County. It was not until title to the property was satisfactory to DuBois Dutch that it had an obligation to pay the purchase price to John Guido in exchange for his delivery of a general warranty deed conveying the property. The Lease further provided that the cost of the title policy and the preliminary title report was not to be paid by DuBois Dutch but by John Guido.

John Guido refused to have the Restaurant Parcel released from the lien of mortgage as requested by DuBois Dutch. Instead, he repudiated the contact and advised DuBois Dutch by letter that he would not agree to subdividing the property unless John Guido was granted "full relief from the mandates of the amended ordinance insofar as set-backs, lot size and coverage are concerned." (DuBois Dutch Exhibit 7).

Rather than join DuBois Dutch in requesting such relief, John Guido, through his lawyer, appeared at the Sandy Township Planning Commission meeting on November 24, 1998 and opposed the granting of the subdivision in accordance with the descriptions that appear on the Lease Agreement. (*See* Guido Exhibit D). Therefore, if DuBois Dutch had any question that Guido was repudiating the contract in the letter of November 17, 1998, the position he took at the Planning Commission meeting on

November 24, 1998, left no doubt that he had no intentions of fulfilling his obligations under the contract.

DuBois Dutch's rights to the Restaurant Parcel have already been determined by the Supreme Court of Pennsylvania:

> At the outset, we note that Dubois [sic] Dutch's status as optionee in the Restaurant Parcel conferred upon it a "substantial interest in the land" that, upon exercise of the Option, made it owner *ab initio* of the Restaurant Parcel. In Detwiler v. Capone we discussed the rights conferred by a lease containing a purchase option.
>
> > An option to purchase is analogous to a contract for the sale of land; it is in nature an encumbrance on the land pledged. In such case, the [optionor] is a trustee of the legal title for the benefit of the purchaser [*qua* optionee]. . . Equity regards the person bound to convey as having done what he should have done, i.e. made the conveyance, and treats him as trustee for the optionee. Where an option is exercised the title of the optionee relates back to the date of the option and his interest is regarded as real estate of that time . . .
>
> Guido v. Township of Sandy, 880 A.2d 1220, 1225 (Pa. 2005) (Internal quotation marks and citations omitted.)

Further, the Supreme Court noted that:

> We also observed in Detwiler that 'the landlord-tenant relationship between the parties ceased to exist upon verbal communication of plaintiffs' election [to exercise the option] and the lease was converted into a contract of sale." 55 A.2d at 384. This ruling reflects an historic account of the legal effect of the exercise of an option to purchase, the import of which brooks no misunderstanding.
>
> Guido v. Township of Sandy, 880 A.2d at 1225.

DuBois Dutch continued to proceed to obtain formal subdivision approval but received a letter from John Guido dated January 27, 1999, advising that it was to vacate the premises prior to the expiration of the Lease on February 28, 1999 (DuBois Dutch Exhibit 8), DuBois Dutch then filed a Complaint for Specific Performance on February 12, 1999, prior to the date that John A. Guido intended to evict DuBois Dutch from its

own property. The law in Pennsylvania regarding specific performance in regard to property is well-established.

> From the moment an agreement of sale of real estate is executed and delivered it vests in the grantee what is knows as an equitable title to the real estate. *See* Ladner on Conveyancing in Pennsylvania, §5:26 (3d ed. 1961). Thereupon the vendor is considered as a trustee of the real estate for the purchaser and the latter becomes a trustee of the balance of the purchase money for the seller. Kerr v. Day, 14 Pa. 112 (1850). Hence, if the terms of the agreement are violated by the vendor, the vendee may go into a court of equity seeking to enforce the contract and to compel specific performance. Borie v. Satterthwaite, 180 Pa. 542, 37 A. 102 (1897); and Agnew v. Southern Ave. Land Co., 204 Pa. 192, 53 A. 752 (1902). While the courts of equity have the power to grant specific performance, the exercise of the power is discretionary. In other words, such a decree is of grace and not of right. Mrahunec v. Fausti, 385 Pa. 64, 121 A.2d 878 (1956). It should only be granted where the facts clearly establish the plaintiff's right thereto; where no adequate remedy at law exists; and, where the chancellor believes that justice requires it. Roth v. Hartl, 365 Pa. 428, 75 A.2d 583 (1950) and Mrahunec v. Fausti, supra.
>
> Inequity or hardship may be a valid defense in an action for specific performance, and such decree refused if in the exercise of a sound discretion it is determined that, under the facts, specific performance would be contrary to equity and justice. Barr v. Deiter, 190 Pa.Super. 454, 154 A.2d 290 (1959) and Merritz v. Circelli, 361 Pa. 239, 64 A.2d 796, 7 A.L.R.2d 1325 (1949). However, inequity or hardship is not a valid defense if the hardship is due to the defendant's own acts or to events clearly foreseeable. Kramer v. Dinsmore, 152 Pa. 264, 25 A. 789. (1893).
>
> Payne v. Clark, 409 Pa. 557, 187 A.2d 769, 770-771 (1963).

Guido has continued to argue that he cannot be made to convey the property because it has not been subdivided. It is true that a court may not order specific performance of a contractual obligation to perform an illegal transaction. Holst v. Butler, 379 Pa. 124, 108 A.2d 740 (1954). However, a vendor of land may not avoid an otherwise legal transaction where the illegality of performance is caused by the vendor's failure to obtain approval of a proposed subdivision. Messina v. Silberstein, 364 Pa. Super. 586, 528 A.2d 959 (1987), Petition for Allowance of Appeal denied, 518 Pa. 619, 641 A.2d 746 (1988). Moreover, an owner will not be permitted to avoid his contractual

obligation under an option allowing a lessee to buy the leased portion of a property by refusing to obtain subdivision if subdivision is possible. Holden v. Kay, 601 A.2d 453 (Pa.Cmwlth. 1991).

In the case at hand, there is more than enough evidence to indicate to this Court that subdivision is possible if only John A. Guido would stop objecting to the same. On July 7, 1999, the Board of Supervisors of Sandy Township granted subdivision approval and declared that the Township had always considered the Restaurant Parcel and the Service Station Parcel to be two different properties. (DuBois Dutch Exhibit 1a, p. 6a). During argument before this Court on the Land Use Appeal filed to No. 05-1983 C.D., the Solicitor for the Township candidly admitted that the Board of Supervisors would have granted DuBois Dutch's request for modification and approved the accompanying subdivision if John A. Guido had consented to the same. Obviously, Sandy Township did not believe that the grant of subdivision would be harmful to the health, safety or welfare of the citizens of Sandy Township since these two properties had been functioning as separate parcels for well over 35 years. Indeed, even the Supreme Court of Pennsylvania saw no impediment to the approval of the subdivision if only a written request for modification were to be filed in accordance with the MPC.

Had the subdivision approval been rendered prior to the 1996 zoning changes, John A. Guido would have a non-conforming lot that would not be subject to set-back requirements or minimum lot size requirements and he would be free to develop the same as he saw fit. A grant of subdivision approval with Sandy Township modifying the current zoning requirements so that the Guido lot is not subject to those requirements puts Guido in the very same position. His lot continues to exist as before and he has the ability to use it without restriction. This Court believes that DuBois Dutch's request

for specific performance should be granted. Guido must be ordered to agree to the modification request and subdivision, execute a deed for the Restaurant Parcel and cause the parcel to be released from the mortgage.

The second issue before the Court concerns whether Guido was entitled to rental payments from DuBois Dutch after the option was executed. Despite his refusal to secure subdivision approval, release the Restaurant Parcel from the lien of mortgage held by S&T Bank or to tender the deed for the premises, Guido contends that DuBois Dutch has forfeited its right to specific performance and he is entitled to eject DuBois Dutch from the subject premises because of the following line in Paragraph 11 of the Lease:

> Unless otherwise expressly stipulated all taxes, assessments, and rentals shall be prorated as of date of transfer of record title.
>
> (DuBois Dutch Exhibit 1b, p. 306a).

Guido contends that there has been no transfer of record title and thus DuBois Dutch was obligated to continue to pay rent for each and every month during the period after DuBois Dutch exercised its option and John A. Guido has refused to convey the premises.

At the trial in this case, Gregory Ley, President and sole shareholder of DuBois Dutch, testified without contradiction that he exercised his option in November and, in accordance with the terms of Paragraph 11, paid the rent due for December of 1998 with the understanding that some of the money would come back to him due to the pro-ration of rent that would occur at the closing date he scheduled for December 23, 1998. (DuBois Dutch Exhibit 6). When Guido, by both letter and subsequent actions, made it clear that he was repudiating the contract and would not perform his obligations thereunder, DuBois Dutch paid no further rent under the Lease contending that it was

no longer a tenant but an equitable owner. Its position was a recognition of the law that a landlord-tenant relationship ceases to exist when the tenant exercises the option contained in the lease and the lease is converted into a contract of sale such that the tenant now becomes an equitable landowner. Detwiler v. Capone, 55 A.2d 380, 384 (1947). It was further confirmed by the Supreme Court of Pennsylvania in the case of Guido v. Township of Sandy, 880 A.2d at 1225, when the Court declared that "[t]his ruling reflects an historic account of the legal effect of the exercise of an option to purchase, the import of which brooks no misunderstanding." Indeed, had DuBois Dutch voluntarily paid rent to Guido after Guido had repudiated the contract, it could have been interpreted as an acceptance of that repudiation by DuBois Dutch and a mutual rescission of the contract. In Detwiler v. Capone, the Supreme Court held that: "Unless there was a waiver of performance by plaintiffs by their conduct or continued payment of monthly rentals, the landlord-tenant relationship between the parties ceased to exist upon verbal communication of plaintiffs' election and the lease was converted into a contract of sale." 55 A.2d at 384.

DuBois Dutch owned the property after it exercised its option on November 16, 1998. It had every reason to expect that closing would take place within a short time thereafter. It had no further obligation to pay rent to Guido as it was no longer his tenant. Closing did not take place for the sole reason that Guido refused to perform his part of the bargain and cooperate with the subdivision request.

This Court believes it must "place the parties in the same situation in which they would have been in if the contract had been performed at the time agreed upon and by the application of the rule that things which ought to have been done are considered as

having been done at the proper time . . ." Candy v. Kean, 159 Pa.Super. 596, 49 A.2d 524, 525 (1946).

Had Guido performed his obligations under the contract when demanded, he could have easily secured subdivision approval and conveyed the property on the date chosen for closing. There would have been no further rents due and owing under the terms of the Lease Agreement and DuBois Dutch would actually have received a refund for part of the rent paid during the month of December, 1998 when it anticipated that closing would occur. Guido cannot by his own actions prevent that which should have been done and then demand rent for all of the years when he has fought his obligation to tender a deed.

During the time that the Lease was in effect, Guido, through his attorney, would send the Lessee written notice of the amount of real estate taxes attributable to the 2.605 acre Restaurant Parcel. The last written notice ever sent by Guido was issued on September 9, 1998, requesting payment of the 1998 school taxes. (DuBois Dutch Exhibit 40). Ultimately, DuBois Dutch paid all past due real estate taxes owing on both the Restaurant and Service Station Parcel and reimbursed Guido for his payment of the real estate taxes Guido had paid on the Restaurant Parcel for the years of 1999, 2000 and 2001. Guido had not paid real estate taxes for any year after 2001. (DuBois Dutch Exhibit 26). Thereafter, DuBois Dutch paid the real estate taxes on both parcels for the years of 2005 and 2006 so that Guido actually owes DuBois Dutch the sum of $2,656.31. (*See* DuBois Dutch Exhibit 39 and Testimony of Paula M. Cherry).

In the case of Cimina v. Bronich, 537 A.2d 1355 (Pa. 1988), reargument denied, the Supreme Court held that a tenant was entitled to specific performance of an option to purchase the leased property notwithstanding his technical breach of the lease

agreement in the form of his failure to pay real estate taxes when due during the term of the lease. Since such a minor breach could be rectified through reimbursement of the monies due, the Supreme Court declared that it could not possibly act to deprive the tenant of his right to specific performance of the contract for the conveyance of the land. The situation in Cimina is far more serious because the breach occurred prior to the exercise of the option by the tenant. Despite the fact that the breach occurred prior to the exercise of the option, the Supreme Court was unwilling to allow the landlord to use it to defeat the tenant's right to the property.

In the case at hand, DuBois Dutch was current on its share of real estate taxes at the time that the option was exercised in November of 1998. All of the arguments over the payment of real estate taxes did not occur between these parties until after Guido repudiated the contract and refused to convey the premises to DuBois Dutch. Had closing taken place in 1998, as demanded by DuBois Dutch, the parties would have been separately assessed for their real estate obligations and the question of who owed what to whom would never have arisen. In any event, the case law involving the payment of rent or real estate taxes makes it clear that such matters are immaterial and do not defeat a claim for specific performance. The Court merely has to direct what credits are due at closing.

BY THE COURT,

/S/ Fredric J Ammerman

FREDRIC J. AMMERMAN
President Judge

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Plaintiff	*	No. 99-160-CD
vs.	*	IN SPECIFIC PERFORMANCE
JOHN A. GUIDO, Defendant	*	

JOHN A. GUIDO, Plaintiff	*	No. 99-263-CD
vs.	*	IN EJECTMENT
DU BOIS DUTCH, LLC, Defendant	*	

ORDER

NOW, this 23rd day of February, 2007, it is the ORDER of this Court as follows:

1. DuBois Dutch, LLC did not violate the terms of the parties' lease by failing to pay rentals after it exercised the option to purchase. No rental amounts were due after the option was exercised. John A. Guido is not entitled to ejectment or loss of rental income. The Ejectment Complaint filed by John A. Guido to No. 99-263-CD is hereby DISMISSED;
2. DuBois Dutch, LLC at all times acted in good faith in its' attempt to proceed pursuant to the terms of the parties' agreement(s). DuBois Dutch, LLC was unable to obtain subdivision approval due to the refusal of John A. Guido to cooperate with obtaining an appropriate subdivision by modification. The refusal by John A. Guido to cooperate with the subdivision proceedings was unreasonable and violated the terms of the Memorandum of Lease;
3. The demand for Specific Performance filed by DuBois Dutch, LLC to No. 99-160-CD is hereby GRANTED. John A. Guido is ordered to:

   A. Proceed in strict conformity with the provisions of the Memorandum of

Lease relative the exercise of the option to purchase by DuBois Dutch, LLC;

B. Unconditionally cooperate with the modification proceedings filed with Sandy Township to secure a subdivision based on the survey map admitted as DuBois Dutch Exhibit 2;

C. Cause the subject premises to be released from the lien of mortgage of S & T Bank;

D. Upon completion of the modification/subdivision proceedings, convey the subject premises with marketable title free of any and all encumbrances to DuBois Dutch in fee simple by no less than special warranty deed; and

E. Reimburse DuBois Dutch at the time of closing for $2,656.31, being the amount of real estate taxes previously paid by DuBois Dutch on John A. Guido's behalf.

BY THE COURT,

/S/ Fredric J Ammerman

FREDRIC J. AMMERMAN
President Judge

I hereby certify this to be a true and attested copy of the original statement filed in this case.

FEB 23 2007

Attest. Prothonotary/ Clerk of Courts

IN THE COURT OF COMMON PLEAS

OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC	:	
-vs-	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS	:	
-vs-	:	
JOHN A. GUIDO	:	

N O T I C E

In accordance with the Rules of Appellate Procedure, Rule 1922, Notice is hereby given that if no objections are made to the text of the transcript within five (5) days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's office.

February 6, 2007 — Thomas D. Snyder

Date

Thomas D. Snyder, RPR
Official Court Reporter

FILED
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William A. Shaw
Prothonotary/Clerk of Courts
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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC	:	
	:	
VS.	:	NO. 05-1983-CD
	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
VS.	:	
	:	
JOHN A. GUIDO	:	

N O T I C E

In accordance with the Rules of Appellate Procedure Rule 1922, Notice is hereby given that if no objections are made to the text of the transcript within five (5) days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office.

DATE: January 15, 2007

CATHY J. PROVOST, RMR

Official Court Reporter

FILED
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JAN 23 2007

William A. Shaw
Prothonotary/Clerk of Courts

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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	*	
vs	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	*	
vs	*	
JOHN A. GUIDO, Intervening Appellee	*	

ORDER

NOW this 4th day of December, 2006, the Court noting receipt and review of the Motion for Oral Argument filed on behalf of John A. Guido, Intervening Appellee, it is the ORDER of the Court that said Motion be and is hereby DENIED.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

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DEC 05 2006
William A. Shaw
Prothonotary/Clerk of Courts

1CC Attys: T. Cherry
Kruk
Guido

GK

FILED

DEC 05 2006

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 12/05/06

____ You are responsible for serving all appropriate parties.

X The Prothonotary's office has provided service to the following parties:

____ Plaintiff(s) ____ Plaintiff(s) Attorney X Other Attorneys T. Cherry, Kruk, Guido

____ Defendant(s) ____ Defendant(s) Attorney

____ Special Instructions:

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading: MOTION FOR ORAL ARGUMENT
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
	:	
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 11-16-06

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GK
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

MOTION FOR ORAL ARGUMENT

AND NOW, comes the Intervening Appellee, John A. Guido, by his attorney, Anthony S. Guido, Esquire, files this motion requesting that your Honorable Court schedule oral argument on the issues involved in the above entitled case.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esquire
Attorney for John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

ORDER OF COURT FOR ORAL ARGUMENT

AND NOW, this _____ day of _____, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, oral argument is scheduled for the ____ day of _____, 2006, at _____ o'clock ___.m. Courtroom No. _____, Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT,

_____

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Motion for Oral Argument filed by Intervening Appellee, John A. Guido, in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 16th day of November, 2006, in the United States Post Office, DuBois, Pennsylvania, and addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Anthony S. Guido
Attorney for John A. Guido,
Intevening Appellee

Date: 11-16-06

FILED
DEC 05 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading: CERTIFICATE OF SERVICE
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay PO Box 487 DuBois, PA 15801 (814) 371-7768 or 371-6900

Dated: November 6, 2006

FILED

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William A. Shaw
Prothonotary/Clerk of Courts

No C/C

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

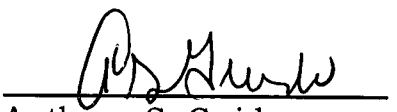
I hereby certify that on the 6th day of November, 2006, true and correct copies of the Brief on Behalf of Intervening Appellee, John A. Guido, were served as follows:

Service in person as follows:

Toni M. Cherry, Esq.
Attorney for DuBois Dutch
Gleason, Cherry & Cherry, LLC
P.O. Box 505
DuBois, PA 15801

Service by first class mail, addressed as follows:

Gregrory M. Kruk, Esq.
Attorney for Township of Sandy
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824



Anthony S. Guido
Attorney for Intervening Appellee Guido
Supreme Court No. 05877
Hanak, Guido and Taladay
P.O. Box 487
DuBois, PA 15801
(814) 371-7768 or 371-6900

FILED
NOV 06 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC	:	
VS.	:	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF	:	
SUPERVISORS	:	
VS.	:	
JOHN A. GUIDO	:	

O R D E R

AND NOW, this 3rd day of October, 2006, following the conclusion of proceedings, it is the ORDER of this Court that both parties supply the Court with brief by no later than November 6, 2006. Either or both parties may thereafter supply a reply brief by no later than November 20, 2006.

BY THE COURT,

President Judge

FILED

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01 9:15 lm

William A. Shaw

Prothonotary/Clerk of Courts

CERT TO ATTY'S

GUIDO

T. CHERRY

G. KRUK

#29

FILED

OCT 05 2006

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 10-5-06

___ You are responsible for serving all appropriate parties.

X The Prothonotary's office has provided service to the following parties:

___ Plaintiff(s) X Plaintiff(s) Attorney ___ Other

___ Defendant(s) X Defendant(s) Attorney 's

___ Special Instructions:

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant vs. SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee vs. JOHN A. GUIDO Intervening Appellee	No. 05-1983-CD Type of Case: LAND USE APPEAL Type of Pleading: MOTION TO DISMISS NOTICE OF APPEAL FILED BY APPELLANT, DUBOIS DUTCH, LLC, FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee Counsel of Record for Intervening Appellee: ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801 (814) 371-7768

Dated: 10-2-06

FILED 3cc Atty Guido
0/8:30cm
OCT 03 2006
William A. Shaw
Prothonotary/Clerk of Courts

#28

03/19/2007 14:59 8143716902 HANAK GUIDO TALADAY PAGE 02

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

TO THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT

MOTION TO DISMISS
NOTICE OF APPEAL FILED BY APPELLANT, DUBOIS DUTCH, LLC, FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS

AND NOW, comes the Intervening Appellee, John A. Guido, by his attorneys, Hanak, Guido & Taladay, files this motion to dismiss appeal filed by Appellant, DuBois Dutch, LLC, in the above entitled case as follows:

I. DUBOIS DUTCH'S APPLICATION FOR SUBDIVISION APPROVAL, REQUEST FOR MODIFICATION

A. Appellant, DuBois Dutch, LLC, (DuBois Dutch) filed with Sandy Township an application for subdivision approval and accompanying request for

modification seeking approval of a minor subdivision being a two-lot subdivision wherein one of the two lots does not comply with the minimum size requirements of the Sandy Township Subdivision Ordinance in the subject district.

B. DuBois Dutch filed a request for modification seeking to modify the size requirements of 45,000 square feet for any lot in the subject district as mandated by the current Sandy Township Zoning Ordinance to approximately 32,910 square feet, the size of one of the lots in the two-lot subdivision.

C. In essence, the request for modification seeks the modification of the size requirements mandated by the Sandy Township Zoning Ordinance to conform to the size of the two lots as set forth in the lease option agreement dated June 16, 1982.

D. Sandy Township's request for modification is governed by Section 1004 of the Sandy Township Zoning Ordinance, a copy of which is attached hereto and marked Exhibit "A". The key words in said section are "undue hardship" and "peculiar conditions" pertaining to the land in question.

E. Section 1004 is supplemented by Section 2 of Article III of the main 1997 Sandy Township Zoning Subdivision Ordinance, No. 1997-3, which specifically defines hardship as follows:

> " Hardship: Physical circumstances or conditions of the land to be subdivided which prevent strict conformity with the provisions of this ordinance and that the authorization of a

03/19/2007 14:59 8143716902 HANAK GUIDO TALADAY PAGE 04

modification may be necessary to enable the reasonable use of the property."

F. In its notice of appeal filed in this case, DuBois Dutch, does not cite a single physical circumstance or conditions of the land to be subdivided which prevents strict conformity with the provisions of the Ordinance nor does it set forth a single fact of how the approval of a modification may be necessary to enable the reasonable use of the property.

G. Sub-section A of 11003 of the Municipalities Planning Code (MPC), titled "Appeals to Court", provides in part as follows:

"A. Land use appeals shall be entered as of course by the Prothonotary or Clerk upon the filing of land use notice which concisely sets forth the grounds on which the appellant relies."

H. The case law of Pennsylvania, in particular, *Kreitz v. Zoning Board of Adjustment*, 4 Pa.Cmwlth Court 602, 287 A.2d 884 (1972) consistently provided that a dismissal of a zoning appeal is proper where the notice of appeal fails to specify the grounds for the appeal.

I. The Court in the case *Perin v. Board of Supervisors*, 563 A.2d 576 (Pa. Cmwlth 1989) held that the grounds for action means the basis of a suit the foundation or fundamental state of facts on which the action rests or an allegation of fact or facts that form the basis for the claim..

J. In its notice of appeal, DuBois Dutch, fails to set forth a single fact which would support the definition of undue hardship as set forth in the Sandy Township Subdivision Ordinance as above quoted, that is, physical

circumstances or conditions of the land to be subdivided which prevents strict conformity with the provisions of the ordinance or facts which would support that the authorization of modification is necessary to enable the reasonable use of the property.

K. The only physical factors cited in DuBois Dutch's notice of appeal are that the undue hardship or physical circumstances are the fact that the property has been physically divided between the parties when the lease-option was granted. Such a factor does not comply with the definition of hardship as set forth in the Sandy Township Subdivision Ordinance.

L. The only allegations which DuBois Dutch sets forth in its appeal as to undue hardship or physical circumstance which prevents strict conformity with the provisions of the ordinance set forth in paragraph 41 wherein DuBois Dutch alleges the following:

> "That the Board of Supervisors erred and abused its discretion in finding that Appellant had not fulfilled the requirements for the granting of a request for modification when
>
> (a) the physical circumstances of the land in question prevents strict conformity with the provisions of the ordinance because the property has already been divided in fact by the parties and such division-in-fact has long been recognized by Sandy Township;
>
> (b) undue hardship will be exacted upon Appellant because John A. Guido will refuse to perform his contractual responsibilities and avoid his obligations and be rewarded for actively opposing a subdivision when such subdivision is possible under the rules of the Municipalities Planning Code and the ordinances of Sandy Township."

03/19/2007 14:59 8143/15902 HANAK GUIDO TALADAY PAGE 06

Such allegations do not fall under the definition of undue hardship and physical circumstances as mandated by the Sandy Township Subdivision Ordinance, or constitute the grounds for the grant of a modification.

M. Approval of the subdivision request application of DuBois Dutch and the accompanying request for modification will have the effect of amending the terms and conditions mandated by Section 1004 of the Sandy Township Subdivision Ordinance and the definition of hardship as set forth in that ordinance.

N. In the case *L.H.T.L.C. v. Township of Hampton*, 809 A.2d 1072, the Commonwealth Court held that subdivision rulings which would effectively amend applicable zoning ordinances would be equivalent to letting the municipality hold in reserve unpublished requirements capable of general application for occasional use which is improper.

WHEREFORE, for the above stated reasons, the subdivision application of DuBois Dutch and the accompanying request for modification must be dismissed.

II. SUBDIVISION PLAN OF INTERVENING APPELLEE, JOHN A. GUIDO

A. John A. Guido has obtained approval of a subdivision plan which divides the subject parcel of land into two parcels, both of which comply with the mandates of the current Sandy Township Zoning and Subdivision Ordinances.

B. In its appeal, DuBois Dutch, does not point to a single instance of where either lot or the plan itself does not comply with all of the mandates of the Sandy Township Zoning and Subdivision Ordinances.

C. The appellant courts have consistently held that application for subdivision plans which conform to all technical requirements of relevant ordinances must be approved. See *Goodman v. Board of Commissions of Township of South Whitehall,* 411 A.2d 838, 49 Pa.Cmwlth 35.

D. It would be an error of law for a governing body to reject a subdivision plan in absence of finding that the plan violates any applicable statute or ordinance. *Schuffler v. Plymouth Township*, 379 A.2d 1060, 32 Pa. Cmwlth 394.

E. Consequently, DuBois Dutch failed to allege that the subdivision violates any terms or conditions of the Sandy Township Subdivision and Zoning Ordinances. Consequently, the Sandy Township Supervisors had no alternative except to approve that plan.

WHEREFORE, Intervening Appellee, John A. Guido, respectfully requests that DuBois Dutch's appeal on the referenced subdivision plan of Intervening Appellee, John A. Guido, must be dismissed.

III. RES JUDICATA

A. The appeal of DuBois Dutch from the rejection of its subdivision plan and request for modification must be dismissed on the additional basis of the principles of res judicata. All of the arguments which DuBois Dutch raised in its request for modification and its notice of appeal filed in this case and the decision of the Supervisors on said subdivision application and the request for modification have been argued and ruled upon by the Commonwealth and Supreme Courts.

B. Under the doctrine of res judicata, a valid and final determination of a Court of competent jurisdiction settles not only issues that were raised and determined but also those that might have been raised. Res judicata extends to every question in the proceedings that is legally cognizable including every fact that might properly be considered in reaching a judicial termination of the controversy in respect to all points of law adjudged. See Pennsylvania Practice, Section 65.96.

C. In these proceedings, DuBois Dutch has merely relabeled its argument from issues pertaining to conforming law to a request for modification. However, the arguments of law in support of the request for modification have been argued by DuBois Dutch with regard to the issues related to the nonconforming lot in its appeal to the Supreme Court on the prior case.

D. In addition, in the original subdivision proceedings filed in this case, DuBois Dutch could have raised the issue of modification and could have requested the Court to approve the subdivision in the alternative, either as a nonconforming lot or on the basis for request for modification.

WHEREFORE, in addition to the reasons above set forth, the appeal of DuBois Dutch must be dismissed on the additional basis of res judicata.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esquire
Attorney for John A. Guido

PART 10

ADMINISTRATION

§22-1001. Grant of Power.

The Board of Sandy Township Supervisors hereby designates the Sandy Township Planning Commission to act and have full authority in the administration of this Chapter and any subsequent amendments thereto.

(Ord. 1997-3, 5/2/1997, §1001)

§22-1002. Appeals.

Any person, firm, or corporation which deems itself aggrieved by any decision of the Board of Township Supervisors may appeal the decision to the Clearfield County Court of Common Pleas.

(Ord. 1997-3, 5/2/1997, §1002)

§22-1003. Application Fees.

The Board of Sandy Township Supervisors may establish and/or amend by resolution a schedule of review fees which shall be charged to the developer. Fees shall be payable to the "Township of Sandy" when the preliminary and final subdivision applications are submitted. The application shall not be considered as complete until such time as the fees have been paid in full. Review fees may include reasonable and necessary charges by the Township's Professional Engineer or consultant for review and report thereon to the Township.

(Ord. 1997-3, 5/2/1997, §1003)

§22-1004. Modifications.

1. The Board of Township Supervisors may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of this Chapter is observed.

2. All requests for a modification shall be in writing and shall accompany and be a part of the application for subdivision approval. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based,

EXHIBIT A

03/19/2007 14:59 8143716902 HANAK GUIDO TALADAY PAGE 11

the provision or provisions of the Ordinance involved and the minimum modification necessary.

3. The Township Supervisors shall keep a written record of all action on all requests for modification.

(Ord. 1997-3, 5/2/1997, §1004)

§22-1005. Revision and Amendment.

The Board of Sandy Township Supervisors may revise, modify, and amend this Chapter by appropriate action taken at a scheduled public meeting, all in accordance with the applicable provisions of the Pennsylvania Municipalities Planning code, Act 247, as amended.

(Ord. 1997-3, 5/2/1997, §1005)

§22-1006. Subdivision Records.

The Township shall keep a written record of its findings, decisions, and recommendations related to all subdivision plans filed with it for review and approval. All records of the Township Supervisors shall be public records.

(Ord. 1997-3, 5/2/1997, §1006)

§22-1007. Conflict With Other Regulations/Repeal of Prior Ordinance.

1. The existing Sandy Township Land Subdivision Regulations, Ordinance of September 27,1965, is hereby repealed. Said repeal to become effective the day prior to the effective date of this Chapter.

2. Wherever there is a difference between minimum standards or dimensions specified in these regulations and those contained in any other official regulations of Sandy Township the more restrictive standard shall apply.

(Ord. 1997-3, 5/2/1997, §1007)

§22-1008. Liability.

The approval of a subdivision plan, or of any improvement, shall not constitute a representation, guarantee, or warranty of any kind or nature by Sandy Township, its Planning Commission, or any official, employee, or appointee thereof, of the safety of any land, improvement, property or use from any cause whatsoever, and shall create no li-

03/19/2007 14:59 8143716902 HANAK GUIDO TALADAY PAGE 12

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

ORDER

AND NOW, this _____ day of _____, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss notice of appeal filed by Appellant, DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors IT IS HEREBY ORDERED AND DECREED that argument is scheduled for the ____ day of _____, 2006, at _____ o'clock ___.m. Courtroom No. 1, of Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT,

_____

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC.	*	
Appellant	*	
vs.	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS,	*	
Appellee	*	
vs.	*	
JOHN A GUIDO,	*	
Intervening Appellee	*	

ORDER

NOW, this 16th day of August, 2006, it is the ORDER of this Court that an evidentiary hearing be and is hereby scheduled in the above-captioned case on **October 3 and 4, 2006,** beginning at 9:00 a.m. each day in Courtroom No. 1 of the Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT,

Fredric J. Ammerman
President Judge

FILED 1cc Attys:
01:01:50
AUG 17 2006
William A. Shaw
Prothonotary/Clerk of Courts

T. Cherry
G. Kruk
A. Guido
(GK)

#27

DATE: 8/17/06

____ You are responsible for serving all appropriate parties.

__X__ The Prothonotary's office has provided service to the following parties:

____ Plaintiff(s) __X__ Plaintiff(s) Attorney ____ Other

____ Defendant(s) __X__ Defendant(s) Attorney

____ Special Instructions:

FILED
AUG 17 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	*	
vs	*	NO. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	*	
vs	*	
JOHN A. GUIDO, Intervening Appellee	*	

ORDER

NOW this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the ORDER of the Court that said Petition be and is hereby DISMISSED.

BY THE COURT,

Fredric J Ammerman

FREDRIC J. AMMERMAN
President Judge

FILED 1CC Attys: T. Cherry G. Kruk A. Guido
01:20 PM
JUL 14 2006

William A. Shaw
Prothonotary/Clerk of Courts

DATE: 7/14/06

____ You are responsible for serving all appropriate parties.

FILED

JUL 14 2006

William A. Shaw
Prothonotary/Clerk of Courts

X The Prothonotay's office has provided service to the following parties:

____ Plaintiff(s) X Plaintiff(s) Attorney ____ Other

____ Defendant(s) X Defendant(s) Attorney

____ Special Instructions;

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	PETITION
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 6-30-06

FILED 2cc Atty
m 19:01 GK
JUL 03 2006

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

PETITION TO RECONSIDER ORDER
OR, IN THE ALTERNATIVE, TO AMEND ORDER

AND NOW, come Intervening Appellee, John A. Guido (Guido) and by his attorney, Anthony S. Guido, files this Petition to reconsider Order of this Court or, in the alternative, to amend said Order on the following basis:

1. Your Honorable Court entered an Order dated June 21, 2006, denying Guido's Petition to Dismiss the Appeal which DuBois Dutch, LLC, filed in this case due to the fact that this Court lacked subject matter jurisdiction.

2. By Order dated June 21, 2006, your Honorable Court dismissed that Petition and determined that the Court does have subject matter jurisdiction relying upon the cases of *Blue Mountain Preservation Ass'n v. Eldred*, 867 A.2d 692; *Morris v. South Coventry Township Board of Supervisors*, 836 A.2d 1015; and *Soliday v. Haycock Township*, 785 A.2d 139.

3. None of those cases involved a request for modification of a dimensional variance mandated by a zoning ordinance which dimensional variances were incorporated in the subdivision ordinance by reference.

4. Previously, we cited the case of *Stoltz v. Zoning Hearing Board of Borough of Lewisburg*, 130 Pa.Commonwealth Ct. 458, 568 A.2d 746, in support of our motion to dismiss for lack of subject matter jurisdiction. DuBois Dutch argued that the Stoltz case was not authority because it arose prior to the re-enactment and amendment of the MPC in 1988.

5. However, the case of Appeal of Fiori, 635 A.2d 743, involved a land development plan which was submitted to the governing on April 6, 1990, which is after the amendment and re-enactment of the MPC in 1988.

6. Prior therefore, the zoning hearing board had granted certain dimensional variances.

7. The Commonwealth Court, in the *Fiori* case, the Court cited, with approval, and adopted the holding in the *Stoltz* case as follows:

> "We held that a borough council's approval of a landowner's subdivision plan did not bar the borough's zoning hearing board from denying an area variance. Relying upon the principle that the granting of variances is an exclusive function of the zoning hearing board, we concluded that despite the fact that the borough's subdivision ordinance incorporated by reference the lot requirements of the zoning ordinance, the borough's council was not thereby empowered to grant a variance in the context of a subdivision application."

8. Therefore, it is clear that despite the fact that the subdivision ordinance incorporates the mandates of a zoning ordinance, variances from the zoning

requirements can only be granted by the zoning hearing board and not the governing body, in this case Sandy Township.

9. There is a very good reason for this in that granting of dimensional variances, whether setbacks or area variances, may impact upon neighboring properties in various ways. When application is made to the zoning hearing board for a variance, the board is required to publish notice of the filing of the application and of the date and time of the hearing on the petition, which hearing an interested neighbor may attend and oppose the application.

10. On the contrary, an application for subdivision approval or a modification of the requirements of the subdivision ordinance, no public notice is required. Therefore, a waiver or modification may be granted by the governing board in the context of a subdivision application without the neighboring properties having any knowledge of the grant of approval until it is too late.

11. Further, the zoning hearing board, as constituted by law, is better able to resolve variance issues than the governing body.

12. In addition, we cite for the Court's consideration, the opinion of the Commonwealth Court in the case of *Peden v. Gambone Brothers Development Company*, 798 A.2d 305, a copy of which opinion is attached. As will be noted in that case, the borough council approved a subdivision plan which included a buffer fence rather landscape buffering as required by the zoning ordinance. Despite that, the Court held that neighbors should enjoin the continued violation of the zoning ordinance due to the fact that no variance from the screening buffer provisions was applied for or granted by the proper authority (the zoning

hearing board).

13. In my opinion, the *Penden*'s case is authority for the fact that a governing body cannot approve plans which are in violation of the applicable zoning regulation absent approval of a variance from the zoning requirements by the zoning hearing board.

Wherefore, Guido hereby respectfully requests that your Honorable Court reconsider its Order determining that it has subject matter jurisdiction of the issue involved in this appeal insofar as modification issues involved in this case are concerned.

14. In the alternative, Guido hereby respectfully requests that, pursuant to Section b of Chapter 7 titled Jurisdiction of Appellate Court's, that this Honorable Court amend its Order of June 21, 2006 and provide that the Order involves a controlling question of law as to which there is substantial ground for difference of opinion that an immediate appeal from the Order may materially advance the ultimate determination of the matter.

15. Such a statement will permit any party to file with the Commonwealth Court an application for permission to appeal to resolve this issue before time, effort, and expense are expended in hearing and briefing the issues involved in this case.

16. It would a total judicial waste of time to litigate this case before this Court and then possibly have the case dismissed due to lack of subject matter jurisdiction by an appellate court.

WHEREFORE, accordingly, Guido hereby respectfully requests that your Honorable Court amend its Order to include the above stated provision so that a request for permission to appeal may be filed.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esquire
Attorney for John A. Guido

West Reporter Image (PDF)

798 A.2d 305

Briefs and Other Related Documents

Commonwealth Court of Pennsylvania.
William and Evelyn PEDEN,
v.
GAMBONE BROTHERS DEVELOPMENT COMPANY and College Woods Inc. and Borough of Trappe.
Appeal of Gambone Brothers Development Company and Borough of Trappe.
Argued March 13, 2002.
Decided May 13, 2002.

Homeowners sought preliminary injunction preventing developer from constructing eight-foot fence in place of the vegetative screen which was required by local zoning ordinances. The Court of Common Pleas, Montgomery County, No. 98-07818, Salus, II, J., granted the preliminary injunction. Developer appealed. The Commonwealth Court affirmed. Thereafter, following bench trial, the Court of Common Pleas ordered the developer to plant the particular vegetative screen proposed by the homeowners' landscape expert. Developer sought post-trial relief from the decree. The Court of Common Pleas denied the motion. Developer appealed. The Commonwealth Court, No. 1253 CD 2001, Simpson, J., held that: (1) the law of the case precluded reconsideration of whether the developer's fence was satisfactory; (2) the developer was precluded from asserting laches in its defense; (3) the trial court acted within its discretion in receiving the testimony of the landscape expert; and (4) the trial court acted within its discretion in selecting the remedy proposed by the expert.
Affirmed.
Leadbetter, J., concurred in part, concurred in the result only in part.

West Headnotes

[1] KeyCite Notes

⇦30 Appeal and Error
⇦30XVI Review
⇦30XVI(M) Subsequent Appeals
⇦30k1097 Former Decision as Law of the Case in General
⇦30k1097(1) k. In General. Most Cited Cases

⇦30 Appeal and Error KeyCite Notes
⇦30XVII Determination and Disposition of Cause
⇦30XVII(F) Mandate and Proceedings in Lower Court
⇦30k1193 Effect in Lower Court of Decision of Appellate Court
⇦30k1195 As Law of the Case
⇦30k1195(1) k. In General. Most Cited Cases

⇦106 Courts KeyCite Notes
⇦106II Establishment, Organization, and Procedure
⇦106II(G) Rules of Decision
⇦106k99 Previous Decisions in Same Case as Law of the Case
⇦106k99(1) k. In General. Most Cited Cases

106 Courts KeyCite Notes
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(7) k. Different Courts or Judges, Rulings By. Most Cited Cases

The "law of the case" doctrine discourages the court that is involved in later phases of litigation from reopening questions decided by another judge of the same court or by another higher court in an earlier phase of the litigation; the doctrine promotes judicial economy and uniformity of decision making, protects the settled expectations of the parties, maintains the consistency of the litigation, and is designed to end the case.

[2] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1097 Former Decision as Law of the Case in General
30k1097(1) k. In General. Most Cited Cases

The "law of the case" doctrine provides, in part, that when an appellate court considers successive appeals with respect to any one case, that court may not alter the resolution of legal questions which it has previously decided.

[3] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1097 Former Decision as Law of the Case in General
30k1097(1) k. In General. Most Cited Cases

30 Appeal and Error KeyCite Notes
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1193 Effect in Lower Court of Decision of Appellate Court
30k1195 As Law of the Case
30k1195(1) k. In General. Most Cited Cases

106 Courts KeyCite Notes
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(7) k. Different Courts or Judges, Rulings By. Most Cited Cases

The law of the case doctrine, which discourages the court that is involved in later phases of litigation from reopening questions decided by another judge of the same court or by another higher court in an earlier phase of the litigation, does not apply where: (1) there has been an intervening change in the controlling law; (2) there has been some substantial change in the evidence or facts giving rise to

the litigation; or (3) the prior ruling was clearly erroneous and would result in manifest injustice if followed.

[4] KeyCite Notes

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k99 Previous Decisions in Same Case as Law of the Case
106k99(7) k. Different Courts or Judges, Rulings By. Most Cited Cases

Commonwealth Court was precluded, by the law of the case, from reconsidering in the context of an ordinance enforcement action whether eight-foot fence which townhouse developer was planning to substitute for the type of vegetative screen that was specifically contemplated by the local ordinance that dealt with such matters was nevertheless in conformity with the ordinance; another panel of the Commonwealth Court had already determined that the fence did not satisfy the requirements of the ordinance, which spoke only of natural vegetative screens. 53 P.S. § 10617.

[5] KeyCite Notes

414 Zoning and Planning
414XI Enforcement of Regulations
414XI(B) Injunction Against Violation
414k782 k. Time to Sue, Limitations and Laches. Most Cited Cases

Homeowners' ordinance enforcement action against townhouse developer which had chosen to substitute eight-foot fence for the type of vegetative screen that was specifically contemplated by the applicable zoning ordinance was not untimely commenced, notwithstanding that the homeowners had waited longer than thirty days to file their enforcement action after learning of the landscaping plan; the enforcement action was an action in equity, not an appeal from an action taken by the municipal zoning board, and thus the thirty-day limitations period which would otherwise restrict the filing of an appeal from zoning board determinations was inapplicable. 53 P.S. §§ 10617, 10914.1(b).

[6] KeyCite Notes

150 Equity
150II Laches and Stale Demands
150k67 k. Nature and Elements in General. Most Cited Cases

"Laches" is an equitable doctrine that bars relief when, to the prejudice of another, the complaining party is guilty of want of due diligence in failing to promptly institute an action.

[7] KeyCite Notes

150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar
150k72 Prejudice from Delay in General
150k72(1) k. In General. Most Cited Cases

The party asserting the defense of laches must present evidence demonstrating prejudice from the

lapse of time that he or she claims has resulted from the opposing party's failure, due to want of diligence, to promptly institute an action.

[8] KeyCite Notes

414 Zoning and Planning
414XI Enforcement of Regulations
414XI(A) In General
414k762 k. Defenses to Enforcement. Most Cited Cases

Party asserting estoppel with respect to the enforcement of zoning regulations must show failure to enforce the law over an extended period of time or some form of active acquiescence in the illegal use of the property in question, innocent reliance on the part of the property owner, as evidenced by substantial expenditures, and that the property owner acted in good faith throughout the proceedings.

[9] KeyCite Notes

414 Zoning and Planning
414XI Enforcement of Regulations
414XI(A) In General
414k762 k. Defenses to Enforcement. Most Cited Cases

414 Zoning and Planning KeyCite Notes
414XI Enforcement of Regulations
414XI(B) Injunction Against Violation
414k782 k. Time to Sue, Limitations and Laches. Most Cited Cases

Townhouse developer against which homeowners had brought zoning ordinance enforcement action failed to present any evidence that it had suffered prejudice due to the homeowners' alleged excessive delay in filing the action, and thus the developer was precluded from asserting the affirmative defenses of laches and estoppel. 53 P.S. § 10617.

[10] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k971 Examination of Witnesses
30k971(2) k. Competency of Witness. Most Cited Cases

157 Evidence KeyCite Notes
157XII Opinion Evidence
157XII(C) Competency of Experts
157k546 k. Determination of Question of Competency. Most Cited Cases

The admission of testimony from an expert witness is within the sound discretion of the trial court; an appellate court may only reverse the trial court as to the admissibility of expert testimony when it can be shown that the trial court clearly abused its discretion or committed an error of law.

[11] KeyCite Notes

⇦30 Appeal and Error
⇦30XVI Review
⇦30XVI(J) Harmless Error
⇦30XVI(J)10 Admission of Evidence
⇦30k1050 Prejudicial Effect in General
⇦30k1050.1 Evidence in General
⇦30k1050.1(1) k. In General. Most Cited Cases

⇦30 Appeal and Error KeyCite Notes
⇦30XVI Review
⇦30XVI(J) Harmless Error
⇦30XVI(J)11 Exclusion of Evidence
⇦30k1056 Prejudicial Effect
⇦30k1056.1 In General
⇦30k1056.1(1) k. In General. Most Cited Cases

To constitute reversible error, an evidentiary ruling must not only be erroneous, but also prejudicial to the complaining party.

[12] KeyCite Notes

⇦307A Pretrial Procedure
⇦307AII Depositions and Discovery
⇦307AII(A) Discovery in General
⇦307Ak44 Failure to Disclose; Sanctions
⇦307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases

Trial court acted within its discretion, in zoning ordinance enforcement action brought against townhouse developer planning to substitute an eight-foot fences for the type of vegetative screen that was required, in receiving the testimony of an expert witness who had been called into court to testify against the developer on the subject of landscape architecture; the identity of the witness had been disclosed to the developer weeks in advance of trial. 53 P.S. § 10617.

[13] KeyCite Notes

⇦414 Zoning and Planning
⇦414XI Enforcement of Regulations
⇦414XI(B) Injunction Against Violation
⇦414k790 k. Trial, Judgment, and Relief. Most Cited Cases

Trial court acted within its discretion in selecting the more expensive of the proposed remedies, which would cost approximately 35% more than the other, in zoning ordinance enforcement action brought by homeowners against townhouse developer planning to substitute an eight-foot fence for the type of natural vegetative screen that was required by ordinance for new constructions projects; the less expensive remedy would have yielded merely an incomplete visual buffer between the homeowners and the new townhouses. 53 P.S. § 10617.

[14] KeyCite Notes

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(D) Motions for New Trial
30k281 Necessity in General
30k281(1) k. In General. Most Cited Cases

Developer against which homeowners had brought zoning ordinance enforcement action failed to preserve for appeal its claim that the trial court erred in requiring the developer to perpetually maintain the visual barrier which it had been ordered to construct in connection with its plan to build new townhouses on the property adjacent to that of the homeowners; developer failed to raise issue in its post-trial motions filed with the trial court. 53 P.S. § 10617.

***308** Arthur L. Jenkins, Jr., Norristown, for appellants.
Gilbert P. High, Jr., Norristown, for appellees, W. Peden and E. Peden.
Lawrence Sager, Pottstown, for appellee, Borough of Trappe.

Before LEADBETTER, Judge, SIMPSON, Judge, and MIRARCHI, Jr., Senior Judge.

OPINION BY Judge SIMPSON.
Gambone Brothers Development Co. (Gambone Brothers) and College Woods, Inc. (College Woods) (collectively Gambone) appeal the order of the Court of Common Pleas of Montgomery County (trial court) denying their motion for post-trial relief from a zoning ordinance enforcement decree. We affirm.
In 1995, Gambone received final approval from Trappe Borough for a townhouse subdivision and development known as "Town Homes at College Woods." The development is adjacent to the Pedens' single-family home. Section 606F of Trappe Borough Zoning Ordinance (Ordinance) requires screening buffers along all exterior property lines between dwelling units of different size and density. The buffers are to consist of, generally, a 25-foot wide "natural" screen consisting of trees and shrubs. The approved development, however, did not provide for a 25-foot wide natural screen. Instead, it provided for a wooden fence six feet in height. The windows of the townhouses erected along the Pedens' property line look over the fence into the Pedens' property and into portions of their house.
Concerned about privacy, the Pedens attempted to negotiate a solution through meetings with the Montgomery County Planning Commission and Gambone. After negotiations failed, the Pedens filed an equity action in the Court of Common Pleas for Montgomery County (trial court). Thereafter, the Pedens filed a motion for a preliminary injunction. Following a hearing, the trial court determined that Gambone was in violation of the Ordinance for failing to construct an appropriate screening buffer. The trial court granted the Peden's motion for a preliminary injunction. The trial court, however, delayed execution of the injunction to permit Gambone to develop a "satisfactory landscape plan" within 180 days. Following an appeal, this Court affirmed, but remanded the case for imposition of an appropriate bond with the grant of the preliminary injunction.
Thereafter, the trial court held a bench trial, during which Mr. Peden testified. He sent a letter to the solicitor for Trappe Borough in 1992 detailing his concerns about the proposed project. As early as 1995, he saw proposed development plans which did not contain a 25 foot vegetative buffer. In 1997, when excavation and construction ***309** began, Mr. Peden sent another letter to the Borough Council detailing his issues over invasion of privacy issues and damage to trees on his property. On the advice of the solicitor for the Borough, Mr. Peden retained independent counsel.
The Pedens also presented the testimony of David Clarke, the owner of a landscape contracting business in the area, whom they retained because Gambone failed to comply with the trial court's order requiring preparation of a plan with a buffer. When Mr. Clarke was called to testify, counsel for Gambone objected that neither curriculum vitae nor report had been received from the witness despite timely discovery requests. The Pedens' lawyer responded that Mr. Clarke's name and the

subject of his testimony was disclosed in writing about three months prior to trial. About two months before trial a plan showing a buffer and an estimate, both prepared by Mr. Clarke, were sent to Gambone's lawyer. Over objection, the court permitted Mr. Clarke to testify.
The trial court found in favor of the Pedens and rejected the argument that the fence constituted a free form screening buffer, noting:
[N]o variance from the screening buffer provisions was applied for or granted by the proper authority. It is also incredulous to think that Council in approving the plan with a fence was granting the fence as an alternative buffer by conditional use within the protections of the MPC. No conditional use for an alternative buffer has ever been sought or mentioned, heretofore. Nor is there evidence that an alternative buffer was applied for, permission given by Borough Council on request, and there is no evidence that Borough Council approved an alternative buffer. A buffer is not mentioned amongst all the various applications, minutes, resolutions, development plans, discussions and approvals both in Trappe Borough Council meetings and the Trappe Borough Planning Commission.
William Peden v. Gambone Bros. Dev. Co., No. 98-07818, filed November 6, 2000 (C.P.Montgomery).
The court ordered Gambone to install a buffer in compliance with Mr. Clarke's plan. The proposed cost of the landscaping was $135,000 and the cost of the plan's preparation was $3,000, yielding a total cost of $138,000.00. At present, Gambone appeals from the trial court's order denying Gambone's post trial motion, thus leaving intact the trial court's order that Gambone install a buffer zone pursuant to the Ordinance. In this appeal, Gambone raises three issues that are addressed below.

I.

First, Gambone contends that it is not in violation of the Ordinance [FN1] because ***310** Trappe Borough approved its development plan that expressly provided for a wooden fence in lieu of a natural buffer. In particular, Gambone argues that the Borough acted within its discretion to approve the fence as an alternative buffer pursuant to Ordinance section 606(F)(4). The Pedens counter that the "law of the case doctrine" bars us from considering this issue.

FN1. Section 606 F of the Ordinance provides as follows:

Buffer Requirements: Along all exterior property lines, screening buffers shall be provided in accordance with the following regulations, except when dwelling units in a proposed development shall abut dwellings of the same use and density····

1. The owner shall place and maintain a planting area 25 feet in width containing deciduous trees, evergreen trees, evergreen and/or deciduous shrubs, flowering trees and/or shrubs and ground cover of sufficient planted density to produce a total visual screening consistent with the topography, the existing vegetation and the use of adjacent land. Wherever possible the owner shall make every effort to retain existing natural screening, such as vegetation and topography. The purpose of this planting is to block objectionable views, enhance good views, provide seasonal color, add texture and aroma, ameliorate possible noise and generally enhance the limits of the property.

2. All evergreen trees to be installed shall not be less than five (5) feet in height at the time of planting and shall be of such species that expected height at maturity shall not be less than 15 feet. All evergreen shrubs to be installed shall not be less than eighteen (18) inches in height at the time of planting and shall be of such species that expected height at maturity shall not be less than 6 feet for screening shrubs.

3. All deciduous trees to be installed shall not be less than twelve (12) feet in height and two and one-half (2- 1/2) inch caliper at the time of planting. Deciduous trees shall be of such species that expected height at maturity shall not be less than 50 feet. Flowering trees shall have expected height of not less than 20 feet.

4. Applicants are encouraged to provide informal, free-form screening buffers when appropriate which need not be located entirely within the minimum required 25 foot width. Such alternative buffers shall be subject to approval by the Borough Council, upon

recommendations of the Borough Planning Commission, either or both of whom may seek the advise [sic] of a licensed landscape architect in the review of the alternative plan.

5. Planting plans prepared by a licensed landscape architect in Commonwealth of Pennsylvania shall be required for all screening buffers, which shall clearly show and list the locations, size, species, and number of plant material proposed to be used.

6. All plant material shall be guaranteed for two years. All plant material which dies within that time shall be replaced by the applicant at his cost.

[1] [2] The law of the case doctrine is a judicial rule that discourages a court involved in later phases of a litigated matter from reopening questions decided by another judge of the same court or a higher court in an earlier phase of the litigation. *Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326 (1995). The doctrine is designed to promote judicial economy, uniformity of decision making, protect the settled expectations of the parties, maintain the consistency of the litigation and end the case. *Id.* The law of the case doctrine provides in pertinent part that "upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court...." *PPG Industries v. Commonwealth, Board of Finance and Revenue,* 567 Pa. 580, 790 A.2d 261, 268 (2002) *quoting Commonwealth v. Yarris,* 557 Pa. 12, 731 A.2d 581, 586 (1999).

[3] The law of the case doctrine, however, does not apply where: (1) there has been an intervening change in the controlling law; (2) there has been a substantial change in the evidence or facts giving rise to the litigation; or (3) the prior ruling was clearly erroneous and would create a manifest injustice if followed. *Starr.*

[4] We previously held that the fence violates the ordinance. [FN2] ***311** *Gambone Bros. Dev. Co. v. William Peden,* 748 A.2d 237 (Pa.Cmwlth., No. 1531 CD 1999, filed February 15, 2000) (*Peden I*). This prior holding is the law of the case. The Borough's approval of the final development plan does not establish compliance with the ordinance, nor does it excuse Gambone from erecting an appropriate buffer. Because another panel of this Court already decided this question, we may not reconsider whether the fence complies with the Ordinance.[FN3]

FN2. In our prior decision in this case we held:

Appellants [Gambone] argue that their fence is simply an 'informal, free-form screening buffer' and thus satisfies the requirements of 606F(4). This argument is simply absurd. Section 606F quite clearly requires a natural screen; it speaks of nothing else. A fence is neither informal nor free form. Moreover, a licensed landscape architect would not be needed to devise a planting plan for a simple fence separating the properties. Reading 606F as a whole, it is inconceivable that a six or eight foot wooden fence erected below townhouses of several stories would be contemplated as an acceptable alternative to a twenty-five foot swath of trees and vegetation meant to screen views from on property to another.

FN3. Gambone also argues the trial court erred in determining that § 606(F)(4) of the Ordinance is invalid on the grounds that it lacks constitutional notice and procedural safeguards mandated by the MPC. The trial court did not render § 606(F)(4) of the Ordinance invalid. The court merely stated that to the extent that § 606(F)(4) was applied here, the necessary constitutional safeguards were not present. In addition, in *Peden I,* we held the fence could not satisfy § 606(F)(4)

II.

[5] Gambone also contends the Pedens' enforcement action should be barred as untimely, noting that the Pedens had access to the development plan as early as 1995 and delayed in bringing an action to enforce the Ordinance. In support of these assertions, Gambone relies on sections 909.1(b)(2) [FN4] and 1002-A [FN5] of the Pennsylvania Municipalities Planning Code (MPC).

> FN4. Act of July 31, 1968, P.L. 805, *as amended,* Section 909.1 added by Section 87 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10909.1(a)(5).
>
> FN5. Added by Section 101 of the Act of December 21, 1988, P.L. 1329, 53 P.S. 11002 A.

Gambone argues that the Pedens were required to appeal within thirty days after borough council approved the development plan. Relying on *Mars Area Residents for a Safe Community v. Zoning Hearing Board of Adams Township,* 108 Pa.Cmwlth. 505, 529 A.2d 1198 (1987), Gambone contends that the Pedens were required to file an appeal within 30 days. In *Mars Area,* the objectors sent a letter to the zoning officer requesting enforcement of a zoning ordinance prohibiting a microwave tower. The zoning officer denied objectors' request, and several months later objectors appealed to the board. On appeal, both the board and the trial court dismissed the appeal as untimely pursuant to section 915 of the MPC [FN6] and objectors appealed to this Court. We held that because objectors had actual notice for several months and failed to file an appeal within thirty days, their claim was untimely.

> FN6. Section 915 of the MPC was repealed by the Act of December 21, 1988, P.L. 1329. The time limitations on appeals to the zoning hearing board originally found in Section 915 of the MPC are now found in Section 914.1 of the MPC which was added to the MPC by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10914.1. Section 914.1 requires all appeals from board determinations to be filed within 30 days after notice of the determination is issued.

This case, however, is distinguishable. Here, the Pedens initiated their cause of action by filing a complaint in equity pursuant to section 617 of the MPC.[FN7] The ***312** action taken by the Pedens was not an appeal from an action or decision of a municipal body or official as was the action taken by residents in *Mars Area.* The Pedens, an aggrieved property owner, filed their direct action with the trial court to enforce the Ordinance. Further, as noted by the trial court, the failure of Borough officials to properly enforce their own ordinances should not run to the Pedens' detriment.

> FN7. Added by Section 61 of the Act of the December 21, 1988, P.L. 1329, 53 P.S. § 10617. That section, entitled, "causes of action," provides:
>
> In case any building, structure, landscaping or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws ··· any aggrieved owner or tenant of real property who shows that his property or person will be substantially affected by the alleged violation ··· may institute any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure, landscaping or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation····

The Pennsylvania Supreme Court's decision in *Frye v. City of Monongahela,* 526 Pa. 170, 584 A.2d 946 (1991) is instructive. In *Frye,* a landowner constructed a carrier pigeon loft in his backyard contrary to the permissible uses in the zoning ordinance. Thereafter, an adjacent landowner filed a complaint in equity to enforce the ordinance. Relying on Section 617 of the MPC, the Court determined that the adjacent landowner, "as an aggrieved neighbor, had an independent right to seek relief from a zoning violation next door and that right could be asserted in an equity action." *Id.* at 175, 584 A.2d at 948. Further, the *Frye* Court held that when, "deliberate violations of a zoning ordinance have the effect of wrongfully infringing on the property rights of a neighbor, that neighbor

is entitled to prompt vindication in a court of equity without regard to alternate administrative remedies that might be available. We have always so held and we continue to do so." *Id.* at 176, 584 A.2d at 948. Based on this authority, we conclude that the Pedens properly brought their action pursuant to Section 617 of the MPC to enforce the Ordinance.

[6] [7] Alternatively, Gambone contends that the affirmative defenses of estoppel and laches operate to bar the Pedens' claim. Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another. *Stilp v. Hafer,* 553 Pa. 128, 718 A.2d 290 (1998). Thus, in order to prevail on an assertion of laches, Gambone must establish a delay arising from the Pedens' failure to exercise due diligence and prejudice resulting from the delay. The party asserting laches as a defense must present evidence demonstrating prejudice from the lapse of time. *Commonwealth ex. rel. Baldwin v. Richard,* 561 Pa. 489, 751 A.2d 647 (2000).

[8] Further, a party asserting estoppel must show failure to enforce the law over a long period of time or some form of active acquiescence of illegal use, property owner's good faith throughout proceedings and property owner's innocent reliance evidenced by substantial expenditures. *Smith v. Zoning Hearing Board of Conewago Township,* 713 A.2d 1210 (Pa.Cmwlth.1998).

[9] Gambone claims that the Pedens failed to exercise due diligence, but fails to present any evidence to demonstrate that it was prejudiced by the delay, rendering this claim meritless. Moreover, in the context of equitable defenses, this Court has held that mere delay in the enforcement of a zoning ordinance does not create a vested right to use property in violation of zoning regulations. *Smith.*

III.

Gambone further contends the trial court erred by admitting the expert report and testimony of the Pedens' landscaping expert, David Clarke. We disagree.

[10] [11] [12] The admission of testimony from an expert witness is within the sound ***313** discretion of the trial court. As such, our standard of review is very narrow; we may only reverse upon a showing that the trial court clearly abused its discretion or committed an error of law. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also prejudicial to the complaining party. *Majczyk v. Oesch,* 789 A.2d 717 (Pa.Super.2001). Further, where an expert's identity is disclosed sufficiently before trial, that expert's testimony is admissible. *Christiansen v. Silfies,* 446 Pa.Super. 464, 667 A.2d 396 (1995) (disclosure of expert's identity six days prior to trial is sufficient to permit adverse party with notice and time to investigate the expert's credentials). Here, disclosure made weeks before trial provided sufficient notice, and no abuse of discretion occurred in receiving Mr. Clarke's testimony.

[13] Gambone also contends that it was an abuse of discretion for the trial court to select the more expensive of the two proposed remedies. In particular, the plan ordered by the trial court contains insufficient detail to justify the total cost quoted.

At trial, Mr. Clarke testified that the cost of implementing his proposed landscape plan would be $135,000.00. R.R. 214a. He testified that the retaining wall would cost $45,900.00. R.R. 214a. Delivery and installation of the shrubs would cost $48,460.00. R.R. 215a. Removal of the trees currently on the Pedens' property would cost $15,600.00. R.R. 215a. Finally, constructing the berm and mulching would cost $25,050.00. R.R. 215a. Mr. Clarke opined that this landscaping plan would comply with the Ordinance. R.R. 220a.

Another written estimate discussed at trial, but not admitted into evidence, contained a quote of $88,610.00. R.R. 321a. With regard to this estimate, Mr. Clarke testified that the estimate only contemplates planting trees along the Pedens' property line, whereas the more expensive estimate provides for plantings along both property lines. R.R. 217a. The Pedens requested that the trial court require plantings along both sides of the property line to create a complete visual buffer and the trial

court agreed. We conclude that the trial court did not abuse its discretion or commit an error of law by approving the plan that will cost approximately $135,000.00 to implement.[FN8]

FN8. We also note that after this Court affirmed the trial court's grant of the preliminary injunction and remanded the case for the posting of an appropriate bond, the parties agreed on a $3,000.00 bond for the landscape plan to be prepared. R.R. 278a. However, because Gambone never submitted a plan prior to trial, the Pedens took it upon themselves to bring a resolution to this matter by presenting the testimony of Mr. Clarke. R.R. 278a.

[14] Accordingly, we affirm the order of the trial court.[FN9]

FN9. As a final issue, Gambone asserts that the trial court erred by issuing an order, which required it to perpetually maintain the total visual buffer. However, Gambone failed to raise this issue in its post-trial motions filed with the trial court and, as a result, this issue is waived. *Taylor v. City of Philadelphia,* 692 A.2d 308 (Pa.Cmwlth.1997) (litigants must raise all allegations of error on post-trial motions or they will be deemed waived on appeal).

Judge LEADBETTER joins in Parts I and III and concurs in the result only as to Part II.

ORDER

AND NOW, this 13th day of May, 2002, the Order of the Court of Common Pleas of Montgomery County is affirmed.

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Peden v. Gambone Bros. Development Co.
798 A.2d 305

Briefs and Other Related Documents (Back to top)

- 2001 WL 34755332 (Appellate Brief) Brief of Borough of Trappe, Appellee (Dec. 26, 2001) Original Image of this Document (PDF)
- 2001 WL 34754736 (Appellate Brief) Brief of Appellees William and Evelyn Peden (Dec. 05, 2001) Original Image of this Document (PDF)
- 2001 WL 34754734 (Appellate Brief) Brief of Appellants (Jan. 01, 2001) Original Image of this Document (PDF)
- 2001 WL 34755329 (Appellate Brief) Reply Brief of Appellants (Jan. 01, 2001) Original Image of this Document (PDF)

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IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached Petition to Reconsider Order or, in the Alternative, to Amend Order filed in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 30th day of ~~July~~ June, 2006, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

TONI M. CHERRY, ESQ.
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Intevening Appellee

Date: 6-30-06

AA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, L.L.C., Appellant,	:	
	:	No. 05-1983-CD
v.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee,	:	
v.	:	
JOHN A. GUIDO, Intervening Appellee.	:	

FILED
03:06 BY
JUN 21 2006
William A. Shaw
Prothonotary/Clerk of Courts
1cc Atty's: T. Cherry
Kruk
Guido
1cc w/out Memo:
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OPINION

This matter comes before the Court pursuant to a Motion to Dismiss the Appeal of the Sandy Township Board of Supervisors' denial of the request of DuBois Dutch, LLC for modification and granting of subdivision approval. Intervening Appellee John A. Guido alleges the Court is without jurisdiction to hear the appeal and the matter should be remanded to the Sandy Township Zoning Hearing Board for further proceedings. Oral argument relative Guido's Motion to Dismiss was held on May 3, 2006.

Guido asserts the instant appeal is, in actuality, a denial of a request for a variance, and not a request for modification. If he is correct, this Court is without subject matter jurisdiction to address the matter on the merits. In support, he relies upon 53 P.S. 10909.1(a)(5), which provides:

> (a) The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudication of the following matters:
> (5) Applications for variances from the terms of the zoning ordinance and flood hazard ordinance or such provisions within a land use ordinance, pursuant to Section 910.2.

#24

Guido argues the zoning ordinance provisions that are referenced in the Sandy Township Subdivision and Land Use Ordinance are exclusively for the zoning hearing board to hear because departure from a minimum lot size of 45,000 square feet is necessarily a variance from the zoning ordinance.

DuBois Dutch urges the Court to adopt a different interpretation of the Legislature's intent when the Municipal Planning Code was amended and re-enacted in 1988. DuBois Dutch maintains the present matter is correctly an appeal of the Board of Supervisors' denial for modification of the township's land use ordinance requirements. This Court agrees with the interpretation advocated by DuBois Dutch.[1]

Case precedent allows for the Court of Common Pleas to hear appeals where a request for modification has been denied by the governing body.[2] Here, the land use ordinance provides authority for the Sandy Township Board of Supervisors to modify applicable standards if enforcement of the ordinance provisions will cause undue hardship. Section 1004, "Modifications" provides, in relevant part:

> The Board of Township Supervisors may grant a modification of the requirements of one (1) or more provisions if the literal enforcement will exact undue hardship because of the peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of this Ordinance is observed...

Section 611A of the land use ordinance references the Sandy Township Zoning Ordinance. The express reference to the zoning ordinance supports the Supervisors' authority to grant modification from both the zoning and land use ordinance requirements if the appropriate criteria

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[1] The Board of Supervisors of Sandy Township concurs with the position of DuBois Dutch.

[2] *See* Blue Mountain Preservation Ass'n v. Eldred, 867 A.2d 692 (Pa.Cmwlth. 2005); Morris v. South Coventry Township Board of Supervisors, 836 A.2d 1015 (Pa.Cmwlth. 2003); Soliday v. Haycock Township, 785 A.2d 139 (Pa.Cmwlth. 2001).

are met. There is no argument here that what DuBois Dutch sought was a modification, not a variance. Accordingly, the appeal filed on behalf of DuBois Dutch is appropriate. The supervisors acted in a procedurally correct manner with the modification request. This Court has subject matter jurisdiction to hear the appeal and to require the presentation of additional evidence.[3]

BY THE COURT,

June 21, 2006

FREDRIC J. AMMERMAN
President Judge

[3] *See* 53 P.S. § 11004-A, which provides the trial court discretion to determine the manner for receiving additional evidence.

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, L.L.C., Appellant,	:	
	:	No. 05-1983-CD
v.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee,	:	
v.	:	
JOHN A. GUIDO, Intervening Appellee.	:	

ORDER

NOW, this 21st day of June 2006, it is the Order of this Court that the Motion to Dismiss, filed by John A. Guido on April 20, 2006, be and is hereby DENIED.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

DATE: 6/21/06

____You are responsible for serving all appropriate parties.

__X__ The Prothonotay's office has provided service to the following parties:

____Plaintiff(s) __X__ Plaintiff(s) Attorney ____ Other

____Defendant(s) __X__ Defendant(s) Attorney

____Special Instructions:

FILED
JUN 21 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS

OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC	:	
-VS-	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS	:	No. 05-1983-CD
-VS-	:	
JOHN A. GUIDO	:	

N O T I C E

In accordance with the Rules of Appellate Procedure, Rule 1922(s), Notice is hereby given that if no objections are made to the text of the transcript within five (5) days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office.

DATE: May 30, 2006

Thomas D. Snyder

Thomas D. Snyder, RPR
Official Court Reporter

FILED NO CC
01:05:31
JUN 07 2006

William A. Shaw
Prothonotary/Clerk of Courts

#22

IN THE COURT OF COMMON PLEAS

OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC	:	
-vs-	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS	:	
-vs-	:	
JOHN A. GUIDO	:	

FILED
0/10:54/51
MAY 04 2006
William A. Shaw
Prothonotary/Clerk of Courts

2cc Attys: T. Cherry Kraft Guido

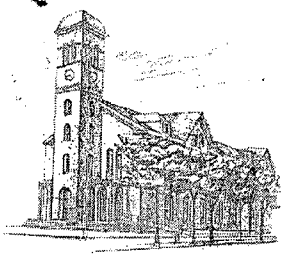
ORDER

NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, it is the ORDER of this Court that counsel for DuBois Dutch, LLC supply the Court with letter brief relative only the jurisdictional question that is contained within the Intervening Appellee's Motion to Dismiss Appeal. The letter brief shall be submitted to the Court within no more than twelve (12) days from this date. The Intervening Appellee, Sandy Township Board of Appeals, shall have no more than five (5) days following receipt thereof to respond in kind. The Court notes that brief from the Intervenor, John A. Guido, has previously been received.

BY THE COURT,

President Judge

#21



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
David S. Ammerman Solicitor
Jacki Kendrick Deputy Prothonotary
Bonnie Hudson Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw
Prothonotary

DATE: 5/4/06

_____You are responsible for serving all appropriate parties.

__X__The Prothonotary's office has provided service to the following parties:

__X__Plaintiff(s)/Attorney(s)

__X__Defendant(s)/Attorney(s)

_____Other

_____Special Instructions:

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	: No. 05 - 1983 C.D.
vs.	: Type of Case: LAND USE APPEAL
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	: Type of Pleading: APPELLANT'S ANSWER TO INTERVENING APPELLEE'S MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS
and	: Filed on Behalf of: DUBOIS DUTCH, LLC, Appellant
JOHN A. GUIDO, Intervening Appellee	: Counsel of Record for this Party:
	: TONI M. CHERRY, ESQ. : Supreme Court No.: 30205
	: GLEASON, CHERRY AND CHERRY, L.L.P. : Attorneys at Law : P. O. Box 505 : One North Franklin Street : DuBois, PA 15801
	: (814) 371-5800

FILED 3cc
019:28/61 Atty T. Cherry
MAY 03 2006
William A. Shaw
Prothonotary/Clerk of Courts

#20

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

APPELLANT'S ANSWER TO INTERVENING APPELLEE'S MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS

TO THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT:

AND NOW, comes the Appellant, DUBOIS DUTCH, LLC, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and answers Intervening Appellee's Motion to Dismiss Appeal from Decision of the Sandy Township Board of Supervisors as follows:

1. ADMITTED in part and DENIED in part. It is ADMITTED that Appellant, DuBois Dutch, LLC, filed a subdivision plan together with a request for modification under Section 1004 of the Sandy Township Subdivision Ordinance. All other aspects of Paragraph 1 are

DENIED. By way of further answer, it is averred that Appellant's request was for a modification of all aspects of the Sandy Township Zoning Ordinance with which the Guido lot was not in compliance including, but not limited to, the minimum lot size requirement of the Ordinance.

2. ADMITTED.

3. DENIED as a conclusion of law to which no response is required. Insofar as a response is required, it is DENIED that the Sandy Township Board of Supervisors would have no jurisdiction to decide the issue of whether the Board of Supervisors should grant a modification of the requirements of one or more provisions of its Ordinance. Likewise, it is DENIED that the Court of Common Pleas of Clearfield County would have no jurisdiction to determine the appeal from the decision of the Sandy Township Supervisors regarding Appellant's request for modification. By way of further answer, it is averred that Intervening Appellee's citation to a case that has no relevance to the issues at hand is misplaced.

By way of further answer, it is averred that the Sandy Township Board of Supervisors have jurisdiction to grant a request for modification by §512.1 of the Pennsylvania Municipalities Planning Code, enacted on December 21, 1988, to be effective 60 days thereafter and found at 53 P.S. §10512.1. §512.1 specifically confers upon the governing body the authority to grant modifications and sets forth therein the requirement that the request be made in writing. A true and correct copy of §512.1 is attached hereto and made a part hereof as Exhibit "A".

Sandy Township incorporated the provisions of §512.1 in Section 1004 of its Zoning Ordinance enacted in May of 1997. A true and correct copy of Section 1004 entitled "Modifications" is attached hereto and made a part hereof as Exhibit "B".

Intervening Appellee himself admits in Paragraph 1 of his Motion that the request made by Appellant was for a modification. A modification request can only be granted by the governing body. In this case, the governing body is the Board of Supervisors. The case cited by Intervening Appellee involved a request for a variance. Appellant concedes that a request for a variance would be brought before the Zoning Hearing Board. However, no request for a variance was made in this case. Consequently, the Zoning Hearing Board does not have jurisdiction to hear the matter that was decided by the Sandy Township Board of Supervisors.

The case cited by Intervening Appellee was decided by the lower court before the provision allowing requests for modifications was even enacted by the legislature. Consequently, the parties in that case could not have requested a modification of the governing body because no such right had been granted by the legislature by amendment to the Pennsylvania Municipalities Planning Code.

4. DENIED. DuBois Dutch never made a request for a variance. DuBois Dutch made a request for a modification under the specific provisions of §512.1 of the Pennsylvania Municipalities Planning Code and Section 1004 of the Sandy Township Zoning Ordinance. Intervening Appellee confuses the concept of a variance with a concept of a modification. A variance request is addressed by the Zoning Hearing Board. A modification request can only be addressed by the governing body of the municipality. The fact that in this instance one of

the requirements of the Ordinance that Appellant requested be modified happens to be the lot size requirement does not make this case a request for a variance. Appellant has asked the Board of Supervisors to modify the requirements of one or more provisions of its Ordinance. That modification was in writing as required by §512.1(b). The Sandy Township Board of Supervisors took jurisdiction over the request as required by §512.1(a) of the Pennsylvania Municipalities Planning Code. The governing body denied the request for modification and Appellant took a timely appeal from that decision. There is nothing in §512.1 of the Pennsylvania Municipalities Planning Code that gives any right to decide a request for modification to the Zoning Hearing Board and Intervening Appellee's assertion that this matter must be first heard and decided by the Sandy Township Zoning Hearing Board is outrageous as it has no basis in law.

WHEREFORE, Appellant respectfully requests that Intervening Appellee's Motion be dismissed.

Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

VE RIFICATION

I, TONI M. CHERRY, ESQ., counsel for Appellant, verify that the information provided in the foregoing Answer is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.

Toni M. Cherry

DATED: May 2, 2006

ties Planning Code. Krumins Roofing & Siding Co., Inc. v. Hidden Valley Development Corp., 31 Pa. D. & C.3d 151 (1983).

5. Statute of frauds

Statute of Frauds (33 P.S. § 1 et seq.) did not bar cause of action asserted by township against subdividers to recover costs incurred in paving segment of road which subdividers agreed to pave as precondition to township approval of subdivision plan. Hampden Tp., Cumberland County v. Tenny, 379 A.2d 635, 32 Pa. Cmwlth. 301, Cmwlth.1977.

§ 10512. Repealed. 1972, June 1, P.L. 333, No. 93, § 5

Historical and Statutory Notes

The repealed section was derived from Act 1968, July 31, P.L. 805, No. 247, § 512, and related to appeals to court from subdivision and land development decisions of the governing body or planning agency.

§ 10512.1. Modifications

(a) The governing body or the planning agency, if authorized to approve applications within the subdivision and land development ordinance, may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

(b) All requests for a modification shall be in writing and shall accompany and be a part of the application for development. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary.

(c) If approval power is reserved by the governing body, the request for modification may be referred to the planning agency for advisory comments.

(d) The governing body or the planning agency, as the case may be, shall keep a written record of all action on all requests for modifications.

1968, July 31, P.L. 805, No. 247, art. V, § 512.1, added 1988, Dec. 21, P.L. 1329, No. 170, § 40, effective in 60 days.

Notes of Decisions

1. In general

Upholding township's denial of preliminary subdivision plan application, trial court properly granted developers waivers from curbing and sidewalk requirements for proposed subdivision, where trial court found that installation of sidewalk and curbing along one of abutting roads would frustrate effect of improvements designed to implement stormwater control, that putting sidewalk

Exhibit "A"

ARTICLE 10
ADMINISTRATION

1001 - Grant of Power

The Board of Sandy Township Supervisors hereby designates the Sandy Township Planning Commission to act and have full authority in the administration of this Ordinance and any subsequent amendments thereto.

1002 - Appeals

Any person, firm, or corporation which deems itself aggrieved by any decision of the Board of Township Supervisors may appeal the decision to the Clearfield County Court of Common Pleas.

1003 - Application Fees

The Board of Sandy Township Supervisors may establish and/or amend by resolution a schedule of review fees which shall be charged to the developer. Fees shall be payable to the "Township of Sandy" when the Preliminary and Final subdivision applications are submitted. The application shall not be considered as complete until such time as the fees have been paid in full. Review fees may include reasonable and necessary charges by the Township's Professional Engineer or consultant for review and report thereon to the Township.

1004 - Modifications

The Board of Township Supervisors may grant a modification of the requirements of one (1) or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of this Ordinance is observed.

All requests for a modification shall be in writing and shall accompany and be a part of the application for subdivision approval. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the Ordinance involved and the minimum modification necessary.

The Township Supervisors shall keep a written record of all action on all requests for modification.

1005 - Revision and Amendment

The Board of Sandy Township Supervisors may revise, modify, and amend this Ordinance by appropriate action taken at a scheduled public meeting, all in accordance with the applicable provisions of the Pennsylvania Municipalities Planning code, Act 247, as amended.

Exhibit "B"

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2006, a true and correct copy of Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors was served upon the following persons by handing the same to them personally at the Clearfield County Courthouse this 3rd day of May, 2006:

GREGORY M. KRUK, ESQ.
Attorney for Appellee

ANTHONY S. GUIDO, ESQ.
Attorney for Intervening Appellee

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

Dated: May 3, 2006

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	Type of Case: LAND USE APPEAL
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	Type of Pleading: **ANSWER TO** **MOTION TO PRESENT** **ADDITIONAL EVIDENCE**
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801 (814) 371-7768

Dated: 4-26-06

FILED NO CC
m/11:09/BK
APR 27 2006
William A. Shaw
Prothonotary/Clerk of Courts

#A

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

ANSWER OF JOHN A. GUIDO TO MOTION OF DUBOIS DUTCH, LLC, TO PRESENT ADDITIONAL EVIDENCE

AND NOW, comes Anthony S. Guido, Esquire, attorney for the Intervening Appellee, John A. Guido, and files this Answer to the Motion filed by DuBois Dutch to present additional evidence in the above entitled case, as follows:

1. Admitted.

2. Admitted.

3. Denied as stated. Although it is admitted that the Sandy Township Supervisors refused to the grant the requested modification of the size requirements mandated by the Sandy Township Zoning Ordinance, the Township of Sandy had no legal authority to grant such a request due to the fact

that DuBois Dutch failed to provide evidence which would satisfy each criteria or element necessary for the Township to grant a modification, which are as follows:

> " a. the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land;
>
> b. the hardship must involve physical conditions or circumstances pertaining to land in question which prevents strict conformity with the ordinance;
>
> c. authorization of a modification is necessary to enable the reasonable use of the property;
>
> d. the requested modification is the minimum variance required to relieve the hardship;
>
> e. the modification will not be contrary to the public interest; and
>
> f. the purpose and intent of the ordinance will be observed."

In the case of *Larsen vs. Zoning Hearing Board of Adjustment of City of Pittsburgh*, 672 A.2d. 286, 543 PA 415, re-argument denied, held in A case involving a request for variance from the mandates of a zoning ordinance opined as follows:

> "The failure of the zoning board to consider each requirement of a zoning ordinance prior to granting a variance is error of law. . . Here, the zoning board failed to consider each of these requirements. Further, the record reveals that appellant failed to provide evidence that would satisfy even the first criteria."

In this case, DuBois Dutch did not provide any evidence before the Township of Sandy to satisfy any of the criteria let alone one of them. Nor will DuBois Dutch be able to satisfy each criteria required for a modification on an

appeal to this Court.

4. Denied as stated. Part of the property in question does not belong to DuBois Dutch as stated. DuBois Dutch owns an equitable interest in the property and nothing more.

5. Denied. There was testimony before the Board in that the attorney for DuBois Dutch called two witnesses: Gregory Ley and James Taylor.

6. Denied. In answer thereto, the answer to Paragraph No. 3 is incorporated herein by reference thereto as though fully set forth herein.

7. Denied. Under the law, DuBois Dutch, as well as any other applicant for a subdivision, must comply with the mandates of the subdivision ordinance and compliance with the mandates of a subdivision ordinance does not deprive any property owner of a protected right to own and use its property in a way that does not interfere with the health, safety or welfare of the community. A land use ordinance is not unconstitutional if it is necessary for the preservation of health, safety and general welfare of the community. See Holden vs. Kay, 601 A.2d. 453, (Pa .Cmwlth 1991).

8. Denied as stated. Under the MPC, a township board of supervisors, in denying an application for subdivision, must give notice to the applicant of the rejection and the reasons therefore, which duty Sandy Township properly discharged. There is no requirement for the Township in the rejection of a s subdivision to issue findings of facts and conclusions of law.

9. It is denied that no evidentiary hearing was held before Sandy Township Board of Supervisors. It is admitted that no sworn testimony was taken by the Board. However, DuBois Dutch did produce two witnesses, James Taylor and Gregory Ley, who testified at said hearing. Further, under the MPC, Sandy Township is not required to hold a formal hearing on the application for subdivision.

10. Admitted. However, whether the Court grants the Motion is subject to the discretion of the Court.

11. Denied. In answer thereto, the answer to Paragraph No. 5 is incorporated herein by reference thereto as though fully set forth herein.

12. Denied as stated. In answer thereto, the answer to Paragraph No. 8 is incorporated herein by reference thereto as though fully set forth herein.

13. Admitted. However, in that case DuBois Dutch was requesting subdivision approval based on the fact that the gas station or residue parcel was a non-conforming lot. Therefore, evidence had to be produced to the Court to determine whether that was the case or not. This case involves a failure of an applicant to meet the criteria necessary for the grant of a modification.

14. For the reasons above set forth, it is not necessary for the Court to hold a evidentiary hearing to determine the merits of the appeal of DuBois Dutch due to the fact that DuBois Dutch failed to provide evidence or meet the criteria necessary for granting of a modification nor will DuBois Dutch or any other party be able to produce such evidence under the factual circumstances of this

case to meet the criteria required in order to legally grant a modification or variance. Therefore, this Court should decide this case as a matter of law.

(a) The reproduced record in the case filed to No. 99-867-CD involves whether the subject gas station or residue parcel is a nonconforming lot. This case involves modification request pursuant to a subdivision application which is completely different and therefore that reproduced record is irrelevant.

(b) The land use ordinances such as zoning and subdivision ordinances are deemed to be a part of an appeal from a land use decision. The Court can take judicial notice of the provisions of any land use ordinance adopted by the municipality in question which, in this case, is Sandy Township.

(c) Each request for modification is different because there are different factors involved in each property as each property is unique. Therefore, other modification requests and decisions thereon would be irrelevant.

(d) Personal financial considerations or inconvenience are not proper evidence in a case involving a variance or modification under a land use ordinance.

(e) There is no evidence that DuBois Dutch or any party can provide to satisfy the criteria necessary for granting of a modification or a variance.

15. Denied. The allegations of Paragraph 15 are legal conclusions and therefore no response is required pursuant to the Pennsylvania Rules of Civil Procedure.

WHEREFORE, Intervening Appellee respectfully requests that your

Honorable Court dismiss the Motion to Present Additional Evidence filed by DuBois Dutch, LLC, and decide this case on the present record.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esquire
Attorney for John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Answer filed in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 26th day of April, 2006, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Anthony S. Guido
Attorney for John A. Guido,
Intevening Appellee

Date: 4-26-06

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading:
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	CERTIFICATE OF SERVICE
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801 (814) 371-7768

Dated: April 25, 2006

FILED NO CC
APR 26 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the ORDER OF COURT FOR ARGUMENT on Motion to dismiss appeal in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 25th day of April, 2006, in the United States Post Office, DuBois, Pennsylvania, and addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Anthony S. Guido
Attorney for John A. Guido,
Intevening Appellee

Dated: April 25, 2006

FILED
APR 26 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

FILED 2cc
01 10:21 BY Atty Guido
APR 20 2006
William A. Shaw
Prothonotary/Clerk of Courts

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Motion filed in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 13th day of April, 2006, in the United States Post Office, DuBois, Pennsylvania, addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Anthony S. Guido
Attorney for John A. Guido,
Intevening Appellee

Date: 4-13-06

#17

CA

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC,
Appellant

vs.

SANDY TOWNSHIP BOARD OF SUPERVISORS,
Appellee

vs.

JOHN A. GUIDO
Intervening Appellee

No. 05-1983-CD

Type of Case: LAND USE APPEAL

Type of Pleading: MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC. FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS

Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee

Counsel of Record for Intervening Appellee:

ANTHONY S. GUIDO, ESQ.
Supreme Court No. 05877
Hanak, Guido and Taladay
498 Jeffers Street
PO Box 487
DuBois, PA 15801

(814) 371-7768

Dated: 4-12-06

FILED 2cc
01/12/2006 Atty Guido
APR 20 2006
GR
William A. Shaw
Prothonotary/Clerk of Courts

#116

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

TO THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT

MOTION TO DISMISS
APPEAL OF APPELLANT, DUBOIS DUTCH, LLC, FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS REFUSING TO MODIFY THE SIZE REQUIREMENTS OF ONE OF THE LOTS OF A TWO-LOT SUBDIVISION

AND NOW, comes the Intervening Appellee, John A. Guido, by his attorney, Anthony S. Guido, Esquire, files this motion to dismiss appeal from decision of the Sandy Township Board of Supervisors filed by Appellant, DuBois Dutch, LLC, for the following reasons:

1. Appellant, DuBois Dutch, LLC, filed a subdivision plan together with a request for modification under Section 1004 of the Sandy Township Subdivision Ordinance requesting relief from the required minimum lot size of 45,000 square feet for one of the lots involved in the subject minor subdivision plan.

2. Pursuant to said request for modification, Appellant, DuBois Dutch, LLC, requested that the minimum lot size of 45,000 square feet be modified to 32,910 square feet for one of the two subject lots.

3. It has recently come to the attention of counsel for Intervening Appellee, John A. Guido, that the Sandy Township Supervisors and on appeal this Court has no jurisdiction to decide the issue of whether the size requirements of one of the lots should be modified. See the case of Stolz, Appellant, vs. Zoning Hearing Board of the Borough of Lewisburg, Appellee, 568 A.2d. 746.

In that case, the Commonwealth Court ruled as follows:

> "However, Stolz claims that because the Borough subdivision ordinance incorporated by reference the lot requirements of the zoning ordinance, and because the subdivision ordinance grants Borough Council the power to deviate from the requirement of the subdivision ordinance, the Borough Council is thereby empowered to grant a variance in the context of a subdivision application.
>
> We disagree. The fact that the minimum lot size requirements of the zoning ordinance have been incorporated into the subdivision ordinance does not change the nature of these requirements. They are clearly zoning concepts. . . . Our decisions in *Bluebell Associates* and in *Beho Development* make it equally

clear that the granting of variances from these requirements is the province of the zoning hearing board. Moreover, the ordinance of a local municipality could not, of course, contravene a legislative enactment."

4. Therefore, DuBois Dutch's request for variance on the issue of whether the size requirements of the zoning ordinance pertaining to one of the two lots should be modified must be heard and decided in the first instance by the Sandy Township Zoning Hearing Board.

WHEREFORE, Intervening Appellee respectfully requests that your Honorable Court dismiss the appeal filed by DuBois Dutch, LLC, in this case from the decision of the Sandy Township Board of Supervisors denying the modification request filed by DuBois Dutch.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esquire
Attorney for John A. Guido

CA

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

FILED
01 10:21 BK
APR 20 2006
William A. Shaw
Prothonotary/Clerk of Courts
2 cc Atty Guido

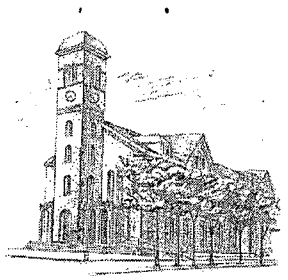
ORDER

AND NOW, this 19 day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision IT IS HEREBY ORDERED AND DECREED that argument is scheduled for the 3rd day of May, 2006, at 9 o'clock A.m. Courtroom No. 1, of Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT,

#16

FILED
APR 20 2006
William A. Shaw
Prothonotary/Clerk of Courts



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
David S. Ammerman Solicitor
Jacki Kendrick Deputy Prothonotary
Bonnie Hudson Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw
Prothonotary

DATE: 4/20/06

__X__ You are responsible for serving all appropriate parties.

_____ The Prothonotary's office has provided service to the following parties:

_____ Plaintiff(s)/Attorney(s)

_____ Defendant(s)/Attorney(s)

_____ Other

_____ Special Instructions:

HANAK, GUIDO and TALADAY

Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
S. Casey Bowers

Telephone: (814) 371-7768
Fax: (814) 371-1974

498 Jeffers Street
P.O. Box 487
DuBois, PA 15801

April 13, 2006

David Meholick, Court Administrator
Clearfield County Courthouse, Suite 228
230 E. Market Street
Clearfield, PA 16830

Re: DuBois Dutch, LLC v. Sandy Township Board of Supervisors v. John A. Guido
No. 05-1983-CD

Dear David:

With regard to the above case, enclosed are the following:

1. Original and two copies of the Motion to Dismiss together with attached Certificate of Service.

2. Letter to Judge Ammerman.

Please deliver the letter and the Motion to Judge Ammerman for his consideration. After the Judge has signed the Order attached to the Petition, please file the Petition with the Prothonotary and request that they certify the two copies and return them to our office in the enclosed stamped, self-addressed envelope.

Very truly yours,

ANTHONY S. GUIDO

ASG:ks
Encls.
cc: Toni M. Cherry, Esq.
Gregory M. Kruk, Esq.

HANAK, GUIDO and TALADAY

Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
S. Casey Bowers

Telephone: (814) 371-7768
Fax: (814) 371-1974

498 Jeffers Street
P.O. Box 487
DuBois, PA 15801

April 12, 2006

Hon. Fredric J. Ammerman
President Judge
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

Re: DuBois Dutch, LLC vs.
Sandy Township Board of Supervisors vs.
John A. Guido
No. 05-1983-C.D.

Dear Judge Ammerman:

After returning from the argument which we held in the above case, I came across the case of Stolz vs. Zoning Hearing Board, 568 A.2d. 746, which, in effect, held that requests for modification of the size requirements pursuant to a subdivision proceedings must be heard and decided by the Zoning Hearing Board rather than the Supervisors. Therefore, with reluctance, I enclose for your consideration a Motion to dismiss DuBois Dutch's appeal with regard to the modification proceedings. Of course, I am not asking that the appeal on the subdivision approval filed by John Guido be dismissed since that subdivision application did not request a variance from the minimum lot size.

I thought it would be best to bring this to your attention for your consideration at this time rather than the Court and the parties sitting through a hearing on the modification proceedings in the event your decision, whatever it may be, is appealed. I am fearful that the Commonwealth Court would dismiss the case due to the fact the Supervisors and, in turn, this Court on appeal had no jurisdiction over the issue in question.

I have forwarded a copy of this letter as well as a copy of the Motion to Toni Cherry, Esq., the attorney for DuBois Dutch, and to Gregory Kruk, Esq., the attorney for the Sandy Township Supervisors. If you should have any questions, please do not hesitate to let me know.

Very truly yours,

ANTHONY S. GUIDO

ASG:ks

cc: Toni M. Cherry, Esq.
Gregory M. Kruk, Esq.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

ORDER

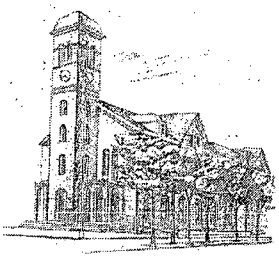
AND NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is hereby scheduled for the 3rd day of May, 2006, at 9 o'clock A.m. in Courtroom No. 1 of the Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT:

President Judge

FILED 1cc Atty T. Chesney
APR 13 2006 @ 9:13 BL
William A. Shaw
Prothonotary/Clerk of Courts

FILED
APR 13 2006
William A. Shaw
Prothonotary/Clerk of Courts



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
David S. Ammerman Solicitor
Jacki Kendrick Deputy Prothonotary
Bonnie Hudson Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw
Prothonotary

DATE: 4/13/06

__X__ You are responsible for serving all appropriate parties.

_____ The Prothonotary's office has provided service to the following parties:

_____ Plaintiff(s)/Attorney(s)

_____ Defendant(s)/Attorney(s)

_____ Other

_____ Special Instructions:

IN THE COURT OF COMMON PLEAS

OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC	:	
-vs-	:	No. 05-1983-CD
SANDY TOWNSHIP BOARD OF SUPERVISORS	:	
-vs-	:	
JOHN A. GUIDO	:	

O R D E R

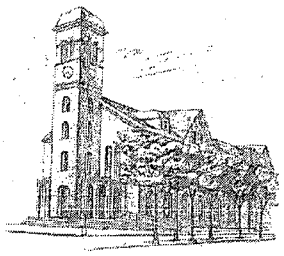
NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido; following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is the ORDER of this Court that said request be and is hereby granted and the Motion be considered withdrawn.

BY THE COURT,

President Judge

FILED 2CC Attys:
01:15:30 T. Cherry
APR 13 2006 Krak
William A. Shaw Guido
Prothonotary/Clerk of Courts

D



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
David S. Ammerman Solicitor
Jacki Kendrick Deputy Prothonotary
Bonnie Hudson Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw
Prothonotary

DATE: 4/18/06

_____You are responsible for serving all appropriate parties.

__X__The Prothonotary's office has provided service to the following parties:

__X__Plaintiff(s)/Attorney(s)

__X__Defendant(s)/Attorney(s)

_____Other

_____Special Instructions:

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	: No. 05 - 1983 C.D.
	: Type of Case: LAND USE APPEAL
vs.	:
	: Type of Pleading: MOTION TO PRESENT ADDITIONAL EVIDENCE
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	: Filed on Behalf of: DUBOIS DUTCH, LLC, Appellant
and	:
	: Counsel of Record for this Party:
JOHN A. GUIDO, Intervening Appellee	: TONI M. CHERRY, ESQ. : Supreme Court No.: 30205
	: GLEASON, CHERRY AND CHERRY, L.L.P. : Attorneys at Law : P. O. Box 505 : One North Franklin Street : DuBois, PA 15801
	: (814) 371-5800

FILED 4cc
APR 07 2006 03:56 BY Atty Cherry
William A. Shaw
Prothonotary/Clerk of Courts

#13

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

MOTION TO PRESENT ADDITIONAL EVIDENCE

TO THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT:

AND NOW, comes the undersigned, counsel for Appellant, DUBOIS DUTCH, LLC, and in accordance with §1005-A of the Pennsylvania Municipalities Planning Code, moves Your Honorable Court to allow Appellant to present additional evidence and, in support of which, avers the following:

1. That the undersigned represents Appellant, DUBOIS DUTCH, LLC, in the Land Use Appeal filed on December 21, 2005, to the above-captioned term and number.

2. That the appeal is from two decisions by the SANDY TOWNSHIP BOARD OF SUPERVISORS involving a parcel of ground owned by Appellant, DUBOIS DUTCH, LLC, and Intervening Appellee, JOHN A. GUIDO.

3. In the first decision, the SANDY TOWNSHIP BOARD OF SUPERVISORS refused to grant a modification of the requirements of its current zoning ordinance so that the parties could subdivide the land in question in accordance with the division in fact that has already occurred between the parties as decided by the Pennsylvania Supreme Court in the case of *Guido v. Township of Sandy and DuBois Dutch, LLC*, 880 A.2d 1220 (Pa. 2005).

4. The second part of the appeal is from the decision of the SANDY TOWNSHIP BOARD OF SUPERVISORS granting the subdivision request of JOHN A. GUIDO for the division of the subject property into two parcels and giving to JOHN A. GUIDO a portion of the land that the Supreme Court has already declared belongs to DUBOIS DUTCH, LLC, without the agreement of or permission of DUBOIS DUTCH, LLC.

5. That there is no transcript in the record forwarded by the SANDY TOWNSHIP BOARD OF SUPERVISORS because no testimony was taken before the Board. Instead, the Board accepted argument from counsel and reviewed various documents.

6. That in the Appeal filed by DUBOIS DUTCH, LLC, Appellant has contended that the Board of Supervisors' performance of its fact-finding function deprived Appellant of a fundamentally fair proceeding and that the findings of the SANDY TOWNSHIP BOARD OF SUPERVISORS capriciously and without reasonable explanation disregarded the overwhelming evidence supporting the grant of Appellant's request. (See Paragraph 38 of Land Use Appeal Notice.)

7. That in its Appeal, Appellant has contended that the SANDY TOWNSHIP BOARD OF SUPERVISORS denied Appellant of its constitutionally-protected right to own and use its

land in a way that does not interfere with the health, safety or welfare of the community. (See Paragraph 39 of Land Use Appeal Notice.)

8. That the SANDY TOWNSHIP BOARD OF SUPERVISORS made no Findings of Fact nor Conclusions of Law in this case but merely issued a letter, through their Zoning Officer, setting forth three "reasons" why the Supervisors denied the DUBOIS DUTCH, LLC, subdivision plan and accompanying request for modification. A true and correct copy of the letter of December 6, 2005, containing the said reasons is attached hereto and made a part hereof as Exhibit "A".

9. That no evidentiary hearing was actually held before the SANDY TOWNSHIP BOARD OF SUPERVISORS and no sworn testimony was taken by the SANDY TOWNSHIP BOARD OF SUPERVISORS.

10. That §1005-A of the Pennsylvania Municipalities Planning Code permits Your Honorable Court to hold a hearing to receive additional evidence if it is shown that proper consideration of the Land Use Appeal requires the presentation of such additional evidence. See 53 P.S. §11005-A.

11. That the undersigned counsel for Appellant believes and therefore avers that it is essential to the proper consideration of the instant Appeal that Appellant be allowed to present additional evidence so Your Honorable Court can make Its own Findings of Fact and Conclusions of Law since no such Findings or Conclusions were made by the Board.

12. Moreover, if the record does not include Findings of Fact, which this record does not, Your Honorable Court is directed by the provisions of §1005-A of the MPC to make Its

own Findings of Fact based on the record below as supplemented by the additional evidence, if any. See 53 P.S. §11005-A.

13. That a full record has been made in the case before the Clearfield County Trial Court at No. 99 - 867 C.D. for the same reason that no evidentiary hearing was held before the SANDY TOWNSHIP BOARD OF SUPERVISORS and that case was the subject of the Appeal decided by the Supreme Court of Pennsylvania in *Guido v. Township of Sandy and DuBois Dutch, LLC*, 880 A.2d 1220 (Pa. 2005).

14. That since Your Honorable Court will have to make Its own Findings of Fact, Appellant believes and therefore avers that it is necessary for Your Honorable Court to have additional evidence and Appellant wishes to present the following:

(a) The Reproduced Record from the initial Land Use Appeal of John A. Guido at No. 99 - 867 C.D. and the Reproduced Record which was presented to the Supreme Court of Pennsylvania in the case of *Guido v. Township of Sandy and DuBois Dutch, LLC*, 880 A.2d 1220 (Pa. 2005);

(b) Copies of all subdivision and land use ordinances and zoning ordinances of Sandy Township;

(c) Evidence of the grant of other modification requests and zoning amendment requests made by Sandy Township Board of Supervisors to show bias on the part of Sandy Township Board of Supervisors;

(d) Evidence of Appellant's financial investment in his premises and such other evidence as will establish Appellant's vested rights in the property; and

(e) Such other evidence as may be relevant in support of the issues raised by Appellant in its Notice of Land Use Appeal.

15. That no decision on the Appeal has been made by Your Honorable Court and the presentation of additional evidence will not unduly delay the resolution of this Appeal and which actually aid Your Honorable Court in making a full and complete record as required by 53 P.S. §11005-A and the case law developed by the Appellate Courts in this Commonwealth.

WHEREFORE, the undersigned respectfully requests Your Honorable Court to allow the presentation of additional evidence by Appellant.

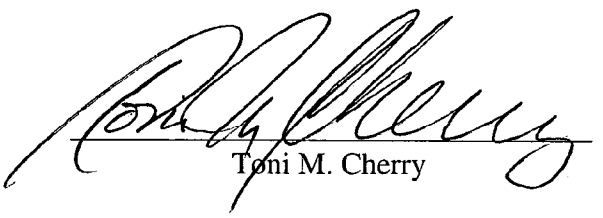
Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

VERIFICATION

I, TONI M. CHERRY, ESQ., counsel for Appellant, verify that the information provided in the foregoing Motion to Present Additional Evidence is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.



Toni M. Cherry

DATED: April 7, 2006

Sandy Township

P.O. BOX 267 • DUBOIS, PA 15801 • PHONE (814) 371-4220 • FAX (814) 375-7837 • E-MAIL sandytwp@adelphia.net

December 6, 2005

Toni M. Cherry, Esq.
Gleason, Cherry and Cherry, L.L.P.
One North Franklin Streert
DuBois, PA 15801

HAND DELIVERED

Re: Minor Subdivision - *DuBois Dutch, LLC*

Dear Ms. Cherry:

In compliance with the Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 4, Section 403.7, Step 7 (Final Plan Review) this letter is to inform you that your requests for a modification, minor subdivision, for DuBois Dutch, LLC, "DuBois Dutch Pantry Restaurant" of 2044 Rich Highway, DuBois, PA 15801 were denied by the Sandy Township Board of Supervisors at their November 21, 2005 meeting.

The Sandy Township Board of Supervisors denied the DuBois Dutch, LLC subdivision plan and accompanying request for modification of the minimum requirements for the following reasons:

1. One of the lots of the minor subdivision plan failed to meet the Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 6, Section 611A, Lots and Lost Sizes.

2. One of the lots of the minor subdivision plan failed to meet the Sandy Township Zoning Ordinance 1996-2, Section 307.10 Lot Yard and Height requirement for a Commercial Highway (CH) zoned district, minimum lot size of 45,000 Sq. Ft.

3. The request for modification failed to meet the requirements of Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 10, Section 1004 ,Modifications, by failing to demonstrate the *"exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of this Ordinance is observed."*, as defined in Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 3, Section 302, Definitions.

EXHIBIT "A"

If you have any questions, please call me at 371-4220.

Sincerely,

James H. Keck
Sandy Township Zoning Officer

cc: Sandy Township Board of Supervisors
Sandy Township Planning Commission
Richard Castonguay, Sandy Township Manager
Gregory S. Ley, DuBois Dutch, LLC (**Hand Delivered to DuBois Dutch Pantry Restaurant**)
Anthony Guido, Esq.
File

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - 1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2006, a true and correct copy of Appellant's Motion to Present Additional Evidence was served upon the following persons by mailing the same to them by United States First Class Mail, postage prepaid, by depositing the same in the United States Post Office at DuBois, Pennsylvania, addressed as follows:

GREGORY M. KRUK, ESQ.
Ferraro, Kruk & Ferraro, LLP
Attorneys at Law
690 Main Street
Brockway, PA 15824
Attorney for Appellee

ANTHONY S. GUIDO, ESQ.
Hanak, Guido and Taladay
Attorneys at Law
P. O. Box 487
DuBois, PA 15801
Attorney for Intervening Appellee

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

Dated: April 7, 2006

FILED

APR 07 2006

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading: CERTIFICATE OF SERVICE
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 3-21-06

FILED NO CC
m/10:41/BDA
MAR 22 2006
William A. Shaw
Prothonotary/Clerk of Courts

#12

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Order of Court for argument on the land use appeals filed in the above captioned action were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 21st day of March, 2006, in the United States Post Office, DuBois, Pennsylvania, and addressed as follows:

(Attorney for Appellant, DuBois Dutch, LLC)
TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

(Attorney for Appellee, Sandy Township Board of Supervisors)
GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Anthony S. Guido
Attorney for John A. Guido,
Intervening Appellee

Date: 3/21/06

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	Type of Case: LAND USE APPEAL
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	Type of Pleading: CERTIFICATE OF SERVICE
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 3-15-06

FILED
MAR 17 2006
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Motion in the above captioned action were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the ____ day of March, 2006, in the United States Post Office, DuBois, Pennsylvania, and addressed as follows:

(Attorney for Appellant, DuBois Dutch, LLC)
TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801

(Attorney for Appellee, Sandy Township Board of Supervisors)
GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Anthony S. Guido
Anthony S. Guido
Attorney for John A. Guido,
Intervening Appellee

Date: 3-15-06

FILED
MAR 17 2006
William A. Shaw
Prothonotary/Clerk of Courts

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading: MOTION
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 3-15-06

FILED 2cc Atty Guido
019:48 BOX
MAR 17 2006 (GK)

William A. Shaw
Prothonotary/Clerk of Courts

#10

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

MOTION

TO: THE HONORABLE FREDRIC J. AMMERMAN, PRESIDENT JUDGE OF SAID COURT

AND NOW, comes Intervening Appellee, John A. Guido, by his attorney, Anthony S. Guido, Esquire, and files the following Motion:

1. Appellant, DuBois Dutch, LLC, filed a land use appeal with this Court to the above caption and term from a decision of Appellee, Sandy Township, which refused Appellant, DuBois Dutch's, Request for Modification on an application for subdivision approval and, in addition, from the decision to approve the subdivision plan filed by Intervening Appellee, John A. Guido.

2. Thereafter, Intervening Appellee, John A. Guido, filed a motion to dismiss the appeal filed by DuBois Dutch on both decisions and filed a brief in support of that motion.

3. In response, as ordered by this Court, Appellant, DuBois Dutch, filed a responsive brief in which it is contended, in part, that DuBois Dutch is entitled to a hearing on the appeal.

4. Section 11005-A of the Pennsylvania Municipalities Planning Code, copy attached, provides in part as follows:

> "If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing . . ."

5. Although it has been more than two months since DuBois Dutch filed the subject appeal, no motion was filed by any party for this Court to receive additional evidence.

6. This Court has scheduled Argument on the Motion to Dismiss the appeal filed by DuBois Dutch for April 10, 2006, at 9:00 a.m.

7. To hold a separate hearing or argument on this appeal would result in a duplication of effort on the part of this Court and the parties.

8. Accordingly, Intervening Appellee, John A. Guido, hereby respectfully requests that Argument on the appeal filed by Appellant, DuBois Dutch, also be scheduled for April 10th at 9:00 a.m. since the law and issues involved in the Motion to Dismiss Appeal and the appeal are virtually the same.

And he will ever pray.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By Anthony S. Guido
Anthony S. Guido, Esquire
Attorney for John A. Guido

ing its use to emergencies or exigent circumstances, could not pursue an appeal from such court's decision either directly or by indirect means of financing an appeal which was supposedly taken by intervenor township and in which legal representation was provided by attorney not officially authorized to act as counsel for township. Schatz v. Zoning Hearing Bd. of Upper Dublin Tp., 343 A.2d 90, 21 Pa.Cmwlth. 112, Cmwlth.1975.

Record in action involving validity of building permits established that individuals who appealed from trial court's order [illegible] parties to proceeding in trial court and such individuals could not appeal from order. Borough of Malvern v. Agnew, 314 [illegible]d 52, 11 Pa.Cmwlth. 285, Cmwlth.1973.

Where neighboring landowners to property for which variance was allowed did not participate in proceedings before board of zoning adjustment or in appeal to Common Pleas Court and did not intervene to become party in Court of Common Pleas proceeding, they did not have standing to take appeal to Supreme Court. Appeal of Greco, 254 A.2d 6, 434 Pa. 431, Sup.1969.

§ 11005–A. Hearing and argument of land use appeal

If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence, provided that appeals brought before the court pursuant to section 916.1[1] shall not be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. If the record does not include findings of fact or if additional evidence is taken by the court or by a referee, the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.

1968, July 31, P.L.805, No. 247, art. X–A, § 1005–A, added 1988, Dec. 21, P.L. 1329, No. 170, § 101, effective in 60 days.

[1] 53 P.S. § 10916.1.

Historical and Statutory Notes

Prior Laws:

1972, June 1, P.L. 333, No. 93, § 19.

1968, July 31, P.L. 805, No. 247, § 11010 (53 R.S. § 11010).

Law Review and Journal Commentaries

Standard of review applicable to Pennsylvania's special education appeals panel. Perry A. Zirkel, 3 Widener J.Pub.L. 871 (1994).

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

ORDER

AND NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is hereby scheduled for the 10th day of April, 2006, at 9:00 o'clock a.m. Courtroom No. 1, Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT,

Fredric J. Ammerman

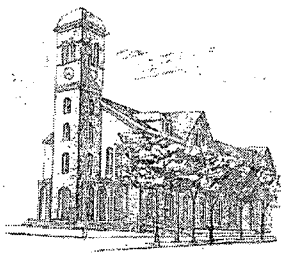
P.J.

FILED 2cc
01 9:48 BN Atty Guido
MAR 17 2006 GK

William A. Shaw
Prothonotary/Clerk of Courts

#10

FILED
MAR 17 2006
William A. Shaw
Prothonotary/Clerk of Courts



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
David S. Ammerman Solicitor
Jacki Kendrick Deputy Prothonotary
Bonnie Hudson Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw
Prothonotary

DATE: 3/17/06

__X__ You are responsible for serving all appropriate parties.

_____ The Prothonotary's office has provided service to the following parties:

_____ Plaintiff(s)/Attorney(s)

_____ Defendant(s)/Attorney(s)

_____ Other

_____ Special Instructions:

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	Type of Case: LAND USE APPEAL
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	Type of Pleading: CERTIFICATE OF SERVICE
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 2-6-06

FILED
FEB 07 2006
William A. Shaw
Prothonotary/Clerk of Courts

#9

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 6TH day of February, 2006, in the United States Post Office, DuBois, Pennsylvania, and addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801
Attorney for Appellant, DuBois Dutch, LLC

GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824
Attorney for Appelle, Sandy Township Board of Supervisors

Anthony S. Guido
Attorney for John A. Guido,
Intevening Appellee

Date: 2-6-06

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
	:	Type of Case: LAND USE APPEAL
vs.	:	
	:	Type of Pleading: CERTIFICATE OF SERVICE
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee
JOHN A. GUIDO Intervening Appellee	:	Counsel of Record for Intervening Appellee:
	:	ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801
	:	(814) 371-7768

Dated: 1-27-06

I hereby certify this to be a true and attested copy of the original statement filed in this case.

JAN 27 2006

Attest.

Prothonotary/
Clerk of Courts

FILED NO
01:57 BH
FEB 01 2006 cc
LM

William A. Shaw
Prothonotary/Clerk of Courts

#8

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC, FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon the following persons by United States First Class Mail, postage prepaid, deposited on the 27th day of January, 2006, in the United States Post Office, DuBois, Pennsylvania, and addressed as follows:

TONI M. CHERRY, ESQ.
Gleason, Cherry & Cherry, LLP
PO Box 505
DuBois, PA 15801
Attorney for Appellant, DuBois Dutch, LLC

GREGORY M. KRUK, ESQ.
Ferraro Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824
Attorney for Appelle, Sandy Township
Board of Supervisors

Anthony S. Guido

Anthony S. Guido
Attorney for John A. Guido,
Intevening Appellee

Date: 1-27-06

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant vs. SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee vs. JOHN A. GUIDO Intervening Appellee	No. 05-1983-CD Type of Case: LAND USE APPEAL Type of Pleading: MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC. FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS Filed on Behalf of: JOHN A. GUIDO, Intervening Appellee Counsel of Record for Intervening Appellee: ANTHONY S. GUIDO, ESQ. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street PO Box 487 DuBois, PA 15801 (814) 371-7768

Dated: 1-25-06

FILED
JAN 27 2006
0/3:40(w
William A. Shaw
Prothonotary/Clerk of Courts
cert to Attys

#7

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

MOTION TO DISMISS
APPEAL OF DUBOIS DUTCH, LLC, FROM
DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS

AND NOW, comes the Intervening Appellee, John A. Guido, by his attorney, Anthony S. Guido, Esquire, files this motion to dismiss appeal from decision of the Sandy Township Board of Supervisors filed by Appellant, DuBois Dutch, LLC, for the following reasons:

1. Appellant, DuBois Dutch, LLC, filed a subdivision plan together with a request for modification under Section 1004 of the Sandy Township Subdivision Ordinance requesting relief from the required minimum lot size of 45,000 square feet for one of the lots involved in the subject minor subdivision plan.

2. Pursuant to said request for modification, Appellant, DuBois Dutch, LLC, requested that the minimum lot size of 45,000 square feet be modified to 32,910 square feet for one of the two subject lots.

3. Appellant, DuBois Dutch, LLC, failed to allege or prove any of the elements required for a request for modification.

4. Even if Appellant, DuBois Dutch, LLC, had proved all of the elements required for a modification, nevertheless, the Township Supervisors had the right under the terms of Section 1004 titled 'Modifications' to reject the modification, for any reason or no reason.

5. In addition, Appellant, DuBois Dutch, LLC, objected to a subdivision plan filed by Intervening Appellee, John A. Guido, even though the plan in question complies with all of the terms and conditions of the present Sandy Township Subdivision and Zoning Ordinances.

6. Appellant, DuBois Dutch, LLC, did not point to any deficiencies in said plan and since there were no deficiencies in said plan, the Township Supervisors had no alternative under the law except to approve that plan.

7. The appeal of Appellant, DuBois Dutch, LLC, is barred by res judicata.

WHEREFORE, Intervening Appellee respectfully requests that your Honorable Court dismiss the appeal filed by DuBois Dutch, LLC, in this case.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By Anthony S. Guido
Anthony S. Guido, Esquire
Attorney for John A. Guido

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	No. 05-1983-CD
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
vs.	:	
JOHN A. GUIDO Intervening Appellee	:	

FILED 1cc
01 9:58 3cc Atty
FEB 01 2006 Guido
William A. Shaw
Prothonotary/Clerk of Courts

ORDER OF COURT FOR ARGUMENT

AND NOW, this 31 day of January, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC,

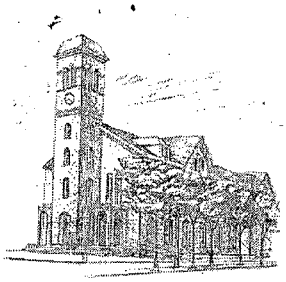
IT IS HEREBY ORDERED AND DECREED that:

(1) argument is scheduled for the 10th day of April, 2006, at 9:00 o'clock a.m. Courtroom No. 1, Clearfield County Courthouse, Clearfield, Pennsylvania, and

(2) Appellant, DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days thereafter.

BY THE COURT,

#7



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
David S. Ammerman Solicitor
Jacki Kendrick Deputy Prothonotary
Bonnie Hudson Administrative Assistant

To: All Concerned Parties

From: William A. Shaw, Prothonotary

It has come to my attention that there is some confusion on court orders over the issue of service. To attempt to clear up this question, from this date forward until further notice, this or a similar memo will be attached to each order, indicating responsibility for service on each order or rule. If you have any questions, please contact me at (814) 765-2641, ext. 1331. Thank you.

Sincerely,

William A. Shaw
Prothonotary

DATE: 2/1/06

__X__ You are responsible for serving all appropriate parties.

_____ The Prothonotary's office has provided service to the following parties:

_____ Plaintiff(s)/Attorney(s)

_____ Defendant(s)/Attorney(s)

_____ Other

_____ Special Instructions:

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS DUTCH, LLC, Appellant	CIVIL ACTION – AT LAW
	NO. 05-1983 C.D.
vs.	Type of Pleading: Response to Writ of Certiorari
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	Filed on Behalf of: Sandy Township Board of Supervisors
and	
JOHN A. GUIDO, Intervening Appellee	Counsel of Record for This Party: GREGORY M. KRUK, ESQ. Supreme Court No. 27048
	FERRARO, KRUK & FERRARO, LLP 690 Main Street Brockway, PA 15824 814-268-2202

FILED
JAN 13 2006
01 9:30 /ns
William A. Shaw
Prothonotary/Clerk of Courts
NO C/C
W/ Attn Cahmeld

#10

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS DUTCH, LLC, Appellant	:	CIVIL ACTION – AT LAW
	:	NO. 05-1983 C.D.
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

RESPONSE TO WRIT OF CERTIORARI

TO: WILLIAM A. SHAW, PROTHONOTARY OF SAID COURT:

1. This document is being filed on behalf of the Sandy Township Board of Supervisors, Appellee in the above-captioned matter.

2. The Sandy Township Board of Supervisors received a Writ of Certiorari on December 27, 2005, commanding Sandy Township within twenty (20) days after receipt of the Writ to certify to the Court the entire record in this matter from which the Land Use Appeal has been taken, or a true and correct copy thereof.

3. The attached documents are true and correct copies of the entire record in this matter from which the Land Use Appeal has been taken, subsequent to the August 23, 2005 Opinion of the Supreme Court of Pennsylvania, which is DuBois Dutch Document No. 2 in the attached documents.

4. This document includes the attached Certification signed by the Secretary of the Board of Supervisors of the Township of Sandy.

5. The attached record consists of the following:

(a) Meeting Agenda/minutes of the November 21, 2005 meeting of the Board of Supervisors of the Township of Sandy, said Meeting Agenda and attachments listing near the end of the Agenda that at 8:00 P.M. the subdivision requests of Sunoco/Dutch Pantry and the modification requests of Dutch Pantry would be discussed.

(b) Fifteen (15) documents submitted by DuBois Dutch, LLC, at the November 21, 2005 meeting, including Document No. 1 which was their request for a modification of minimum lot size. (Documents are numbered 1-15 in the lower right hand corner).

(c) Six (6) documents submitted in opposition to the request for modification. the opposition documents were filed on behalf of John A. Guido. (Documents are numbered 1-6 in the lower right hand corner).

(d) Document labeled as Exhibit 3, being October 13, 2005 application for subdivision and land development submitted by Attorney Toni M. Cherry on behalf of DuBois Dutch, LLC.

(e) November 9, 2005 letter from Attorney Gregory M. Kruk to Toni M. Cherry, Esq. and Anthony S. Guido, Esq. informing them of November 21, 2005 modification procedure at Sandy Township Board of Supervisors meeting.

(f) November 17, 2005 submittal by James H. Keck, Zoning Officer, to the Board of Supervisors.

(g) Checklist for DuBois Dutch, LLC, minor subdivision.

(h) November 23, 2005 notification letter to DuBois Dutch, LLC, regarding denial of modification request.

(i) December 2, 2005 letter to Attorney Guido concerning approval of Guido subdivision request.

(j) December 6, 2005 formal denial letter from Township to Toni M. Cherry, Esq., attorney for DuBois Dutch, LLC.

(k) Copy of items submitted by fax machine to Gregory M. Kruk, Esq., by Zoning Officer regarding Section 301.10 of Subdivision and Land Development Ordinance.

(l) Proposed Subdivision Map of DuBois Dutch, LLC.

WHEREFORE, the Sandy Township Board of Supervisors, Appellee, hereby responds to the Writ of Certiorari in the above-captioned matter.

SANDY TOWNSHIP
BOARD OF SUPERVISORS, APPELLEE

BY: Gregory M. Kruk
Attorney for Appellee

CERTIFICATION OF RECORD

I hereby certify to the Court of Common Pleas of Clearfield County, PA, that the attached is a true and correct copy of the entire record of the Board of Supervisors of Sandy Township in the above-captioned matter subsequent to the August 23, 2005 Opinion of the Supreme Court of Pennsylvania.

Barbara D. Hopkins

Barbara D. Hopkins, Secretary

SANDY TOWNSHIP SUPERVISORS
1094 CHESTNUT AVENUE, P.O. BOX 267
DUBOIS, PA 15801

REGULAR MEETING OF NOVEMBER 21, 2005 @ 7:00 P.M.

AGENDA

CALL TO ORDER

ROLL CALL

PUBLIC COMMENTS ON AGENDA ITEMS ONLY

APPROVAL OF THE MINUTES OF NOVEMBER 7, 2005

TABLED BUSINESS

1. **Updated Emergency Operations Plan - Promulgation Page - Resolution 2005-15 to Adopt the National Incident Management System (NIMS)**

UNFINISHED BUSINESS

1. **Proposal of Part Time Police Officer to Full Time**

NEW BUSINESS

1. **Request for Modification - Viglione and Repine**
2. **Request for Modification - Morey**
3. **Schedule Public Hearing for Amendment to TL PRD - Robt. DuBois**
4. **Award Audit Request for Proposals**
5. **Award Consulting Request for Proposals**
6. **Resolution 2005-16 - Police Participant Contributions for 2006 - 2.5%**

CORRESPONDENCE

1. **Adelphia**
2. **Home Nursing Agency Request for Donation**
3. **International Union of Operating Engineers - Temporary Employee(s)**

ADMINISTRATIVE REPORTS

1. **Equipment Expense - October 2005**
2. **Sandy Twp. Planning Commission Minutes - October 18, 2005**
3. **Engineers Report**
   - **✔Mitigation Wetlands Monitoring Report - Industrial Park**
4. **Managers Report**

SUPERVISORS COMMENTS

OPEN MEETING TO THE FLOOR

CLOSE MEETING TO THE FLOOR

PAYING OF BILLS

General Fund	**$55,998.11**
Recreation Fund	**$ 892.50**
CDBG Fund	**$ 92.00**
Payroll #23	**$54,284.23**

8:00 P.M.
SUBDIVISION REQUESTS - SUNOCO/DUTCH PANTRY
MODIFICATION REQUEST - DUTCH PANTRY

LEGAL AND PERSONNEL MEETING WILL FOLLOW ADJOURNMENT

ADJOURN

SANDY TOWNSHIP SUPERVISORS
1094 CHESTNUT AVENUE, P.O. BOX 267
DUBOIS, PA 15801

REGULAR MEETING OF NOVEMBER 21, 2005 @ 7:00 P.M.

MINUTES

CALL TO ORDER
Chairman Brady LaBorde called the Regular Meeting of the Board of Supervisors to Order at 7:16 p.m.

ROLL CALL

Board Present:	Staff Present:
Ray Anderson	Perry Bowser, Twp. Engineer
James Jeffers	Richard Castonguay, Twp. Manager
Brady LaBorde	Barbara Hopkins, Twp. Secretary-Treasurer
Mark Sullivan	James Keck, Twp. Zoning Officer
David Sylvis	Greg Kruk, Twp. Solicitor
	Kris Kruzelak, Sgt. Police Department
	Others: see attendance list

PUBLIC COMMENTS ON AGENDA ITEMS ONLY

APPROVAL OF THE MINUTES OF NOVEMBER 7, 2005
Motion by David Sylvis second by Ray Anderson to approve the Minutes of November 7, 2005. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

TABLED BUSINESS

1. **Updated Emergency Operations Plan - Promulgation Page - Resolution 2005-15 to Adopt the National Incident Management System (NIMS)**

Manager Castonguay presented Resolution 2005-15. With the approval of Resolution 2005-15 the Board will be in compliance with the National Incident Management Systems. A Promulgation Page was presented to the Board for their signature. By signing the Promulgation Page, Sandy Township has adopted the Updated Emergency Operation Plan. The signed Resolution and Promulgation Page will be mailed to Clearfield County Department of Emergency Management.

Motion by David Sylvis second by Ray Anderson to adopt Resolution 2005-15 and authorizing the signing of the Promulgation Page. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye
Motion carried.

UNFINISHED BUSINESS

1. Proposal of Part Time Police Officer to Full Time

Manager Castonguay explained that at the last regular meeting he requested a part time officer, Dan Duffalo, be promoted to full time police officer and the issue was tabled until this meeting.

The Board of Supervisors discussed the 2006 budget with the proposed 1 mil tax increase. Resident Bill Reasinger questioned the need of purchasing a back hoe and also the need to hire another full time police officer.

The Emergency Services Tax was discussed.

Supervisor Anderson commented the cost of a full time police officer for one year is $50,000 to $60,000.

Motion by Ray Anderson second by James Jeffers to table the request to hire part time police officer Dan Duffalo to full time police officer until the Supervisors and Manager have time to review the 2006 proposed budget. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye
Motion carried.

NEW BUSINESS

1. Request for Modification - Viglione and Repine

Zoning Officer Keck presented a request for a modification of the Official Development Plan for the Treasure Lake Planned Residential Development. The modification request is for Anthony & Maureen Viglione of 612 Dewey Circle, Ridgway, Pennsylvania and Thomas E. & Margaret S. Repine of 262 Treasure Lake, DuBois, Pennsylvania. The proposed modification would subdivide Lot 7 and consolidate a portion of Lot 7 with Lot 6 and Lot 8 in Section 7A. The sewage needs have been met for both properties by an existing sanitary sewer line. The Sandy Township Planning Commission recommended approval of this lot consolidation at their October 18, 2005 meeting.

Motion by Mark Sullivan second by Ray Anderson to approve the Viglione and Repine request for a modification of the Official Development Plan for the Treasure Lake Planned Residential Development as presented. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye
Motion carried.

2. Request for Modification - Morey
Zoning Officer Keck presented a lot consolidation request for Wade E & Irma C. Morey, 1230 Treasure Lake, DuBois, Pennsylvania. The request is for a modification of the Official Development Plan for the Treasure Lake Planned Residential Development. The proposed modification would consolidate Lot 239 and Lot 240 in Section 15. The sewage needs have been met for both properties by an existing sanitary sewer line. The Sandy Township Planning Commission recommended approval of this lot consolidation at their October 18, 2005 meeting.

Motion by David Sylvis second by Ray Anderson to approve the Morey modification request in the Treasure Lake Planned Residential Development as presented. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye
Motion carried.

3. Schedule Public Hearing for Amendment to TL PRD - Robt. DuBois
The Sandy Township Planning Commission reviewed a request for a minor subdivision/lot consolidation at Treasure Lake for Robert H. & Marilou G. DuBois at their November 16, 2005 meeting. The Board of Supervisors need to schedule a Public Hearing for this amendment to the Treasure Lake Planned Residential Development.

Motion by David Sylvis second by James Jeffers to schedule a public hearing December 5, 2005 at 7:00 p.m. for Robert and Marilou DuBois minor subdivision/lot consolidation request as presented. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye
Motion carried.

4. Award Audit Request for Proposals
Manager Castonguay recommended the award of an Audit Proposal to Catalano, Case, Catalano and Fannin for the years 2005, 2006 and 2007. The fees for services are year ending December 31, 2005 $9,500; December 31, 2006 $9,800; December 31, 2007 $10,100.

Motion by David Sylvis second by Ray Anderson to award the audit proposal as presented to Catalano, Case, Catalano and Fannin for the years ending 2005, 2006, and 2007. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

5. Award Consulting Request for Proposals
Manager Castonguay said the Township received three proposals for consulting services. Gannett Fleming, GCDA and Stiffler, McGraw and Associates. Manager Castonguay recommended Stiffler, McGraw and Associates and commented they are also the low proposal.

Motion by James Jeffers second by Ray Anderson to award the consulting services proposal to Stiffler, McGraw and Associates as presented. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

6. Resolution 2005-16 - Police Participant Contributions for 2006 - 2.5%

Motion by David Sylvis second by James Jeffers to approve Resolution 2005-16, to set the Police Participant Pension Contributions for the 2006 year at 2.5%. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

CORRESPONDENCE

1. Adelphia

2. Home Nursing Agency Request for Donation

A request for a $100 donation was received from Home Nursing Agency of Altoona.

Motion by David Sylvis second by James Jeffers to refer the request of Home Nursing Agency to the Township Solicitor for legality. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

3. International Union of Operating Engineers - Temporary Employee(s)

Motion by David Sylvis second by Ray Anderson to Receive and File Correspondence. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

ADMINISTRATIVE REPORTS

1. Equipment Expense - October 2005

2. Sandy Twp. Planning Commission Minutes - October 18, 2005

3. Engineers Report

✔Mitigation Wetlands Monitoring Report - Industrial Park

Mr. Bowser reported that GeoTech Engineering, Inc. working on behalf of the Township submitted a Mitigation Wetlands Monitoring Report for the Sandy Township/Developac Industrial Park (Permit No. E17-310) to the Department of Environmental Protection. The Township requested that this be the Final Monitoring Report and that the report submitted supports this request.

4. Managers Report

✔NCRPDC Rural Transportation Planning

Mr. Castonguay attended the rural transportation planning meeting at NCRPDC on November 15, 2005 in Ridgway. Various transportation projects were discussed for the region. Mr. Castonguay commented he has a copy of the revised TIP that shows the projected projects by county.

✔Brady Township - UCC Appeals Board

Brady Township is interested in sharing Sandy Townships Appeals Board. The Manager requested authorization to contact Brady Township to facilitate the request.

Motion by David Sylvis second by Ray Anderson authorizing the Manager to contact and proceed with Brady Townships request to share a UCC Appeals Board. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

✔Gift Certificates for Employees

Requested authorization to purchase gift certificates for township employees and advisory board/commission members in the amount of $50 each.

Motion by Ray Anderson second by James Jeffers authorizing the purchase of $50 gift certificates for township employees and advisory board/commission members. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

Motion by Ray Anderson second by David Sylvis to Receive and File Administrative Reports. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.

SUPERVISORS COMMENTS

Supervisor Anderson commended the Police Department on doing a good job on the recent jewelry burglary. Mr. Anderson asked if the work on Spafford road has stopped for the winter.

Manager Castonguay reported that the work will continue when weather permits.

Supervisor Jeffers asked Mr. Spafford if the work is being done to his satisfaction. Mr. Spafford responded it is.

OPEN MEETING TO THE FLOOR

CLOSE MEETING TO THE FLOOR

PAYING OF BILLS

General Fund	**$55,998.11**
Recreation Fund	**$ 892.50**
CDBG Fund	**$ 92.00**
Payroll #23	**$54,284.23**

Motion by David Sylvis second by Ray Anderson to pay all bills as presented. General Fund $55,998.11; Recreation Fund $892.50; CDBG Fund $92.00 and Payroll #23 $54,284.23. A roll call vote was taken.

Ray Anderson - aye	James Jeffers - aye
Brady LaBorde - aye	Mark Sullivan - aye
David Sylvis - aye	

Motion carried.
Time 7:40 p.m. The Board of Supervisors recessed until 8:00 p.m.

8:00 P.M.
SUBDIVISION REQUESTS - SUNOCO/DUTCH PANTRY
MODIFICATION REQUEST - DUTCH PANTRY

Chairman Brady LaBorde Reconvened the Sandy Township Board of Supervisors Regular Meeting at 8:00 p.m. November 21, 2005

All Supervisors present. Staff present: Manager Richard Castonguay, Secretary-Treasurer Barbara Hopkins, Zoning Officer James Keck, Solicitor Greg Kruk.
Others present: Attorney Toni Cherry, Attorney Anthony Guido, Dutch Pantry Manager Thomas Larson, Dutch Pantry Owner Greg Ley, property owner (adjacent to Dutch Pantry and BP Gas Station) James Taylor.

Sandy Township Solicitor Greg Kruk read the definition for modification and also the hardship definition. Attorney Kruk informed the Supervisors that they should make a decision on the modification request at this (11-21-05) meeting. The properties are known as the Dutch Pantry Restaurant and BP Gas Station on State Route North 219 near Interstate 80 Exit 97. Mr. Kruk told the Board that the subdivision request of DuBois Dutch, LLC has been to the Court of Common Pleas, the Commonwealth Court and the Supreme Court and now is back before the Supervisors for their consideration. The Sandy Township Planning Commission recommended approval of either subdivision at their November 16, 2005 meeting, contingent upon the Board of Supervisors approval or denial of the Request for Modification as submitted. The Supervisors agreed to hear the Modification Request and the Subdivision Request of DuBois Dutch, LLC as the first item.

MODIFICATION REQUEST - DUBOIS DUTCH PANTRY (DUBOIS DUTCH, LLC)

Toni Cherry, solicitor representing DuBois Dutch Pantry (DuBois Dutch, LLC) presented a request for modification of the minimum lot size in a Commercial-Highway District, under Sandy Township Zoning Ordinance 1996-2. Ms. Cherry reviewed the history on the DuBois Dutch Pantry and introduced the following documents:

1. ***Request for Modification of Minimum Lot Size Requirement For a Commercial-Highway District Under Sandy Township Zoning Ordinance No. 1996-2.***
2. ***(J-14-2004) IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT No. 36 WAP 2003;***
3. ***Section 10515.1 Preventive Remedies and 10512.1 Modifications (PA Municipalities Code)***
4. ***July 6, 1998 correspondence to Harley Hotels, Inc. and DuBois Dutch, LLC from John A. Guido***
5. ***July 7, 1998 correspondence to Attorney Leeper from Attorney Anthony Guido***
6. ***November 16, 1998 letter to John A. Guido from M. Dale Leeper***
7. ***November 17, 1998 letter to Dale Leeper, Esq. regarding John A. Guido-DuBois Dutch, LLC;***
8. ***Sandy Township Supervisors Regular Meeting Minutes of July 7, 1999;***
9. ***An Assignment and Assumption of Lease (Vol. 1951 Page 453) dated July 5, 1998***
10. ***Deed (Vol 1852 Page 85 dated June 13, 1997***
11. ***Deed dated December 19, 1986 (Vol 1130 Page 130)***
12. ***Copy of a Building Permit issued by Sandy Township on October 28, 1970 to Hospitality Motor Inn, Inc.;***
13. ***Memorandum of Lease dated July 7, 1982 between Phillip Dieringer and Harley Hotels (Vol 843 Page 79), Inc.***

Attorney Cherry cited several Court Cases argued;

14. ***Holden vs. Day Commonwealth Court of Pennsylvania Argued October 8, 1991/Decided December 20, 1991***
15. ***Buckingham Township vs. Commonwealth Court of PA Argued October 5, 2000/Decided January 11, 2001.***

Sandy Township Zoning Officer Keck prepared a memo for the Board of Supervisors to assist them in reaching an informed decision on the proposed request. The request for a minor subdivision for DuBois Dutch, LLC proposes to subdivide a 3.353 acre parcel into two (2) parcels. Parcel "A" will contain 2.597 acres which will be conveyed to DuBois Dutch, LLC. John Guido will retain the residual parcel of 0.756, Parcel "B". Parcel "B" will also include the area referenced as Parcel "C", which contains 0.216 acres. Parcel "C" is also a "Service Road Easement" for both Parcels "A" and "B". The sewage planning has been met for both parcels via existing sanitary sewer line. This subdivision is located off of PA State Route 219 in Sandy Township, Clearfield County.

Gleason, Cherry and Cherry on behalf of DuBois Dutch, LLC, has submitted a Request for Modification of the Minimum Lot size in a Commercial-Highway District, under Sandy Township Zoning Ordinance 1996-2. The Township Ordinance minimum lot size requirement for a Commercial-Highway District is 45,000 square feet. Parcel "B" has a proposed area of 32,910 square feet. The Sandy Township Planning Commission recommended approval of this subdivision at their November 16, 2005 meeting, contingent upon the Board of Supervisors approval of the Request for Modification submitted.

Attorney Cherry introduced several witnesses on behalf of DuBois Dutch LLC.
Mr. Larson, manager of DuBois Dutch, testified that he has been employed at DuBois Dutch for many years and DuBois Dutch employs approximately 30 people. Mr. Larson said that the Dutch Pantry and the BP Station have operated as separate properties for many years. Mr. Larson requested the Board of Supervisors approve the modification/subdivision request of DuBois Dutch.
Mr. Taylor, adjoining property owner, testified that his adjoining property will not be affected if the Board approves the modification/subdivision request. Mr. Taylor spoke in support of DuBois Dutch.
Mr. Ley, owner of DuBois Dutch, testified he has an Assignment and Assumption of Lease on the property and would like to exercise his right to purchase the property.

Attorney Kruk asked representatives of DuBois Dutch to explain their position on the hardship they would face if the Board of Supervisors deny the request for a modification/subdivision.

Mr. Ley responded that Mr. Guido would have control over his property where the grease trap and the sanitary line is located.

Attorney Cherry requested her presentation of documents be a part of the record.
Attorney Kruk instructed Secretary Hopkins to include the documents in the record.

Attorney Anthony Guido, representing his son John Guido, owner of record of the property in discussion testified and objected to the proposed modification request and then presented a request for a minor subdivision.

Attorney Guido introduced for the record:
1. OBJECTIONS TO REQUEST BY DUBOIS DUTCH, LLC FOR MODIFICATION OF MINIMUM LOT SIZE REQUIREMENT FOR COMMERCIAL-HIGHWAY DISTRICT UNDER SANDY TOWNSHIP ZONING ORDINANCE NO. 1996-2;
2. Civil Action In the Court of Common Pleas of Clearfield County, Pennsylvania No. 99-867-CD Answers to Plaintiff's Interrogatories to Defendant, DuBois

Dutch, LLC;
3. Sandy Township definition of Subdivision (MPC)
4. Sandy Township definition of Hardship
5. Sandy Township 1996 Zoning Ordinance, Article 10 Administration (Page 57)
6. Copy of a page from General Municipal Law Planning and Development 53 P.S. Section 10507 (Effect of subdivision and land development ordinance);

Mr. Guido stated he has had the BP station for sale for several years and has been unable to sell it because it does not meet the minimum lot requirement size.

Zoning Officer James Keck prepared a memo for the Board of Supervisors to assist them in reaching an informed decision on the subdivision request of John Guido. The applicant (John Guido) proposes to subdivide a 3.35-acre parcel into two (2) parcels. Parcel "A" will contain 2.32 acres and Parcel "B" will contain 1.03 acres. Parcel "B" will also include the area referenced as Parcel "C", which contains 0.23 acres. Parcel "C" is also a "Service Road Easement" for both Parcels "A" and "B". The sewage planning has been met for both parcels via existing sanitary sewer line. This subdivision is located off of PA State Route 219 in Sandy Township, Clearfield County. The revised subdivision plan includes cross easements for the greasetrap, sanitary sewer manhole, and also a cross easement for nine (9) parking spaces, for Parcel "A". The Pennsylvania Supreme Court has made a ruling on a former minor subdivision submission concerning this property. The Sandy Township Planning Commission recommended approval of this subdivision at their November 16, 2005 meeting.

Board of Supervisors discussion and questions for witnesses present.
Supervisor LaBorde asked if the Dutch Pantry and the BP Station could both use an easement to use parking spaces.
Supervisor Jeffers asked questions about the roadway into the properties.
Supervisors LaBorde asked Mr. Guido the asking price of the BP Station.

Executive Session - 10:20 p.m.
Attorney Kruk explained the Executive Session is to clarify to the Board of Supervisors the Supreme Court Decision.

Meeting reconvened at 10:30 p.m.

The Board of Supervisors expressed their desire to follow the 1996 Sandy Township Zoning and Subdivision Ordinance as written and adopted. They also expressed their concerns to both parties at creating a sub standard lot when the definition of hardship is not met.

The Request of DuBois Dutch, LLC for Modification of Minimum Lot Size Requirement for a Commercial-Highway District was presented for action.

Motion by Ray Anderson second by James Jeffers to deny the Modification Request of DuBois Dutch, LLC. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye

Motion carried.

The Request of DuBois Dutch, LLC for a minor subdivision to subdivide a 3.353-acre parcel into two (2) parcels. Parcel "A" will contain 2.597 acres which will be conveyed to DuBois Dutch, LLC. John Guido will retain the residual parcel of 0.756 acres, Parcel "B". Parcel "B" will also include the area referenced as Parcel "C", which contains 0.216 acres was presented for action.

Motion by Mark Sullivan second by Ray Anderson to deny the subdivision request presented by DuBois Dutch, LLC. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye

Motion carried.

The Request of John Guido for a minor subdivision to subdivide a 3.35-acre parcel into two (2) parcels. Parcel "A" will contain 2.32 acres and Parcel "B" will contain 1.03 acres. Parcel "B" will also include the area referenced as Parcel "C", which contains 0.23 acres. Parcel "C" is also a Service Road Easement" for both Parcels"A" and "B". The subdivision plan includes cross easements for the greasetrap, sanitary sewer manhole, and also a cross easement for nine (9) parking spaces, for Parcel "A".

Motion by Ray Anderson second by James Jeffers to approve the John Guido Subdivision Request as presented. A roll call vote was taken.

Ray Anderson - aye
Brady LaBorde - aye
David Sylvis - aye
James Jeffers - aye
Mark Sullivan - aye

Motion carried.

LEGAL AND PERSONNEL MEETING WILL FOLLOW ADJOURNMENT
Chairman LaBorde announced a Legal and Personnel Meeting will follow adjournment.

ADJOURN
Motion by David Sylvis second by James Jeffers to adjourn. Meeting adjourned at 10:40 p.m.

Respectfully submitted:

Barbara D. Hopkins

Barbara D. Hopkins
Secretary-Treasurer

Sandy Township Board of Supervisors

Date: 11-21-05

Please Sign In

Name	Address
Suzanne Byers	The Progress
Del	Sandy
Liz Dean	Sandy
Amanda Thompson	WDKW
Pat Donlin	Courier Express
[illegible]	SUNNY TOLE
[illegible]	Du Bois
[illegible]	1 N. FRANKLIN ST DU BOIS, PA.
[illegible]	1137 Valley Rd West Decatur PA 16878
Thomas E Dawson	103 Holiday Lane DuBois, Pa.
Jim Taylor	
Peggy	DUBOIS DUTCH PANTRY

IN THE TOWNSHIP OF SANDY

CLEARFIELD COUNTY, PENNSYLVANIA

APPLICATION FOR SUBDIVISION

RE: Request for Subdivision of the Lands Owned by John A. Guido which are Subject to an Agreement to Convey 2.605 Acres thereof to DuBois Dutch, LLC

REQUEST FOR MODIFICATION OF MINIMUM LOT SIZE REQUIREMENT FOR A COMMERCIAL-HIGHWAY DISTRICT UNDER SANDY TOWNSHIP ZONING ORDINANCE NO. 1996-2

TO THE HONORABLE, THE BOARD OF SUPERVISORS OF SANDY TOWNSHIP:

AND NOW, comes DUBOIS DUTCH, LLC, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and brings this request for a modification of the minimum lot size requirement for the Commercial-Highway Zoning District and, in support thereof, avers the following:

PARTIES:

1. DUBOIS DUTCH, LLC, is a limited liability company having its principal place of business at the intersection of I-80 and State Route 219 in Sandy Township, R. D. #3, Box 273C, DuBois, Pennsylvania 15801, and is the Equitable Owner of 2.605 acres, more or less, situate in the Township of Sandy upon which it conducts its business, together with a right of ingress and egress to Route 219 across an area which is .222 acres of land. DUBOIS

DUTCH, LLC, owns and operates the business located on the foregoing property and known as Dutch Pantry, which business has been continuously operated on the foregoing site since 1971.

2. JOHN A. GUIDO is an adult individual with a mailing address of P. O. Box 98, Flint Hill, Virginia 22627, and is the Legal Owner of 3.361 acres of land in Sandy Township, a portion of which is subject to the equitable interests of DUBOIS DUTCH, LLC. JOHN A. GUIDO is the owner and former operator of the B.P. Station located at the intersection of I-80 and State Route 219 which business had been operated on said site either as a B.P. Oil Company Station, or a Boron Oil Company Station or as a Standard Oil Company Station since approximately 1970 until the time that JOHN A. GUIDO discontinued operating the same and said building is now vacant.

STANDING:

3. Section 10107(a) of the Pennsylvania Municipalities Planning Code defines "**landowner**" as "the legal or beneficial owner or owners of land including the holder of an option or contract to purchase (whether or not such option or contract is subject to any condition), a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land. See 53 P.S. §10107.

4. Article III, Section 302 of the Sandy Township Subdivision and Land Development Ordinance enacted May of 1997 adopts the definition of landowner set forth in the Pennsylvania Municipalities Planning Code.

5. That DUBOIS DUTCH, LLC has standing to bring a request for a subdivision of the premises upon which it conducts its restaurant business known as the Dutch Pantry because

DUBOIS DUTCH, LLC, is the beneficial owner of the above-mentioned parcel of land, having duly exercised its option to purchase the same from JOHN A. GUIDO in accordance with the terms of an Option granted to it by Assignment in a Lease dated June 16, 1982, Memorandum of which has been recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, on July 12, 1982, in Deed Book Vol. 843, page 79.

6. That by letter dated November 16, 1998, DuBois Dutch did notify JOHN A. GUIDO of its intent to exercise the option to purchase 2.605 acres of land over which it held an option by reason of said lease. A true and correct copy of the letter of July 16, 1998, is attached hereto and made a part hereof as Exhibit "A".

HISTORY:

7. By Lease dated June 16, 1982, between Phillip J. Dieringer and Harley Hotels, Inc., Phillip J. Dieringer did agree to lease the portion of the property on which the Dutch Pantry was located containing approximately 2.605 acres and easement parcel containing .222 acres of land if he were successful in purchasing the property from James R. Taylor, Jr., now a widower. That Lease also gave to Harley Hotels, Inc., a right to purchase the leased property for $30,000.00 at the end of the term of the Lease or at any time during any extension thereof. The Lease term ran from August 1, 1982, through February 28, 1989, and could be extended for two additional successive periods of five years each bringing the full Lease term with extensions through to February 28, 1999.

8. Mr. Dieringer and his wife purchased the 3.643 acres of land of which the Dutch Pantry parcel was a part from James R. Taylor, Jr., widower, by deed dated July 2, 1982, and

recorded in Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 842, page 337 on July 7, 1982.

9. Mr. Dieringer entered into a second Agreement on July 7, 1982, with Harley Hotels, Inc., confirming the terms of the Lease dated June 16, 1982, but making it effective July 8, 1982, rather than August 1, 1982.

10. A Memorandum of the June 16th Lease as modified by the Agreement of July 7, 1982, was recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 843, page 79 on July 12, 1982. That Memorandum described the parcels that were the subject of the Lease between Phillip J. Dieringer and Harley Hotels, Inc., and also set forth the term with the two additional successive periods of five years and stated that a Purchase Option at the end of the original term or any time during any extension had been granted to Harley Hotels, Inc. A true and correct copy of the Memorandum is attached hereto and made a part hereof as Exhibit "B".

11. The Lease between Mr. Dieringer and Harley Hotels, Inc., obligated Harley Hotels, Inc., to pay the taxes on the land that it was leasing from Dieringer for operation of the Dutch Pantry Restaurant and Harley Hotels and its successor have continued to pay the taxes on the portion of land occupied by Dutch Pantry Restaurant from the time that the restaurant was constructed through to the present.

12. At the time that said Option Agreement was granted, the portion that was the subject of the Option Agreement and the remaining land after the option was exercised were both in compliance with the Sandy Township Zoning Ordinance in effect at that time.

13. On December 19, 1986, Phillip J. Dieringer and Sherry S. Dieringer sold the gas station and land to John A. Guido and Roberta A. Guido. The deed was recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No.. 1130, page 150 on December 22, 1986, and was under and subject to the Lease with Harley Hotels, Inc., a Memorandum of which was dated July 7, 1982, and recorded in Deed Book No. 843, page 79. That was the Lease that gave Harley Hotels, Inc., an option to purchase the land that was the subject of the Lease.

14. On June 19, 1996, a new Zoning Ordinance took effect changing the designation of the zoning district in which the properties were located and requiring a minimum lot size that was larger than the size of the land that would remain to John A. Guido after the exercise of the option by Dutch Pantry Restaurant.

15. John A. Guido and his wife were later divorced and pursuant to a Property Settlement Agreement, she did convey all of her right, title and interest in the subject property to him by deed dated June 13, 1997, and recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 1852, page 85 on June 24, 1997. Again, that deed was made under and subject to the Lease between Phillip J. Dieringer and Harley Hotels, Inc., a Memorandum of which was recorded in Deed Book No. 843, page 79.

16. On July 5, 1998, Harley Hotels, Inc., did sell the Dutch Pantry Restaurant located in Sandy Township to DuBois Dutch, LLC, and by Assignment dated July 5, 1998, did assign all of its right, title and interest in the Lease with Phillip J. Dieringer to DuBois Dutch, LLC. A

true and correct copy of the Assignment is attached hereto and made a part hereof as Exhibit "C".

17. By letter dated July 6, 1998, addressed to both Harley Hotels, Inc., and DuBois Dutch, LLC, John A. Guido acknowledged that the Lessee, Harley Hotels, Inc., was currently in full compliance with all of the requirements and obligations of the Lease and did consent to the Assignment of the Lease by Harley Hotels, Inc., to DuBois Dutch, LLC, and specifically set forth that DuBois Dutch, LLC, would have all of the rights and privileges under the Lease including, but not limited to, the right to exercise the Purchase Option for the property upon which the DuBois Dutch Pantry was located and which property was the subject of the Lease A true and correct copy of said letter is attached hereto and made a part hereof as Exhibit "D".

18. On November 16, 1998, DuBois Dutch, LLC, gave notice, through its attorney, to John A. Guido that it was exercising its option to purchase the subject premises for $30,000.00 pursuant to the terms of Paragraph 9 of the June 16, 1982, Lease and made the request that the lien against the property be satisfied and that all appropriate action to bring the matter to completion be taken by John A. Guido. That letter is referred in Paragraph 6 hereof and attached as Exhibit "A".

19. By letter dated November 17, 1998, JOHN A. GUIDO, by his attorney, advised that he would not convey the subject premises to DUBOIS DUTCH, LLC, nor would he cooperate in securing subdivision approval from Sandy Township unless the Township granted relief from the mandates of the amended ordinance insofar as setbacks, lot size and coverage were concerned. A true and correct copy of the letter of November 17, 1998, is attached hereto and made a part hereof as Exhibit "E".

20. JOHN A. GUIDO did not proceed before the Planning Commission and the Board of Supervisors of Sandy Township to request a subdivision and, as a result, DuBois Dutch, LLC, filed a Complaint for specific performance before the Court of Common Pleas of Clearfield County, Pennsylvania, on February 12, 1999.

21. On May 17, 1999, the Court issued an Order holding all matters between the parties in abeyance until a decision by the Sandy Township Planning Commission and the Supervisors was made on the application to declare the premises a non-conforming lot and grant the subdivision.

22. The Board of Supervisors of Sandy Township unanimously approved the subdivision request of DUBOIS DUTCH, LLC, on July 7, 1999, on the basis that the Township and the parties always treated the property as two separate parcels and agreed that the exercise of the option reverted back to the time when the option was granted and at that time both lots were in conformance with the ordinance existing in 1982. A true and correct copy of the minutes of the regular meeting of the Sandy Township Supervisors held on July 7, 1999, is attached hereto and made a part hereof as Exhibit "F".

23. That JOHN A. GUIDO appealed the Township's grant of subdivision approval to the Court of Common Pleas of Clearfield County, Pennsylvania, and a hearing de novo was held before the Honorable John K. Reilly, Jr., then President Judge of Clearfield County, on June 13, 2000.

24. That by Order dated June 5, 2001, Judge Reilly affirmed the decision of the Township of Sandy granting subdivision approval to DUBOIS DUTCH, LLC, on the basis that the properties had actually been divided as of June 16, 1982, the date of the grant of the option

and that when such lots were divided, both lots were in full compliance with the then-existing zoning ordinance of Sandy Township.

25. That JOHN A. GUIDO again appealed the decision granting subdivision approval and was successful in having the Commonwealth Court, on a two to one decision, overturn the holding of the Clearfield County Court.

26. Thereafter, the Supreme Court of Pennsylvania granted allocator to decide the question of whether a leasehold interest with an option to purchase creates a property interest in the lessee sufficient to support a subdivision under the terms of the Pennsylvania Municipalities Planning Code.

27. By Order entered August 23, 2005, and attached hereto as Appendix "A", the Supreme Court of Pennsylvania declared that the parties had divided the property in fact as of June 16, 1982, because the exercise of the option by DUBOIS DUTCH passed equitable title to the land described in the option as of the date the option was granted, to wit, June 16, 1982. However, the Supreme Court determined that there was no legal subdivision as of that date because no request for legal subdivision had been made at that time and DUBOIS DUTCH would have to request a modification of the requirements of the current ordinance in effect in order to receive a legal subdivision approval.

28. The Supreme Court left the parties with the opportunity to seek further relief pursuant to the modification procedure established by the Municipalities Planning Code and Sandy Township and/or to complete the underlying litigation seeking specific performance.

29. DUBOIS DUTCH, LLC, again requests subdivision approval and brings this written request to the Board of Supervisors of Sandy Township to modify the minimum lot size

requirement in a C-H - Commercial Highway District so that the division in fact of this property which occurred on June 16, 1982, according to the decision of the Pennsylvania Supreme Court, can also be recognized as a legal subdivision and so that DuBois Dutch can compel John A. Guido to perform his part of the agreement between the parties and convey the premises upon which DuBois Dutch conducts its business.

JURISDICTION:

30. Section 512.1(a) of the Pennsylvania Municipalities Planning Code allows the governing body to grant a modification of the requirements of one or more provisions of the subdivision and land development ordinance if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed. See 53 P.S. §10512.1(a).

31. Article 10, Section 1004 of the Sandy Township Subdivision and Land Development Ordinance adopts the foregoing provisions of the Pennsylvania Municipalities Planning Code.

32. Both the MPC and Section 1004, Article 10 of the Sandy Township Subdivision and Land Development Ordinance require that all requests for modification be in writing and accompany and be a part of the Application for Subdivision Approval. Both statute and ordinance require that the request state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary.

33. Section 515.1 of the Pennsylvania Municipalities Planning Code allows a municipality to grant subdivision approval to a subdivision of real property that has occurred in violation of any ordinance adopted by the municipality and to impose as an additional condition for the grant of approval the requirement that the division of property comply with the conditions that would have been applicable to the property at the time that the applicant acquired an interest in such real property. 53 P.S. §10515.1.

34. That DUBOIS DUTCH, LLC, acquired its interest in the property on June 16, 1982, and on that date, both lots met all requirements for legal lots under the ordinance in existence in Sandy Township at that time.

35. That for all the foregoing reasons, the Board of Supervisors of Sandy Township has jurisdiction to modify the minimum lot size requirement to allow the lots that have already been divided by the actions of these parties to be legally subdivided so that both parties will be left in the position that they created for themselves.

MODIFICATION REQUESTED:

36. Sandy Township Zoning Ordinance 1996-2 prescribes 45,000 square feet as the minimum lot size for land in the C-H - Commercial Highway Zoning District.

37. The land of which DUBOIS DUTCH, LLC, is now the equitable owner meets all of the requirements of the 1996 Sandy Township Zoning Ordinance currently in effect.

38. The land that remains to JOHN A. GUIDO is 42,305 square feet with the actual lot upon which the gasoline station is erected being 32,910 square feet. The building as erected meets all building setback lines imposed by the 1996 Ordinance.

39. DUBOIS DUTCH, LLC, requests Sandy Township to grant a modification of the minimum lot area required for a lot in a commercial highway district so that the land remaining to JOHN A. GUIDO can continue to be used as it has been used for the past 35 years and a legal subdivision can be approved so that DUBOIS DUTCH, LLC, can compel JOHN A. GUIDO to issue a deed to DUBOIS DUTCH, LLC, for the land it acquired through the exercise of the option.

GROUNDS FOR GRANTING MODIFICATION AND FACTS OF UNREASONABLENESS OR HARDSHIP ON WHICH REQUEST IS BASED:

40. JOHN A. GUIDO, by letter dated July 6, 1998, assured DUBOIS DUTCH, LLC, that it had all of the rights of its predecessor in title, including the right to exercise the option to purchase the 2.605 acre parcel of ground.

41. That in reliance of the rights granted to it, DUBOIS DUTCH, LLC, purchased the Dutch Pantry Restaurant and exercised the option to purchase the land on November 16, 1998.

42. That the Supreme Court of Pennsylvania has reaffirmed that "an option to purchase land is a substantial interest in the land; and, when the option is exercised, the optionee's ownership reverts to the granting of the option." (citations omitted). 880 A.2d 1220, 1225 (Pa. 2005).

43. That the Supreme Court affirmed that when DuBois Dutch exercised the option to purchase, the landlord-tenant relationship with John A. Guido ceased to exist and the lease was converted into a contract of sale. (citations omitted) 880 A.2d at 1225.

44. The Supreme Court has declared that "DuBois Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon DuBois Dutch effective June 16, 1982." 880 A.2d at 1225.

45. The Pennsylvania Supreme Court held "that the law views DuBois Dutch's exercise of the Option as effectuating transfer of the Restaurant Parcel to DuBois Dutch as of the date of the 1982 Lease and Option, and that ... such conveyance resulted in the division-in-fact of the Property into the Restaurant Parcel and the Gas Station Parcel ...". 880 A.2d at 1227.

46. That the Supreme Court noted that the MPC and Sandy Township's Subdivision Ordinance provides a procedure by which Sandy Township could excuse failures to conform to its current ordinance and did direct the parties to request a modification of that portion of the ordinance to which the transaction could not conform.

47. That if such modification is not granted, JOHN A. GUIDO will continue to refuse to convey the restaurant parcel to DuBois Dutch because a legal subdivision cannot occur even though the parcels have been divided in fact for over 23 years.

48. That JOHN A. GUIDO has filed an action in the Court of Common Pleas of Clearfield County, Pennsylvania, seeking to eject DUBOIS DUTCH, LLC, from the property and to take away from Gregory Ley, owner of DUBOIS DUTCH, LLC, his entire life savings that is wrapped up in the Dutch Pantry Restaurant.

49. That the land has already been divided into a restaurant parcel and a gas station parcel and each parcel has been separately used by the owners of the respective businesses located thereon and their respective predecessors in title for well over 30 years.

50. That if the modification is not granted, DUBOIS DUTCH will be deprived of its constitutional right to own property that the Supreme Court of Pennsylvania has recognized belongs to it.

51. That if the modification is not granted, DUBOIS DUTCH will be deprived of the land that it has been in possession and control of and paid taxes on since 1982.

52. That it would be unreasonable to refuse the request for modification for the following reasons:

(a) That Sandy Township has recognized the properties as two separate parcels for decades.

(b) That both parcels are completely developed and have been in use as separate, completely developed businesses for over 30 years.

(c) That since the properties are fully developed and have continued to operate throughout the years, they cannot be held to be contrary to the public interest or to the purpose and intent of the Planning Ordinance.

(d) That both parties have the same land after the granting of the modification and the grant of subdivision approval as they have had since 1982 and both parties will get the benefit of their bargain.

(e) That when JOHN A. GIUDO purchased the property, it was subject to the option in favor of the predecessor in title of DUBOIS DUTCH and JOHN A. GUIDO knew that the restaurant parcel could be purchased at any time during the lease term by exercise of the option. Consequently, he has no less than he expected to have when he purchased the property.

(f) That no further building nor permits are required as the parcels are fully developed and all infrastructure serving each parcel is in place and has been in place for over 23 years.

(g) That the parcels have been divided in fact since 1982 with DuBois Dutch being the equitable owner of the 2.605 acre parcel of land and the granting of the modification request and subdivision approval does not impose any greater burden on the infrastructure and roads of Sandy Township nor does it in any way adversely impact upon the health, welfare or safety of the residents of Sandy Township.

WHEREFORE, Applicant respectfully requests that the minimum lot size requirement for lots in a C-H - Commercial Highway District be modified and that the Township Board of Supervisors accept the lot size of the gas station parcel, having a total square footage of 42,305 square feet and a building lot size of 32,910 square feet and approve the request for subdivision.

Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Equitable Owner

VERIFICATION

I, GREGORY S. LEY, verify that the information provided in the foregoing **Request for Modification** is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsification to authorities.

Gregory S. Ley

Gregory S. Ley

DATED: October 13, 2005

LAW OFFICES

THEISEN, BROCK, FRYE, ERB & LEEPER CO., L.P.A.

PAUL T. THEISEN*
JERRY A. BROCK
GARY F. FRYE
JOHN E. ERB
M. DALE LEEPER*
JAMES S. HUGGINS*
COLLEEN E. COOK*
JOHN E. TRIPLETT, JR.*

ABE SELLERS*

424 SECOND STREET

POST OFFICE BOX 739

MARIETTA, OHIO 45750

TELEPHONE 373-5455
TELECOPIER 373-4409
AREA CODE 740
e-mail address
tbls@ofynet.net

*ADMITTED IN OHIO AND WEST VIRGINIA

*OF COUNSEL

November 16, 1998
(Overnight Courier and Ordinary Mail)

John A. Guido
R.R. #1, Box 260
Game School Road
Brockway, PA 15824-9311

Dear Mr. Guido:

As you and your father know, we represent DuBois Dutch, LLC. By reason of an Assignment and Assumption of Lease from Harley Hotels, Inc. dated as of July 5, 1998 and recorded at Volume 1951, Page 453 of the records of Clearfield County, DuBois Dutch, LLC is the assignee of the various rights and obligations of Harley Hotels, Inc. under a Lease dated June 16, 1982 between Phillip J. Dieringer as Lessor and Harley Hotels, Inc. as Lessee. A copy of that Lease is attached, as is a copy of our Assignment, as recorded. A Memorandum of Lease, dated July 7, 1982, was recorded on July 12, 1982 in the records of Clearfield County in Book 843, at Page 79. By reason of the assignment, DuBois Dutch, LLC succeeded to the rights and obligations of the Lessee under the Lease.

Pursuant to Paragraph 9 of the Lease, DuBois Dutch, LLC, as assignee of the Lessee's rights, privileges and options thereunder, does hereby give notice to you, as assignee and successor to the rights and obligations of the Lessor under the Lease, of its intent to exercise its option to purchase the Leased Property (including ingress and egress and utility easements as provided in the Lease) for the sum of $30,000, being the purchase price provided for in the Lease. As you know, the option is exercisable upon 30 days' written notice. We therefore suggest December 23, 1998 as the closing date. DuBois Dutch, LLC stands ready, willing and able to pay the purchase price, through such instrument as you may reasonably require, and to do all other things which may be required under the Lease on its part to consummate the purchase.

We understand that the property is subject to a mortgage given to S & T Bank of DuBois and ask that you make

EXHIBIT "A"

331a

appropriate arrangements to have a release of the Leased Property available. As you know, DuBois Dutch, LLC has had the property surveyed in conformity with the requirements of Sandy Township and the survey is expected to be presented to the township for approval in late November. Your father has contacted us concerning certain subdivision requirements and we trust that you will take appropriate action to insure that our client's rights under the purchase option will not be adversely affected. Real estate taxes and related matters can be addressed once a final closing date has been selected.

Respectfully,

M. Dale Leeper

MDL:clt
cc: Anthony S. Guido, Esquire (telecopied and mailed)
Greg S. Ley
Denning Gearhart

(54904)

332a

THIS LEASE dated the 7th day of July, 19 82 by and between

PHILLIP J. DIERINGER

whose address is RD # ROCTON, PENNSYLVANIA 15856,
hereinafter (whether one or more), called "Lessor", and HARLEY HOTELS, INC. an Ohio corporation, with its principal office in the Terminal Tower, Cleveland, Ohio 44113, hereinafter called "Lessee".

WITNESSETH, That:

Lessor, in consideration of the sum of One Dollar ($1.00) and other valuable consideration received by Lessor from Lessee, does hereby lease and let to Lessee, upon and subject to the covenants, terms, rentals and agreements set forth in a certain instrument of lease between Lessor and Lessee dated JUNE 16, 19 82, (herein called the "Lease"), the following described premises (herein called the "Leased Premises") situated in the Township of Sandy, County of Clearfield, and State of Pennsylvania:

As described in attached Exhibits, A, B, D AND E.

CLEARFIELD COUNTY
ENTERED OF RECORD
TIME 12:2.5 PM 7-12-82
BY Scott V. Jones
FEES 17.50
TIM MORGAN, Recorder

TO HAVE AND TO HOLD the same for a term of Six years - 7 months, commencing on the 1st day of August, 19 82, and ending on the 28th day of February, 19 89, unless sooner terminated or further extended as in said Lease provided or permitted. Lessee is granted by the terms of said Lease a continuing option of "First Refusal" to meet any bona fide offer received by Lessor from a third party to purchase or lease the Leased Premises and Lessee has the right to purchase or lease said premises on the same terms as contained in such offer. Lessee is further granted by said Lease the following option(s) to extend the term thereof and/or to purchase the Leased Premises: Two (2) additional successive periods of five (5) years with Purchase Option at end of original term or at any time during any extension.

Lessor and Lessee agree that the description of the Leased Premises as contained in the Lease is hereby amended to substitute therefor the description of said premises as herein above set forth, and that each and every other provision, covenant and condition with respect to the rights and obligations of the parties hereto and the use and occupancy of the above described Leased Premises as set forth in said Lease shall remain in full force and effect without modification and are incorporated herein and made a part hereof by reference thereto as fully and effectively as if rewritten herein at length.

IN WITNESS WHEREOF, this Lease has been duly executed in duplicate, each copy to be deemed an original, by Lessor and Lessee, as of the day and year first above written.

Executed in the presence of:

Phillip J. Dieringer, Lessor

Sherry S. Dieringer (Wife) LESSOR

By Harley Hotels, Inc. LESSEE

ATTEST BY: R. J. HARBERT, VICE PRESIDENT, SECY.

CLV-1321-C

EXHIBIT "B"

2970

BOOK 843 PAGE 080

ACKNOWLEDGMENT

COUNTY OF Clearfield } SS:

BEFO E, a Notary Public in and for said County and State, personally appeared the above named

Phillip J. Dieringer

who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at DuBois, Pa.

this 7th day of July, A.D., 1982.

SUSAN M. HARTZFELD, Notary Public
DuBois, Clearfield County, Pa.
My Commission Expires July 29, 1985

My commission expires July 29, 1985.

Susan M. Hartzfeld
Notary Public

STATE OF OHIO } CORPORATE ACKNOWLEDGMENT

COUNTY OF CUYAHOGA } SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above named

HARLEY HOTELS, INC.

by R. J. HARPST, its VICE PRESIDENT and SECRETARY, its

HE

, who acknowledged that ~~XXX~~ did sign the foregoing instrument and that the same is the free act and deed of said corporation and the free act and deed of ~~XXXXXXXX~~ personally and as such officers.

HIM

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Cleveland, Ohio

this 29th day of June, A.D., 1982.

My commission expires 12/7/85.

Thomas J. Bahn, Jr.
Notary Public
THOMAS J. BAHN, JR.
THOMAS J. BAHN, JR., Notary Public
Residence - Summit County
State Wide Jurisdiction, Ohio
My Commission Expires Dec. 7, 1985

This instrument was prepared by

LEASE
From

To

Return to:
1800—M Midland Building
Cleveland, Ohio 44115

298a

340 PAGE 007

-80 & Rt. 219
uBois, PA
XHIBIT A

EXHIBIT "A"

.11 that certain Lot or piece of ground situate in the Township of Sandy, County f Clearfield, and Commonwealth of Pennsylvania, bounded and described as follows:

eginning at a 2" iron pipe, said pipe being North 61°-47'-30" East a distance of .20 feet from Station 1611+39.40 feet on the Route 219 base line;

hence by the Legal Right-of-Way line of Ramp "D" North 61°-47'-30" East a distance of 84.00 feet to a 2" iron pipe;

hence 232.66 feet on the arc of a curve to the right, said curve having a radius of 00.00 feet, with a chord bearing North 38°-26'-41" East a distance of 183.62 feet o a 2" iron pipe;

hence continuing with said Right-of-Way South 74°-54-08" East a distance of 57.74 eet to a 2" iron pipe on the original line of the James M. Norwood lot;

hence with the westerly line of said Norwood lot, South 38°-30'-21" East a distance of 31.44 feet to a 2" iron pipe;

hence with southerly line of said Norwood lot, North 46°-45'-09" East a distance of 1.94 feet to a 2" iron pin on the Legal Right-of-Way line of Ramp "D";

hence with said Legal Right-of-Way line of Ramp "D", South 74°-54'-08" East a distance of 162.83 feet to a 2" iron pipe at the corner of the parcel now or formerly owned by the McIntosh Coal Company;

hence with the line of said McIntosh Coal Company, South 38°-30'-21" East a distance of 102.25 feet to a 2" iron pipe;

hence South 43°-01'-48" West a distance of 120.30 feet to the most westerly corner of the Boron Oil Company parcel;

Thence with the line of said Boron Oil Company the following six courses;

North 46°-58'-12" West a distance of 37.00 feet;

South 43°-01'-48" West a distance of 41.00 feet;

South 46°-58'-12" East a distance of 27.00 feet;

South 43°-01'-48" West a distance of 152.50 feet;

North 46°-58'-12" West a distance of 115.01 feet;

South 61°-47'-30" West a distance of 120.46 feet to the easterly right-of-way line of Route 219;

Thence North 28°-12'-30" West with said Right-of-Way line of Route 219 to the iron pipe at the point of beginning, a distance of 186.44 feet, containing 2.605 Acres, more or less, but subject to all legal highways and easements of record.

299a

EXHIBIT "B"

LEGAL DESCRIPTION

Easement Parcel:

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point which is 100.00 feet perpendicularly right of base line station 1605 + 75.79 of Rt. 219; thence by the following courses and distances:

(1) N 28 12' 30" W for a distance of 12.17 feet;

(2) N 21 33' 52" W for a distance of 367.46 feet;

(3) N 61 47' 30" E for a distance of 26.18 feet;

(4) S 21 33' 52" E for a distance of 362.55 feet;

(5) S 29 15' 37" W for a distance of 31.72 feet;

and containing therein exactly 0.222 acres of land.

COMMONWEALTH OF
STEVE D. FINNEY
SURVEYOR
16574-E
PENNSYLVANIA

R.S

3000

43 PAGE 82

EXHIBIT "D"

LEGAL DESCRIPTION
S/S Parcel

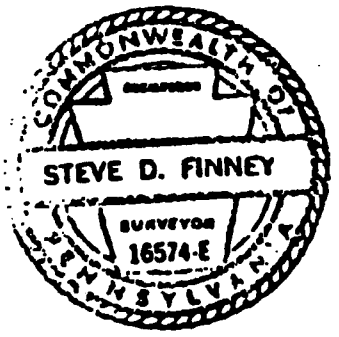
Parcel No. 2:

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point 100.00 feet perpendicularly right of base line station 1605 + 75.79 of Rt. 219; thence by the following courses and distances:

(1) N 28° 12' 30" W a distance of 224.17 feet;
(2) N 61° 47' 30" E a distance of 20.00 feet;
(3) N 28° 12' 30" W a distance of 153.00 feet;
(4) N 61° 47' 30" E a distance of 120.46 feet;
(5) S 46° 58' 12" E a distance of 115.01 feet;
(6) N 43° 01' 48" E a distance of 152.50 feet;
(7) N 46° 58' 12" W a distance of 27.00 feet;
(8) N 43° 01' 48" E a distance of 41.00 feet;
(9) S 46° 58' 12" E a distance of 37.00 feet;
(10) S 43° 01' 48" W a distance of 326.05 feet;
(11) S 21° 33' 52" E a distance of196.82 feet;
(12) S 29° 15' 37" W a distance of 38.43 feet;

to the point of beginning and containing therein exactly 0.775 acres of land.



Steve D. Finney, R.S.

301a

EXHIBIT "E"

VOL 843 PAGE 83

LEGAL DESCRIPTION

Easement Parcel: SERVICE ROAD

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point which is 100.00 feet perpendicularly right of base line station 1605 + 75.79 of Rt. 219; thence by the following courses and distances:

(1) N 28 12' 30" W for a distance of 12.17 feet;

(2) N 21 33' 52" W for a distance of 367.46 feet;

(3) N 61 47' 30" E for a distance of 26.18 feet;

(4) S 21 33' 52" E for a distance of 362.55 feet;

(5) S 29 15' 37" W for a distance of 31.72 feet;

and containing therein exactly 0.222 acres of land.

COMMONWEALTH OF PENNSYLVANIA
STEVE D. FINNEY
SURVEYOR
16574-E

R.S.

FIELD COUNTY
D OF RECORD 9-12-82
12:25 PM
Cathy V. Jones
1750
GAN, Recorder

PENNSYLVANIA:
OF CLEARFIELD SS
D in the Recorder's Office in and for said
Deeds and Record Book No. 843
1 etc.
NESS my hand and seal of office this
day of A.D. 1982
Tim Morgan Recorder

My Commission Expires
First Monday in January 1984

3020

Entered of Record Sept. 12 1982 12:25 PM Tim Morgan Recorder

EXHIBIT "B"

LEGAL DESCRIPTION

Retained Parcel

Parcel No. 1:

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point which is 132.40 feet perpendicularly right of base line station 1605 + 96.46 of Rt. 219; thence by the following courses and distances:

(1) N 21° 33' 52" W a distance of 196.82 feet;

(2) N 43° 01' 48" E a distance of 45.55 feet;

(3) S 38° 15' 00" E a distance of 170.70 feet;

(4) S 47° 00' 00" W a distance of 52.45 feet;

(5) S 29° 15' 37" W a distance of 53.32 feet;

and containing therein exactly 0.282 acres of land.

COMMONWEALTH OF PENNSYLVANIA
STEVE D. FINNEY
SURVEYOR
16574-E

Steve D. Finney, P.S.

3030

EXHIBIT "C"

LEASE

THIS LEASE, dated the 16th day of June, 1982, by and between PHILLIP J. DIERINGER, whose address is R. D., Brockton, Pennsylvania 15856 and whose phone number is 814/583-5359 hereinafter (whether one or more) called "Lessor", and Harley Hotels, Inc., a corporation whose address is 2100 Terminal Tower, Cleveland, Ohio 44115, hereinafter called "Lessee",

WITNESSETH, That:

1. LEASED PROPERTY. Lessor hereby leases to Lessee the following premises (hereinafter called the "Leased Property") situated in Township of Sandy, County of Clearfield, State of Pennsylvania,
A parcel on the SEQ of I-80 and Rt. 219 more fully described in Exhibit A attached hereto and made a part hereof; together with the right of ingress and egress to Rt. 219 across an area described in Exhibit B attached hereto and made a part hereof; and together with the right to use, maintain and repair existing sewer, water, power/telephone lines and any other existing facilities that serve the restaurant property leased hereunder. Together with all oppurtenances thereto, and all rights and interests of Lessor in public highways, roads, streets and ways adjoining said premises.

This Lease shall take effect only in the event Lessor acquires the fee to the above described premises. In the event Lessor fails to acquire ownership prior to July 31, 1982, this Lease shall be null and void.

2. TERM. TO HAVE AND TO HOLD the same for a term of six years and seven months commencing on the 1st day of August, 1982, and ending on the 28th day of February, 1989.

3. RENTAL. Lessee agrees to pay as rent for the Leased Property the sum of One Hundred Seventy Seven Dollars and Fifty Cents ($177.50) per month, payable monthly in advance on the first day of each month during said term by check payable to Lessor at Lessor's address shown above until Lessee is notified by Lessor as to change of address.

4. OPTION(S) TO EXTEND TERM. Lessee is hereby granted the option(s) to extend the term of this Lease beyond the original term for two (2) additional successive periods of five (5) years each at the same rental and on the same terms and conditions as herein provided, except as may be otherwise expressly stipulated hereinbelow. Said option(s) shall be exercisable only if Lessee gives Lessor notice of exercise prior to expiration of the original term or the then current additional period for which said term theretofore has been extended, as the case may be.

5. SUPPLEMENTAL LEASE AGREEMENT: Lessee shall have the right at its expense, to have the premises surveyed by a Registered Surveyor. After the survey has been completed and inspected by the parties, Lessor and Lessee shall execute a Supplemental Lease Agreement, recordable in form, for the purpose of substituting the legal description derived from the survey for the description herein contained, provided however that if Lessee elects to cause a Memorandum of Lease to be executed as hereinafter provided, and if said Memorandum of Lease contains the legal description derived from said survey, a Supplemental Lease Agreement shall not be executed, and the Memorandum of Lease shall serve the purpose thereof.

6. MEMORANDUM OF LEASE. Lessor and Lessee agree that this Lease shall not be recorded but a Memorandum of this Lease shall be executed (which memorandum may contain the description derived from the survey referred to in paragraph 5 above) by the parties for recording purposes and Lessee shall have the right to record the same, but if such Memorandum of Lease shall not be executed by Lessor, then Lessee may, at its option, record this Lease.

7. LESSEE'S RIGHT OF TERMINATION. Since Lessee expects to use the Leased Property for restaurant purposes, it is mutually agreed that if Lessee is unable by reason of injunction or other legal interference to use any part of the Lease Property or the improvements thereon for such purposes, or if such use is prohibited by any present or future law, ordinance, zoning or other regulation of any duly constituted governmental authority, or by any restriction on the Leased Property not removed within ninety (90) days, or if building permits (including permits for curb cuts, sanitary facilities, and any other permits required in order to construct and operate on the Leased Property restaurant facilities of the type desired by Lessee shall not be issued by the appropriate governmental authority (or, if issued, are revoked), or if such use should be prevented or in the judgment of Lessee materially impaired by the widening, altering or improving of any adjoining street or road or as a result of taking all or part of the Leased Property for public or quasi-public use in condemnation proceedings or other exercise of the right of eminent domain, or by agreement in lieu thereof, (all herinafter collectively called "Condemnation Proceedings"), then, in any such event, Lessee shall have the right, in addition to any other rights it may have, to terminate this Lease by giving Lessor not less than thirty (30) days notice and in the event of such termination, rentals and any other charges hereunder shall be prorated as of the date that construction or operation of a restaurant business on the Leased Property is so prevented or materially impaired and all further rentals and other changes shall abate. In the event that a portion, but not all of the Leased Property shall be taken in Condemnation Proceedings and Lessee does not exercise the foregoing election to terminate this Lease, then this Lease shall continue in full force and effect as to the portion of the Leased Property not so taken and Lessee shall be entitled to a prorated reduction in the rentals and any other charges prvided for herein, as of the date that construction or operation of business upon the Leased Property is prevented or materially inpaired, and such reduction is to be not less than that based on the proportion which the area so taken bears to the area originally leased, and provided that further consideration by Lessor and Lessee shall be given to the respective values of the area taken and the area not taken to reflect any additional reduction indicated. Lessor shall be entitled to any Condemnation Proceedings award for its fee simple interest and its other interest in the Leased Property and Lessee shall be entitled to any award for its leasehold interest, buildings and other improvements upon the Leased Property, and for any relocation costs. Notwithstanding anything to the contrary contained in this Lease, Lessee shall have the right, at its sole cost and expense, to assert a separate claim in any Condemnation Proceedings for the value of its leasehold, buildings or other improvements upon the Leased Property an any relocation costs pertaining to such improvements. Whenever notice of a taking of Lease Property or improvements thereon is received by either Lessor or Lessee, such party shall notify the other thereof, and Lessor and Lessee shall jointly negotiate with the taking authority as to the value of their respective interests in the Lease Property or improvements thereon to the end of being fairly compensated therefor. Nothing contained herein shall, however, restrict Lessee to use the Leased Property only for service station purposes, but Lessee may use the same for any lawful purpose whatsoever.

8. TAXES AND ENCUMBRANCES. Lessee shall pay all taxes and assessments levied upon the leased land and any and all buildings, structures and improvements, thereon belonging to Lessee. All other obligations of the Lessor which are or may become a lien on the Leased Property by actions of or against the Lessor shall be paid by Lessor as they become due. Any taxes levied upon any buildings, improvements or equipment belonging to Lessee shall be promptly paid by Lessee as they become due.

9. PURCHASE OPTION. Lessee, as part of the consideration hereof, is hereby granted the privilege and option of purchasing the Leased Property at the end of the term of this Lease or at any time during any extension thereof for the sum of Thirty Thousand Dollars ($30,000). Said purchase option shall be exercisable by Lessee's giving Lessor at least thirty (30) days written notice of its exercise said option. The purchase price herein specified shall be reduced by any Condemnation Proceedings awards received by Lessor, its successors and assigns, since commencement of this Lease. Purchase shall include ingress and egress and utility easements as provided in this lease.

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10. FIRST REFUSAL OPTION ON SALE OR LEASE. If during the term of this lease, or any extension hereof, Lessor receives a bona fide offer from a third party to buy the Leased Property (or to lease the same for a period after the expiration of this lease) which after Lessor sha-l desire to accept, Lessor shall immediately notify Lessee giving Lessee all of the terms and conditions of such offer, including price (or rental) and Lessee shall have the right and option for thirty (30) days after receipt of such notice to elect to buy the Leased Property (or lease it) for the same donsideration and on the same terms and conditions as contained in such offer. Said option shall be exercisable by Lessee's giving notice to Lessor thereof within such thirty (30) days period and if said option is not exercised by Lessee within such period, Lessor shall have the right to sel (or lease) the said premises to such third party, but only at the price (or rental) and on the terms and conditions contained in said offer and in any case subject to the within Lease which shall remain in full force and effect. No sale, transfer (or lease) of said Leased Property shall be valid unless and until the foregoing requirements are fully complied with. The term "Leased Property" as used in the foregoing "first refusal" option includes all or any portion of the Leased Property and land of which the Leased Property is a part. Said option shall run with the land and failure of Lessee to exercise said option in any one case shall not affect Lessee's right to exercise and option in any cases thereafter arising.

11. TERMS IN THE EVENT OF SALE. Upon receipt of notice of Lessee's election to purchase the lease property, pursuant to the option herein granted, Lessee shall procure from a responsible title company a preliminary title report on the condition of Lessor's title. Lessee shall have a reasonable time to examine same. Upon completion of such examination, Lessee shall notify Lessor of any defects, restrictions, liens, encumbrances or encroachments affecting the leased property, in which event, Lessor agrees to promptly correct or cure the same if so requested by Lessee, or in the alternative, Lessee, at its option, may undertake whatever action may be necessary to correct or cure any such defects, restrictions, liens, encumbrances or encroachments. At such time as title is satisfactory to Lessee it will pay the purchase price to Lessor in exchange for Lessor's general warranty deed conveying the Lease Property to Lessee with all rights of dower released, free and clear of all encumbrances except restrictions and easements of record and current taxes not then due and payable. Lessor agrees to furnish to Lessee, upon the closing, a policy of Title Insurance issued by the title company in the amount of the purchase price, showing good and marketable title in Lessee subject only to the exceptions to be contained in the deed from Lessor conveying title to Lessee. The cost of such title policy and the preliminary title report shall be borne by Lessor. Transfer of personal property incuded in said sale shall be made by Lessor's bill of sale with full warranty of clear title. Unless otherwise expressly stipulated all taxes, assessments, and rentals shall be prorated as of date of transfer of record title. Reassessed special assessments, if any, shall be paid in full by Lessor whether due or to become due.

12. ASSIGNMENT AND SUBLETTING. Lessor agrees that Lessee may assign this Lease or sublet all or part of the Leased Property, and in the event Lessee does assign or sublet, and Lessor is so notified in writing, Lessor agrees to give Lessee's assignee or sublessee written notice of any default hereunder, and Lessor agrees that such assignee or sublessee may comply with all of the provisions of this Lease as to the Leased Property assigned or subleased, be entitled to possession of such portion of the Leased Property pursuant to the terms of this Lease and to attorn to Lessor.

13. LESSOR'S RIGHTS IF LESSEE DEFAULTS. Lessee agrees that if default be made in the payment of rent or in the performance of any provisions to be performed by it Lessor may at Lessor's election, after giving Lessee not less than thirty (30) days' written notice to cure such default, at any time while such default continues declare said term ended and enter into possession of the Leased Property and sue for and recover all rents and damages occrued under this Lease

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14. SURRENDER AND HOLDOVER. Lessee agrees to surrender possession of the Lease Property to the Lessor at the end of the original term or any extension thereof. If, after the expiration of this Lease, Lessee shall remain in possession of the Leased Property and continue to pay rent without a written agreement as to such possession, Lessee shall be regarded as a tenant from month to month and such rent shall be payable at the monthly rate and in the manner herein provided.

15. QUIET ENJOYMENT. Lessor covenants that Lessor is well seized of and has good right to lease the Leased Property, agrees to defend the title thereto and warrants that Lessee shall at all times during said term, and any extension there of, have peaceable and quiet enjoyment and possession of said premises without le or hindrance from Lessor or any person whomsoever. If Lessor's title or right to receive rent or any other payments hereunder be disputed or in the event of a change of ownership of Lessor's estate by voluntary transfer or operation of law, Lessee may withold rent thereafter accruing until Lessee is furnished with proof satisfactory to it as to the party entitled thereto.

16. SAVE HARMLESS. Lessee agrees to protect, indemnify and save harmless the Lessor, his heirs and assigns, from any and all losses, damages and claims, suits or costs which shall arise or grow out of the construction, reconstruction, operation, or maintenance of said property, and/or any injury to any person or persons, or any property cuased by or resulting in anyway from the operation, use or condition of the facilities of the demised property, including the driveways, sidewalks, buildings or equipment now or hereafter erected or installed thereon.

17. NOTICES. It is mutually agreed that any and all notices herein provided for must be given in writing and shall be deemed given if and when delivered in person or duly deposited in the United States mails, postage prepaid for regular or certified mail, or filed for transmission with a recognized telegraph company, properly addressed to the party to whom given at the address of such party shown in this Lease, provided, however, that either party may specify any other post office address in the United States by giving at least ten (10) days' written notice thereof to the other party.

18. RIDERS. Any riders attached to this instrument shall be considered as a part of this Agreement and incorporated herein as if originally written herein. Any reference to "see Rider" with a number designation shall refer to the rider so numbered as attached.

19. ENTIRETY OF AGREEMENT, SIGNING BY LESSEE, SUCCESSORS AND ASSIGNS. This Lease merges all prior negotiations and understandings and there are no other agreements or understandings, oral or otherwise, between the parties pertaining to the Leased Property. This Lease and any written agreement hereafter made by the parties pertaining thereto shall be binding upon Lessee only when executed on Lessee's behalf by an officer or authorized representative of Lessee at its address above set forth. A signed copy of this Lease will be mailed or delivered to Lessor after execution thereof by Lessee. This Lease and all of the covenants hereof, including without limitation any options herein contained, shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, devises, representatives, successors and assigns.

WHEREOF, Lessor and Lessee have hereunto subscribed their names to duplicate copies of this instrument, each of which shall be deemed an original the day and year first above written.

3070

WITNESS WHEREOF, Lessor and Lessee have hereunto subscribed their names to duplicate copies of this instrument, each of which shall be deemed an origina the day and year first above written.

In the presence of:

_____ Phillip J. Dieringer Lessor

_____ Sherry S. Dieringer (wife) Lessor

SHERRY S.

Harley Hotels, Inc.
Lessee

_____ BY _____

_____ AND _____

INDIVIDUAL ACKNOWLEDGMENT

STATE OF PENNSYLVANIA)
) SS:
COUNTY OF CLEARFIELD)

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above named PHILLIP J. DIERINGER and Sherry S. Dieringer, who is personally known to me and who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

In witness whereof, I have hereunto set my hand and official seal at DuBois, Pa this 18th day of June, 1982.

Susan M. Hartzfeld
Notary Public
SUSAN M. HARTZFELD, Notary Public
DuBois, Clearfield County, Pa.
My Commission Expires July 29, 1985

CORPORATE ACKNOWLEDGMENT

STATEOF)
) SS:
COUNTY OF)

BEFORE ME, a Notary Public in and for said County, personally appeared the above named _____ by _____ its _____ and _____ its _____, who are personally known to me and who acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said corporation and the free act and deed of each of them personally and as such officers.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ this _____ day of _____, 1982.

_____
Notary Public

3080

P 500— Assignment of lease by tenant, with warranties, plain English format: 11-78

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Dubois, PA

ASSIGNMENT AND ASSUMPTION OF LEASE

VOL 1951 PAGE 453

The parties agree as follows:

Date: as of the 5th of July, 19 98

Parties:
Assignor: Harley Hotels, Inc., an Ohio corporation
Address: 17000 Bagley Road, Middleburgh Heights, Ohio

Assignee: Dubois Dutch, LLC, a Pennsylvania Limited Liability Company
Address: RD #3, Box 273-C
I-80 & S.R. 219, Dubois, PA 15701

If there are more than one Assignor or Assignee, the words "Assignor" and "Assignee" shall include them.

Lease assigned: The Lease which is assigned herein is indentified as follows:
Landlord Phillip J. Dieringer
Tenant Harley Hotels, Inc.
Date June 16, 1982 Premises: SE 1/4 of I-80 and US 219 Dubois, Sandy Township, Clearfield Co., PA

(This Lease was/~~not~~ recorded in ~~this County~~ ~~in the office of the~~

A memorandum of Lease dated July 7, 1982 was recorded on July 12, 1982 in the County of Clearfield, State of Pennsylvania, in Book 913, Page 79.

Consideration: Assignor has received TEN ($ 10.00) dollars and other good and valuable consideration for this Assignment.

Assignment: Assignor assigns to the Assignee all the Assignor's right, title and interest in a) the Lease and b) the security deposit, if any, stated in the Lease.

Assumption: Assignee agrees to pay the rent promptly and perform all of the terms of the Lease as of the date of this Assignment. Assignee assumes full responsibility for the Lease as if Assignee signed the Lease originally as Tenant.

Indemnity: Assignee agrees to indemnify and hold Assignor harmless from any legal actions, damages and expenses, including legal fees that the Assignor may incur arising out of the Lease.

Benefit to landlord: Assignee agrees that the obligations assumed shall benefit the landlord named in the Lease as well as the Assignor.

Assignor's statements: Assignor states that Assignor has the right to assign this Lease and that the premises are free and clear of any judgments, executions, liens, taxes and assessments.

Assignee's statements: Assignee states that Assignee has read the Lease and has received the original or an exact copy of the Lease.

Successors. This assignment is binding on all parties who lawfully succeed to the rights or take the place of the Assignor or Assignee.

Margin headings The margin headings are for convenience only.

Signatures: The Assignor and Assignee have signed this Assignment as of the date at the top of the first page.

WITNESS: Amelia Marr

ASSIGNOR
HARLEY HOTELS, INC.
By: Abe Wolf
Abe Wolf, Vice President & Treasurer

WITNESS: [illegible]

ASSIGNEE
Dubois Dutch, LLC
By: [illegible]
Member

EXHIBIT "C"

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VOL 1951 PAGE 454

STATE OF
COUNTY OF

On the day of 19 , before me personally came

to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that executed the same.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of July 19 98 , before me personally came Abe Wolf to me known, who, being by me duly sworn, did depose and say that he resides at No. 41 Dundale Place, Hazlet NJ ; that he is the Vice President and Treasurer of Harley Hotels, Inc.

, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed h is name thereto by like order.

Elenn M. Golding
Notary Public

ELENN M. GOLDING
Notary Public, State of New York
No. 52-9485032
Qualified in Kings County
Commission Expires May 31, 2000

STATE OF
COUNTY OF

On the day of July 19 98. before me personally came

to me known and known to me to be a manager of Dubois Dutch, LLC, a Pennsylvania limited liability company, and known to me to be the individual described in and who executed the foregoing instrument as a manager of Dubois Dutch, LLC, and acknowledged before me that he executed the same as a manager aforesaid for th uses and purposes in said instrument set forth.

Notary Public

STATE OF
COUNTY OF

On the day of 19 , before me personally came the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides at No.

that he knows

to be the individual described in and who executed the foregoing instrument; that he, said subscribing witness, was present and saw execute the same; and that he, said witness, at the same time subscribed h name as witness thereto.

CLEARFIELD COUNTY
ENTERED OF RECORD
TIME 12 Noon 2-17-98
BY Karen L. Starck
FEES 15.50
Karen L. Starck, Recorder

I hereby CERTIFY that this document is recorded in the Recorder's Office of Clearfield County, Pennsylvania.

Karen L. Starck
Recorder of Deeds

HARLEY HOTELS, INC., Assignor

DUBOIS DUTCH, LLC, Assignee

Assignment of Lease with Assumption

Dated July 10, 98

3309

Entered of Record 2-17 1998 12:00 Noon Karen L. Starck, Recorder

July 6, 1998

Harley Hotels, Inc.
21 Terminal Tower
Cleveland, Ohio 44115

Dubois Dutch, LLC
RD. #2, Box 244
I-80 & S.R. 879
Dubois, PA 16830

Dear Sirs and Madams:

The undersigned is the Lessor by assignment, purchase or succession to Philip J. Dieringer as original Lessor under that certain Lease dated June 16, 1982 by and between Phillip J. Dieringer and Harley Hotels, Inc. (the "Lease").

You have informed the Lessor that Harley Hotels, Inc., as Lessee under the Lease, intends to sell and assign all of its right, title and interest in and to the Lease to Dubois Dutch, LLC.

Please be advised that the Lessee is currently in full compliance with all of the requirements and obligations imposed upon it by the Lease and is not in default of its obligations under the Lease. The Lessee's interest under the Lease is assignable provided that written notice is given to the Lessor, and, upon such assignment, the assignee shall be entitled to all of the Lessee's rights and privileges under the Lease, including, but not limited to, the right of occupancy, the right of peaceful possession, the right to exercise the purchase option and the right of first refusal option upon the sale or lease of the Leased Property, provided that Lessee performs all the covenants to be performed by it and complies with all of the terms and conditions of the Lease.

You are further advised that the term of the Lease will end no later than the 28th day of February, 1999, all of the options extended to the Lessee having heretofore been properly exercised.

Respectfully,

John A. Guido

2900

DEFENDANT'S

6/13/00 CP

(47603)

EXHIBIT "D"

HANAK, GUIDO and TALADAY
Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
Jeffrey S. DuBois

Telephone: (814) 371-7768
Fax: (814) 371-1974

498 Jeffers Street
P.O. Box 487
DuBois, PA 15801

November 17, 1998

M. Dale Leeper, Esq.
Theisen, Brock, Frye,
Erb & Leeper Co., L.P.A.
424 Second Street
Post Office Box 739
Marietta, OH 45750

Re: John A. Guido - DuBois Dutch, LLC

Dear Mr. Leeper:

In reply to your letter of November 16th, as I had previously advised you, Sandy Township amended the zoning ordinance applicable to the area in which the subject property is located. The amendments resulted in the fact that my son's remaining property will be a substandard lot under the terms of the amended zoning ordinance. My son had no way of anticipating that would occur when he purchased the property approximately ten years ago. Therefore, it is my opinion that this intervening legal factor is a legal impediment to closing on the transaction in accordance with the terms of the option.

If my son is left with a substandard lot that will severely limit his use of the property in the future. Again, this was not anticipated when he purchased the property since the zoning regulations applicable at that time were not very restrictive. Therefore, as previously advised, my son cannot look favorably upon the approval of the subdivision under these circumstances, unless the Sandy Township authorities in approving the subdivision grant full relief from the mandates of the amended ordinance insofar as set-backs, lot size, and coverage are concerned.

Further, your client was fully aware of the subdivision problem when he purchased the subject Lease. For some reason that completely eludes me. He elected to purchase the property before this problem was resolved.

EXHIBIT "E"

My son and I stand ready, willing and able to negotiate a possible solution to this problem if your client so desires. Please advise.

Very truly yours,

Anthony S. Guido,

ANTHONY S. GUIDO

ASG:dfy

cc: John A. Guido

SANDY TOWNSHIP SUPERVISORS
12TH STREET AND CHESTNUT AVENUE
DUBOIS, PA 15801

REGULAR MEETING OF JULY 7, 1999 AT 7:00 P.M.

AGENDA

MEETING CALLED TO ORDER

ROLL CALL

PUBLIC COMMENTS *(Comments Regarding Agenda Items ONLY)*

APPROVAL OF THE PUBLIC HEARING MINUTES OF JUNE 16, 1999 FOR BECK SUBDIVISION

APPROVAL OF THE MINUTES OF THE REGULAR MEETING OF JUNE 16, 1999

TABLED BUSINESS
1. Larry Reed/Planning Module/ Resolution 1999-13

OLD BUSINESS

NEW BUSINESS
1. Larry Reed/Expansion of Country Place Mobile Home Park
2. Keene Subdivision
3. Dutch Pantry Subdivision/Greg Ley
4. Recreation Agreement YMCA/Sandy Township
5. Annual Police Shoot & Annual Firearms Qualifications/Subvention
6. Resolution 1999-14 Acceptance of Shaffer Road Extension
7. Central Christian School/Infrastructure
8. Lions Club/Drainage Assistance
9. Award Truck Bid

CORRESPONDENCE
1. City of DuBois/Drought Emergency Plan
2. Clearfield County/ GIS Department

ADMINISTRATIVE REPORTS
1. Fire Department Report - May 1999
2. Road Report - June 1999
3. Tax Collectors Report - June 1999
4. Zoning Report - June 1999
5. Managers Search Update

ELECTED OFFICIALS COMMENTS

OPEN MEETING TO THE FLOOR

CLOSE MEETING TO THE FLOOR

EXHIBIT "F"

5a

3. Dutch Pantry Subdivision/Greg Ley - Manager Rich read a memo from the Zoning Officer James H. Keck to the Supervisors dated July 6, 1999. This is a request for a minor subdivision for Gregory S. Ley - Dutch Pantry. The applicant proposes to subdivide 2.57 acres from property of John A. Guido located at Exit 16 of I-80 in Sandy Township. The Sandy Township Planning Commission reviewed this proposed subdivision at their regular meeting of June 23, 1999. The subdivision plan, as presented, results in a nonconforming parcel being created based on our current zoning ordinance minimum lot size requirement of 45,000 square feet. The parcel remaining for John A. Guido would be 32,910 square feet which is less than the required minimum lot size. Based on the fact that the subdivision would result in a nonconforming lot and it is possible to revise the plan to conform with the current ordinance, the Planning Commission voted to forward the subdivision request to the Supervisors with the recommendation that the request be denied.
Manager Rich said that for the record the Supervisors were here once before, however the Attorney for Dutch Pantry withdrew the request. Attorney for Dutch Pantry went back to the Planning Commission with a different approach as to why the request should be granted.

Attorney Toni Cherry, representing Gregory Ley/DuBois Dutch LLC, requested the Supervisors approve the subdivision request of Gregory S. Ley. She said that under the current zoning ordinance the parcel remaining for Mr. Guido is less than the size requirement. Attorney Cherry said her clients position is that the lot existed in its present condition prior to the enactment of the latest zoning ordinance and upon adoption of the Ordinance became a legal non-conforming lot. Attorney Cherry pointed out several sections of the Zoning Ordinance that she feels pertains to Mr. Leys request. She said Mr. Ley's option dates back to 1982 and at that time both lots were in conformance with the Ordinance. She said Mr. Guido cannot claim the same degree of title in the land that he owns and the land that DuBois Dutch is on. Attorney Cherry said the properties have always been treated as two separate properties. Attorney Cherry requested the Supervisors grant the subdivision request of Gregory S. Ley.

Attorney Anthony Guido, representing his son John A. Guido, requested the Supervisors deny the subdivision request of Gregory S. Ley because it would leave his parcel a non conforming lot. He said if the subdivision is granted his son will not be able to expand or sell the lot. Attorney Guido cited several sections of the Sandy Township Zoning Ordinance. Attorney Guido requested the subdivision be denied.

Manager Rich said that the Township Solicitor, Ed Ferraro, gave the Supervisors his views in a letter dated June 23, 1999. In his letter he said that since the parties have always treated this property as two (2) separate parcels, the Township always recognized it as two (2) separate parcels, and the fact that the exercise of an option can revert back to the time that the option was executed, it is the Solicitors opinion that the Planning Commission could approve this subdivision as presented with the lot sizes contained thereon.

Sherry Beers made a motion seconded by Ray Anderson to approve the subdivision request of Gregory S. Ley-DuBois Dutch, LLC, property located at Exit 16 of I 80 in Sandy Township. A roll call vote was taken.

Del Spafford - aye	Ray Anderson - aye
Michael Behringer - aye	Sherry L. Beers - aye

Motion carried a 4-0 vote.

6a

[J-14-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN A. GUIDO	: No. 36 WAP 2003
v.	: Appeal from the Order of Commonwealth Court entered October 17, 2002 at No. 1545CD2001, reversing the Order of the Court of Common Pleas of Clearfield County entered June 5, 2001 at No. 99-867CD.
TOWNSHIP OF SANDY AND DUBOIS DUTCH, LLC	
	: 809 A.2d 1036 (Pa. Cmwlth. 2002)
APPEAL OF DUBOIS DUTCH, LLC	: ARGUED: March 2, 2004

OPINION

MR. JUSTICE BAER

DECIDED: AUGUST 23, 2005

In this dispute concerning real property, we granted allocatur limited to determining whether a leasehold interest in a parcel of land coupled with an option to purchase such land creates a property interest in the lessee-optionee sufficient to support a legally recognized subdivision of the property either at the time the lease and option were simultaneously executed or when the purchase option was exercised. The Commonwealth Court held that governmental recognition of a subdivision was not proper at either time because the petitioning party failed to satisfy the requirements of the municipality's relevant ordinances. We affirm.

APPENDIX A

BACKGROUND

Appellee John Guido (Guido) purchased the Property at issue situate in Sandy Township, Pennsylvania, in 1986. At purchase, the 3.379-acre lot was informally separated into two parcels by virtue of a 1982 lease (hereinafter, 1982 Lease) between Guido's predecessor in title and Appellant Dubois Dutch, LLC's predecessor lessee.[1] Dubois Dutch owns and operates a Dutch Pantry Restaurant on a 2.605-acre area of the lot; Guido retains occupancy of the smaller portion of the parcel, approximately 0.772 acres in area, on which he built and maintains a convenience store and gas station.[2]

The present conflict arose because the 1982 Lease between Dubois Dutch and Guido contained an option granting Dubois Dutch the opportunity to purchase the Restaurant Parcel before the expiration of the 1982 Lease on February 29, 1999 (hereinafter, the Option). On June 19, 1996, however, before Dubois Dutch had exercised the Option and prior to the 1982 Lease's expiration, Sandy Township repealed its 1964 Zoning Ordinance (hereinafter, 1964 Zoning Ordinance), which applied when the 1982 Lease and Option were executed, and adopted a new Zoning Ordinance (hereinafter, 1996

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[1] Notwithstanding that the events in question occurred over a span during which title to the land in question and the lease on the 2.605-acre portion thereof both changed hands, no issues before us implicate questions of succession of title or lease. For the sake of convenience, hereinafter the line of owners of the tract in question will be identified collectively as "Guido," and the lessees as "Dubois Dutch," corresponding to the parties to the instant appeal.

[2] Hereinafter, the entire 3.379-acre lot will be referred to as the "Property," the 2.605-acre portion of the Property on which Dubois Dutch operates the Dutch Pantry Restaurant will be identified as the "Restaurant Parcel," and the residual 0.772-acre portion of the Property will be referred to as the "Gas Station Parcel." While we utilize the acreages as set forth in the Commonwealth Court's opinion, we acknowledge a discrepancy of 0.002 acres between the area of the Property and the combined area of the individual parcels (0.772 + 2.605 = 3.377). The discrepancy, however, is not relevant to the legal issues in this appeal.

Zoning Ordinance), which required minimum lot sizes of 45,000 square feet in the area where the Property is located.

In November 1998, Dubois Dutch attempted to exercise the Option. Exercise of the Option would have left Guido with a lot 33,259 square feet in area, 11,741 square feet fewer than the required minimum lot size set forth in the 1996 Zoning Ordinance.[3] Guido refused to convey the Restaurant Parcel to Dubois Dutch, due to his concern that his residue lot, the Gas Station Parcel, would be non-conforming pursuant to the 1996 Zoning Ordinance and thus rendered commercially useless. On November 28, 1998, Dubois Dutch sought formal subdivision approval from the Sandy Township Planning Commission (hereinafter, Planning Commission).[4] Guido objected and the Planning Commission rejected the subdivision approval request.

On February 12, 1999, Dubois Dutch commenced a legal action against Guido in the Clearfield County Court of Common Pleas, seeking specific performance of the Option. As a defense to specific performance, Guido asserted that he could not perform his contractual duty because subdivision of the property would violate the 1996 Zoning Ordinance. Additionally, Guido countersued for ejectment, seeking possession of the Restaurant

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[3] Both portions of the lot would have had acceptable dimensions for commercial use under the 1964 Zoning Ordinance.

[4] As discussed in detail *infra*, the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101, *et seq.* (MPC), allows municipalities to regulate subdivision and land development through enacting subdivision and land use ordinances. When a municipality has enacted such an ordinance, no formal subdivisions of land may occur without compliance with the ordinance. See 53 P.S. § 10507. In addition to the 1964 and 1996 Zoning Ordinances previously identified, Sandy Township specifically enacted subdivision ordinances which require formal approval by the municipality of all subdivisions and provide penalties for failure to comply (hereinafter, 1965 Subdivision Ordinance and 1997 Subdivision Ordinance). As is relevant to this case, property owners seeking approval under the 1997 Subdivision Ordinance must comply, *inter alia*, with requirements in the applicable1996 Zoning Ordinance.

Parcel free of any claim by Dubois Dutch. Dubois Dutch filed preliminary objections to the ejectment action, raising the pendency of its prior action for specific performance, pursuant to Pa.R.C.P. 1028(a)(6).[5] On May 17, 1999, following a hearing, in an apparent effort to effectuate an amicable resolution of the parties' dispute, the trial court directed Dubois Dutch to apply, once again, to the Planning Commission seeking approval of a formal subdivision of the Property. The trial court also issued an order staying all litigation pending a decision by the Planning Commission on the subdivision approval request it directed Dubois Dutch to submit.[6]

Pursuant to the court's direction, Dubois Dutch reapplied to the Planning Commission.[7] In due course, Dubois Dutch raised two principal arguments: first, that the 1982 Lease and Option effected a *per se* lawful subdivision at inception; or second, that upon Dubois Dutch's exercise of the Option, its ownership interest would relate back to 1982 and thus be governed by the 1964 Zoning Ordinance, such that even if the 1996 Zoning Ordinance applied, Guido's Gas Station Parcel should win approval as a pre-existing non-conforming lot[8] with a pre-existing non-conforming ongoing business situate

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[5] Rule 1028, providing bases on which a party may raise preliminary objections, provides in subsection (a)(6) that preliminary objections may be filed due to "pendency of a prior action or agreement for alternative dispute resolution."

[6] The underlying actions apparently are still pending in the Clearfield County Court of Common Pleas. Although not relevant to the appeal currently before this Court, neither the parties nor the courts below have cited authority suggesting that the trial court could not have ordered Guido to perform the contract despite the fact that the residual Gas Station Parcel would be in violation of the 1996 Zoning Ordinance and the 1997 Subdivision Ordinance.

[7] The record is not clear as to the date on which Dubois Dutch applied for this second subdivision application with the Planning Commission.

[8] In conformity with the definition in section 107 of the MPC, 53 P.S. §10107, the 1996 Zoning Ordinance defines "Nonconforming Lot" as "a lot the area or dimension of which (continued...)

thereon. On June 13, 1999, the Planning Commission agreed and approved Dubois Dutch's request for formal subdivision.[9]

On August 3, 1999, Guido filed an appeal from the Planning Commission's decision with the Clearfield County Court of Common Pleas. On June 13, 2000, the trial court held a *de novo* hearing. The court found that the creation of the 1982 Lease and Option and Dubois Dutch's attempt to execute the Option constituted a Subdivision of the property under the MPC as of June 1982. The trial court noted that equitable title of property subject to a lease coupled with a purchase option passes, upon exercise of a purchase option, not as of the date of exercise, but rather as of the date of option creation. Thus, it concluded that the 1965 Subdivision Ordinance governed.[10] Trial Ct. Op. at 8-9.

The court then considered the 1965 Subdivision Ordinance's requirement that the lots resulting from a Subdivision must "comply with the minimum requirements of the Sandy Township Zoning Ordinance." Trial Ct. Op. at 13 (quoting 1965 Subdivision Ordinance § 611(A)). Concluding that the "minimum requirements" could be satisfied by use of the

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(...continued)
was lawful prior to the adoption or amendment of this Zoning Ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption or amendment." 1996 Zoning Ordinance at 10.

[9] At this point, it is advantageous to distinguish the informal division of property by parties from the formal subdivision approval process set forth in the MPC and the relevant ordinances. The parties have cited no impediment to the transfer of property between private parties even if such transfer would violate a municipality's ordinances such that the purchaser would be unable to use or develop the land. We will refer hereinafter to such a transfer of ownership as "division-in-fact," and characterize the property as "divided-in-fact." Conversely, when a property owner complies with the MPC and the municipality's subdivision ordinances by obtaining the requisite approval, we will denote such formally approved division as "Subdivision," and characterize the property as "Subdivided."

[10] This point is of questionable import since under either the 1965 or 1997 Subdivision Ordinance any subdivision that occurred was, on its face, "illegal" for want of formal approval, a point the trial court notes in its Conclusions of Law. Trial Ct. Op. at 20.

Zoning Ordinance's exceptions, such as pre-existing non-conforming lots, the court held that the Gas Station Parcel satisfied the definition of non-conforming use because its lot size was "lawful" under the 1964 Zoning Ordinance, even if the property had not been formally Subdivided. Accordingly, the trial court held that the Gas Station Parcel constituted a permissible pre-existing non-conforming lot under the 1996 Zoning Ordinance. The court entered an order approving Dubois Dutch's Subdivision application. Guido timely appealed that decision to the Commonwealth Court.

A three-judge panel of the Commonwealth Court reversed the trial court by a vote of two to one.[11] See Guido v. Township of Sandy, 809 A.2d 1036 (Pa. Cmwlth. 2002). The majority found that a leasehold interest coupled with an option to purchase does not create a Subdivision of the property and, therefore, Dubois Dutch could not effectively "lock-in" the Gas Station Parcel as a pre-existing non-conforming lot by exercising its option to purchase a portion of the property after the 1996 Zoning Ordinance took effect. The Commonwealth Court held:

> There is simply no legal authority, or reason, to hold that the **potential** right to exercise an option to purchase, created by a lease in 1982, which Dubois Dutch did not seek to exercise until 1999, created a subdivision in 1982 under an ordinance which was no longer in existence when the option was exercised. In this case, Dubois Dutch's **right** to pursue subdivision approval was no different in 1982 than it was in 1998, when it finally initiated its first request before the Township Supervisors. Although that right might not have arisen until Dubois Dutch elected to exercise its option, its decision to exercise its right, or to forego its right, was the sole impediment to its right to official subdivision. Hence, any impairment to Dubois Dutch's right to apply under the 1965 Subdivision Ordinance, rather than the [1997 Subdivision Ordinance], is the result of Dubois Dutch's own decision to delay the exercise of its option.

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11 Judge Simpson dissented without opinion.

Guido, 809 A.2d at 1041-42 (emphasis in original). The majority further rejected the trial court's conclusion that the Gas Station Property could satisfy the 1997 Subdivision Ordinance's requirement that the lots meet the "minimum requirements" of the 1996 Zoning Ordinance. It found that the "minimum requirements" could not be satisfied by way of exceptions to the 1996 Zoning Ordinance - e.g., by designation as a pre-existing non-conforming lot - and held that the only remedy available to Dubois Dutch was the modification provisions of the 1997 Subdivision Ordinance. The modification provision, modeled on MPC section 512, allows the municipality to modify any of its requirements if the literal enforcement of the provision would exact undue hardship due to the particular conditions pertaining to the land. See 53 P.S. § 10512.1(a). The court, however, noted that Dubois Dutch failed to provide the required written request for modification.[12] See 53 P.S. § 10512(b). Therefore, the majority found that, because Dubois Dutch had never sought Subdivision approval before the effective date of the 1996 Zoning Ordinance or properly requested modification, the trial court erred in approving the Subdivision application based on its finding of pre-existing non-conforming use.

Dubois Dutch filed a petition for reargument, which the Commonwealth Court denied. On January 2, 2003, Dubois Dutch timely filed a petition for allowance of appeal to this Court. By Order dated August 27, 2003, our Court granted the appeal limited to the following issue: Whether a leasehold interest with an option to purchase creates a property interest in the lessee sufficient to support a Subdivision under the terms of the MPC.

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[12] Guido asserts, without citation to the record, that Dubois Dutch originally applied for approval by submitting a modification request, which it later withdrew. As such modification request was not involved in the current approval proceeding, it is irrelevant to our discussion.

DISCUSSION

The parties do not materially dispute the facts stated above. Thus, the issue under consideration presents a question of law and our review is plenary. Naylor v. Township of Hellam, 773 A.2d 770, 773 (Pa. 2001).

I.

The parties agree that the 1982 Lease and Option, at inception, reflected their mutual intention to grant Dubois Dutch an option to purchase the Restaurant Parcel. This does not answer, in itself, Guido's argument that he should not be compelled to specifically perform his obligation thereunder by conveying that parcel to Dubois Dutch. Nevertheless, because the 1982 Lease and Option lie at the heart of this dispute, we must consider preliminarily its legal effect *vis-à-vis* the parties.

At the outset, we note that Dubois Dutch's status as optionee in the Restaurant Parcel conferred upon it a "substantial interest in the land" that, upon exercise of the Option, made it owner *ab initio* of the Restaurant Parcel. In Detwiler v. Capone we discussed the rights conferred by a lease containing a purchase option.

> An option to purchase is analogous to a contract for the sale of land; it is in nature an encumbrance on the land pledged. In such case, the [optionor] is a trustee of the legal title for the benefit of the purchaser [*qua* optionee] . . . . Equity regards the person bound to convey as having done what he should have done, i.e. made the conveyance, and treats him as trustee for the optionee. Where an option is exercised the title of the optionee relates back to the date of the option and his interest is regarded as real estate of that time . . . .

55 A.2d 380, 383 (Pa. 1947) (internal quotation marks and citations omitted); see In re Powell, 123 A.2d 650, 654 (Pa. 1956) ("An option to purchase land is a substantial interest in the land; and, when the option is exercised, the optionee's ownership reverts to the

granting of the option . . . ."); cf. Chelan County v. Wilson, 744 P.2d 1106, 1109 (Wash. App. 1987) (noting that even where issues regarding regulatory compliance inhere in a transaction conveying land, the vendee of property has a valid and subsisting interest therein). We also observed in Detwiler that "the landlord-tenant relationship between the parties ceased to exist upon verbal communication of plaintiffs' election [to exercise the option] and the lease was converted into a contract of sale." 55 A.2d at 384. This ruling reflects an historic account of the legal effect of the exercise of an option to purchase, the import of which brooks no misunderstanding. Thus, in People's Street-Railway Co. v. Spencer, 27 A. 113 (Pa. 1893), we wrote:

> It was held in [Kerr v. Day, 14 Pa. 112 (1850)], that an option to purchase is a substantial interest in land, which may be conveyed to a vendee; and the English chancery cases were reviewed by Bell, J., with the result that, 'when the lessee made his option to purchase, he was to be considered as the owner ab initio. Indeed, the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election.' And in [Frick's Appeal, 101 Pa. 485 (1882)], where the land was sold upon a prior judgment before payment or conveyance, it was held that the surplus was the property of the optional vendee.

Id. at 114. Accordingly, Dubois Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois Dutch effective June 16, 1982.

Guido does not materially contest this assertion; instead, he aims to minimize its importance. He argues first that the "relation back principle" relied upon by Dubois Dutch applies only as between contracting parties, and does not affect the enforcement of zoning ordinances. The authorities he relies upon, however, merely illustrate the primacy of

zoning authority over competing or inconsistent contractual arrangements.[13] These cases say nothing about the antecedent proposition that, upon exercise, the Option vested title to the parcel in Dubois Dutch as of June 16, 1982, notwithstanding the consequences of any subsequent zoning regulation on either party's use or enjoyment of that property. Although this result undeniably complicates zoning issues -- this case being one example -- Spencer, Detwiler, and Powell leave no room for doubt as to the legal status, or the legally effective date of inception, of Dubois Dutch's title to the property once it exercised the Option.

II.

Thus, we arrive at the vexing matter that lies at the heart of this case: whether and when the Property was divided-in-fact or Subdivided as a matter of law. Dubois Dutch's argument requires that the division-in-fact of the Property into the two smaller parcels legally coincided with the execution of the 1982 Lease and Option. In support of its argument, Dubois Dutch directs our attention to the MPC section 107, which defines "subdivision" as follows:

> the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development . . . .

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[13] In support of this claim, Guido appeals to our decision in In re Michener, 115 A.2d 367 (Pa. 1955), and the Commonwealth Court's disposition of Gulla v. North Strabane Township, 676 A.2d 709 (Pa. Cmwlth. 1996), *aff'd*, 712 A.2d 281 (Pa. 1998). In Michener, we considered and rejected the right of parties to affect zoning matters by private contract. In Gulla, the Commonwealth Court -- and, in turn, this Court -- affirmed the trial court's conclusion that the parties had no standing to protest a township's formal subdivision approval because their claim was based solely on a private right established by deed.

53 P.S. § 10107. Dubois Dutch in particular draws our attention to the "by any means" language in the definition to support its claim that formal municipal approval is not a necessary condition to the division-in-fact of one parcel into two or more smaller parcels.

Our analysis leads us to conclude that, when Dubois Dutch attempted to exercise the Option in 1998, Pennsylvania law related the transaction back to 1982 and recognized it as a conveyance, as of 1982, of the Restaurant Parcel. Thus, logic dictates that the property must have been divided-in-fact as of the effective date of that sale. We reject, however, Dubois Dutch's argument that MPC section 107's reference to "lease" compels the conclusion that the property was divided-in-fact at the time of execution of the lease. This contention, which echoes the trial court's ruling,[14] defies the plain language of the above definition. A careful reading reveals that division-in-fact may occur by any means, including changes in existing lot lines, and that such changes may occur *for the immediate or future purpose* of lease, or building or lot development. In contending that MPC section 107 contemplates the instantiation of property division *by way of* lease, Dubois Dutch and the trial court mistake ends for means and broaden the definition beyond its terms. We agree with the Commonwealth Court that "the **potential** right to exercise an option to purchase, created by a lease in 1982, which Dubois Dutch did not seek to exercise until 1999," cannot in itself have divided-in-fact the property as of 1982. Guido, 809 A.2d at 1041-42 (emphasis in original). To hold otherwise would lead to the absurd result that the Property would have been divided-in-fact by virtue of an inchoate interest in

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[14] See Trial Ct. Op. at 9 (ruling that the definition of "subdivision" contained in MPC section 107 "clearly contemplates that a division of land 'by any means,' including the signing of a lease, constitutes a subdivision" as of 1982); see also White v. Township of Upper St. Clair, 799 A.2d 188, 202 (Pa. Cmwlth. 2002) (holding that a lease conveying a discrete parcel of the town's land to a lessor "creates a subdivision" within the meaning of the MPC). But see id. (concluding "that the Township has subdivided Boyce Park for the purpose of the lease").

property the holder might opt not to exercise, leaving the owner with a division of his property he did not desire at the hands of someone with no interest in effecting such a division. However, just as the exercise of the Option passed equitable title to the optionee effective as of the date of the inception of the Option, so *must* it have effectuated division-in-fact of the Property without which the idea that equitable title was then conveyed would be incoherent.

Nevertheless, division-in-fact does not amount to a governmentally recognized Subdivision; indeed, an interested governmental body may view a particular division-in-fact as illegal.[15] Thus, notwithstanding our recognition of the applicability of the "relation back" doctrine to equitable ownership, we cannot conclude that the Property was legally Subdivided through some sophistry arising from the actions of the parties or operation of law absent active governmental contemplation and ratification.

III.

Having established that the law views Dubois Dutch's exercise of the Option as effectuating transfer of the Restaurant Parcel to Dubois Dutch as of the date of the 1982 Lease and Option, and that we must of necessity recognize that such conveyance resulted in the division-in-fact of the Property into the Restaurant Parcel and the Gas Station Parcel, we now must consider the impact of these determinations on the paramount question of how government should view the two lots resulting from these transactions. In addressing this issue, we must first examine why the legislature requires formal Subdivision approval.

The MPC provides that "[w]here a subdivision and land development ordinance has been enacted by a municipality under the authority of this article, no subdivision or land

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15 The pragmatic implications, if any, of such illegality are unclear, and need not be determined herein.

development of any lot . . . shall be made . . . except in accordance with the provisions of such ordinance." 53 P.S. § 10507. Moreover, the MPC mandates that subdivision ordinances "shall require that all subdivision and land development plats of land situated within the municipality shall be submitted for approval to the governing body." 53 P.S. § 10501.

This formal approval process effectuates the purposes of the MPC which, *inter alia*, include protecting and promoting the safety and health of the public, accomplishing coordinated development, guiding the uses of land and structure, and preserving the Commonwealth's natural resources. 53 P.S. § 10105. The MPC additionally suggests appropriate contents of a municipality's subdivision ordinance including, *inter alia*, requiring conformance with the municipality's comprehensive development plan; street, curb, and walkway provisions; water and sewage requirements; and flooding abatement measures. See 53 P.S. § 10503. While such issues may not be relevant in every Subdivision, as they do not appear to be relevant in the current case, the approval process allows the municipality to protect the public's health and safety and to coordinate development in those instances where Subdivision could affect the community negatively.

In the case *sub judice*, while we recognize that Dubois Dutch could not have sought Subdivision approval until it exercised the Option, as discussed *supra*, we agree with the Commonwealth Court that Dubois Dutch's "decision to exercise its right, or to forego its right, was the sole impediment to its right to official subdivision." Guido, 809 A.2d at 1042. Had Dubois Dutch exercised the Option prior to the adoption of the new lot size requirements in the 1996 Zoning Ordinance and obtained formal approval under the 1965 Subdivision Ordinance, the two properties would have been conforming lots under the 1964 Zoning Ordinance, and would therefore have fit the 1996 Zoning Ordinance's definition of a pre-existing non-conforming lot. By choosing not to exercise the Option and seek Subdivision approval until 1998, Dubois Dutch assumed the risk that the ordinances might

change such that one or both of the individual parcels would not comply with "the minimum requirements of the Sandy Township Zoning Ordinance," which would prevent approval under the Subdivision Ordinance.[16]

As previously noted, the MPC and the 1997 Subdivision Ordinance nevertheless provide a procedure by which the municipality's governing body can excuse failures to conform to the ordinance. Parties may request modifications as set forth in MPC section 512.1:

> The governing body or the planning agency . . . may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

53 P.S. § 10512.1(a). As the Commonwealth Court observed, however, the MPC modification procedure requires the request for modification be provided in writing and "state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary." 53 P.S. § 10512.1(b). We agree with the Commonwealth Court that Dubois Dutch's argument before the Planning Commission in favor of designating the property a

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[16] Our limited grant in the case does not encompass whether the Commonwealth Court correctly determined that a designation of a parcel as a pre-existing non-conforming use could not satisfy the Subdivision Ordinance's requirement that the lots conform to the "minimum requirements" of the Zoning Ordinance. We note, however, that such a reading furthers the MPC's subdivision provisions' purpose of allowing municipalities to regulate community development by requiring those requesting Subdivision approval to meet the current zoning requirements, absent an approved request for modification.

pre-existing non-conforming use cannot be viewed as a "tacit request" for modification. Guido, 809 A.2d at 1043.[17]

Therefore, we affirm the Commonwealth Court's determination that while the 1982 Lease and Option in themselves did not divide-in-fact the property as a matter of logical necessity, division-in-fact necessarily occurred when Dubois Dutch exercised the Option and the law recognized the conveyance as relating back to 1982. We also hold that division-in-fact in no way impels governmentally sanctioned Subdivision. Consequently, we affirm the Commonwealth Court's ruling that the division-in-fact effectuated under the 1982 Lease and Option failed, under these circumstances, to satisfy the Subdivision approval requirements of the applicable 1997 Subdivision Ordinance. Finally, we agree with the Commonwealth Court that Dubois Dutch failed to request modification in compliance with MPC section 512.1. Accordingly, we affirm the Order of the Commonwealth Court reversing the decision of the Court of Common Pleas of Clearview County. We leave the parties with the opportunity to seek further relief pursuant to the modification procedure established by the MPC and Sandy Township and/or to complete the underlying litigation seeking specific performance, consistently with this decision.

Mr. Justice Saylor files a concurring opinion in which Mr. Chief Justice Cappy and Mr. Justice Nigro join.

Judgment Entered August 23, 2005

John A. Vaskov

Deputy Prothonotary

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[17] On the record before us, however, we see no obvious impediment to either party filing an appropriate modification request to permit the Planning Commission to determine whether this circumstance warrants a modification relating to the subdivision approval process. It appears that arguments could be made by both parties in favor of modification.

[J-14-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN A. GUIDO	:	No. 36 WAP 2003
v.	:	
TOWNSHIP OF SANDY AND DUBOIS DUTCH, LLC	:	Appeal from the Order of the Commonwealth Court entered October 17, 2002 at No. 1545CD2001, reversing the Order of the Court of Common Pleas of Clearfield County entered June 5, 2001 at No. 99-867CD.
APPEAL OF: DUBOIS DUTCH, LLC	:	ARGUED: March 2, 2004

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: AUGUST 23, 2005**

I join the majority opinion, except for portions of its discussion concerning the principle of relation back as applied in the circumstances of this case.

While the majority ultimately reaches the conclusion that relation back does not apply relative to the attempt to effect (retroactively) a de facto, legal subdivision, see Majority Opinion, slip op. at 15, I respectfully differ with certain of its efforts to reconcile the relation-back principle with this conclusion. In particular, my thinking does not align with the majority's indications that optioned property segments must be viewed as retrospectively divided in fact upon the exercise of an option. See, e.g., id. at 11, 15. To me, it is preferable merely to recognize from the outset that, while an optionee's equitable title may in fact be deemed to relate back to the date of the execution of the

option for certain purposes,[1] relation back serves no meaningful role in determining whether and when a legal subdivision has been effected, at least where the parties to the option made no effort to comply with governing land-use regulation prescribing a procedure for lawful real estate subdivision that was in place at the time of their initial agreement.

I also reiterate the majority's observation that application of general principles of law and equity to further address the parties' respective interests arising out of the option agreement in the circumstances as they have unfolded is beyond the limited scope of this appeal.

Mr. Chief Justice Cappy and Mr. Justice Nigro join this concurring opinion.

[1] See, e.g., BAXTER DUNAWAY, 1 L. DISTRESSED REAL EST. §11:46 (2004) (observing that "in most jurisdictions a prior lease which contains an option to purchase must be subordinated to the mortgage or the mortgage will be extinguished by the exercise of the option[;] [a]lthough the option is exercised after the recording of the mortgage, the conveyance generally 'relates back' to the recording of the lease and option to purchase and, consequently, wipes out the mortgage").

[J-14-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN A. GUIDO	: No. 36 WAP 2003
v.	: Appeal from the Order of Commonwealth Court entered October 17, 2002 at No. 1545CD2001, reversing the Order of the Court of Common Pleas of Clearfield County entered June 5, 2001 at No. 99-867CD.
TOWNSHIP OF SANDY AND DUBOIS DUTCH, LLC	:
	: 809 A.2d 1036 (Pa. Cmwlth. 2002)
APPEAL OF DUBOIS DUTCH, LLC	: ARGUED: March 2, 2004

OPINION

MR. JUSTICE BAER **DECIDED: AUGUST 23, 2005**

In this dispute concerning real property, we granted allocatur limited to determining whether a leasehold interest in a parcel of land coupled with an option to purchase such land creates a property interest in the lessee-optionee sufficient to support a legally recognized subdivision of the property either at the time the lease and option were simultaneously executed or when the purchase option was exercised. The Commonwealth Court held that governmental recognition of a subdivision was not proper at either time because the petitioning party failed to satisfy the requirements of the municipality's relevant ordinances. We affirm.

BACKGROUND

Appellee John Guido (Guido) purchased the Property at issue situate in Sandy Township, Pennsylvania, in 1986. At purchase, the 3.379-acre lot was informally separated into two parcels by virtue of a 1982 lease (hereinafter, 1982 Lease) between Guido's predecessor in title and Appellant Dubois Dutch, LLC's predecessor lessee.[1] Dubois Dutch owns and operates a Dutch Pantry Restaurant on a 2.605-acre area of the lot; Guido retains occupancy of the smaller portion of the parcel, approximately 0.772 acres in area, on which he built and maintains a convenience store and gas station.[2]

The present conflict arose because the 1982 Lease between Dubois Dutch and Guido contained an option granting Dubois Dutch the opportunity to purchase the Restaurant Parcel before the expiration of the 1982 Lease on February 29, 1999 (hereinafter, the Option). On June 19, 1996, however, before Dubois Dutch had exercised the Option and prior to the 1982 Lease's expiration, Sandy Township repealed its 1964 Zoning Ordinance (hereinafter, 1964 Zoning Ordinance), which applied when the 1982 Lease and Option were executed, and adopted a new Zoning Ordinance (hereinafter, 1996

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[1] Notwithstanding that the events in question occurred over a span during which title to the land in question and the lease on the 2.605-acre portion thereof both changed hands, no issues before us implicate questions of succession of title or lease. For the sake of convenience, hereinafter the line of owners of the tract in question will be identified collectively as "Guido," and the lessees as "Dubois Dutch," corresponding to the parties to the instant appeal.

[2] Hereinafter, the entire 3.379-acre lot will be referred to as the "Property," the 2.605-acre portion of the Property on which Dubois Dutch operates the Dutch Pantry Restaurant will be identified as the "Restaurant Parcel," and the residual 0.772-acre portion of the Property will be referred to as the "Gas Station Parcel." While we utilize the acreages as set forth in the Commonwealth Court's opinion, we acknowledge a discrepancy of 0.002 acres between the area of the Property and the combined area of the individual parcels (0.772 + 2.605 = 3.377). The discrepancy, however, is not relevant to the legal issues in this appeal.

Zoning Ordinance), which required minimum lot sizes of 45,000 square feet in the area where the Property is located.

In November 1998, Dubois Dutch attempted to exercise the Option. Exercise of the Option would have left Guido with a lot 33,259 square feet in area, 11,741 square feet fewer than the required minimum lot size set forth in the 1996 Zoning Ordinance.[3] Guido refused to convey the Restaurant Parcel to Dubois Dutch, due to his concern that his residue lot, the Gas Station Parcel, would be non-conforming pursuant to the 1996 Zoning Ordinance and thus rendered commercially useless. On November 28, 1998, Dubois Dutch sought formal subdivision approval from the Sandy Township Planning Commission (hereinafter, Planning Commission).[4] Guido objected and the Planning Commission rejected the subdivision approval request.

On February 12, 1999, Dubois Dutch commenced a legal action against Guido in the Clearfield County Court of Common Pleas, seeking specific performance of the Option. As a defense to specific performance, Guido asserted that he could not perform his contractual duty because subdivision of the property would violate the 1996 Zoning Ordinance. Additionally, Guido countersued for ejectment, seeking possession of the Restaurant

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[3] Both portions of the lot would have had acceptable dimensions for commercial use under the 1964 Zoning Ordinance.

[4] As discussed in detail *infra*, the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101, *et seq.* (MPC), allows municipalities to regulate subdivision and land development through enacting subdivision and land use ordinances. When a municipality has enacted such an ordinance, no formal subdivisions of land may occur without compliance with the ordinance. See 53 P.S. § 10507. In addition to the 1964 and 1996 Zoning Ordinances previously identified, Sandy Township specifically enacted subdivision ordinances which require formal approval by the municipality of all subdivisions and provide penalties for failure to comply (hereinafter, 1965 Subdivision Ordinance and 1997 Subdivision Ordinance). As is relevant to this case, property owners seeking approval under the 1997 Subdivision Ordinance must comply, *inter alia*, with requirements in the applicable1996 Zoning Ordinance.

Parcel free of any claim by Dubois Dutch. Dubois Dutch filed preliminary objections to the ejectment action, raising the pendency of its prior action for specific performance, pursuant to Pa.R.C.P. 1028(a)(6).[5] On May 17, 1999, following a hearing, in an apparent effort to effectuate an amicable resolution of the parties' dispute, the trial court directed Dubois Dutch to apply, once again, to the Planning Commission seeking approval of a formal subdivision of the Property. The trial court also issued an order staying all litigation pending a decision by the Planning Commission on the subdivision approval request it directed Dubois Dutch to submit.[6]

Pursuant to the court's direction, Dubois Dutch reapplied to the Planning Commission.[7] In due course, Dubois Dutch raised two principal arguments: first, that the 1982 Lease and Option effected a *per se* lawful subdivision at inception; or second, that upon Dubois Dutch's exercise of the Option, its ownership interest would relate back to 1982 and thus be governed by the 1964 Zoning Ordinance, such that even if the 1996 Zoning Ordinance applied, Guido's Gas Station Parcel should win approval as a pre-existing non-conforming lot[8] with a pre-existing non-conforming ongoing business situate

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[5] Rule 1028, providing bases on which a party may raise preliminary objections, provides in subsection (a)(6) that preliminary objections may be filed due to "pendency of a prior action or agreement for alternative dispute resolution."

[6] The underlying actions apparently are still pending in the Clearfield County Court of Common Pleas. Although not relevant to the appeal currently before this Court, neither the parties nor the courts below have cited authority suggesting that the trial court could not have ordered Guido to perform the contract despite the fact that the residual Gas Station Parcel would be in violation of the 1996 Zoning Ordinance and the 1997 Subdivision Ordinance.

[7] The record is not clear as to the date on which Dubois Dutch applied for this second subdivision application with the Planning Commission.

[8] In conformity with the definition in section 107 of the MPC, 53 P.S. §10107, the 1996 Zoning Ordinance defines "Nonconforming Lot" as "a lot the area or dimension of which (continued...)

thereon. On June 13, 1999, the Planning Commission agreed and approved Dubois Dutch's request for formal subdivision.[9]

On August 3, 1999, Guido filed an appeal from the Planning Commission's decision with the Clearfield County Court of Common Pleas. On June 13, 2000, the trial court held a *de novo* hearing. The court found that the creation of the 1982 Lease and Option and Dubois Dutch's attempt to execute the Option constituted a Subdivision of the property under the MPC as of June 1982. The trial court noted that equitable title of property subject to a lease coupled with a purchase option passes, upon exercise of a purchase option, not as of the date of exercise, but rather as of the date of option creation. Thus, it concluded that the 1965 Subdivision Ordinance governed.[10] Trial Ct. Op. at 8-9.

The court then considered the 1965 Subdivision Ordinance's requirement that the lots resulting from a Subdivision must "comply with the minimum requirements of the Sandy Township Zoning Ordinance." Trial Ct. Op. at 13 (quoting 1965 Subdivision Ordinance § 611(A)). Concluding that the "minimum requirements" could be satisfied by use of the

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(...continued)
was lawful prior to the adoption or amendment of this Zoning Ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption or amendment." 1996 Zoning Ordinance at 10.

[9] At this point, it is advantageous to distinguish the informal division of property by parties from the formal subdivision approval process set forth in the MPC and the relevant ordinances. The parties have cited no impediment to the transfer of property between private parties even if such transfer would violate a municipality's ordinances such that the purchaser would be unable to use or develop the land. We will refer hereinafter to such a transfer of ownership as "division-in-fact," and characterize the property as "divided-in-fact." Conversely, when a property owner complies with the MPC and the municipality's subdivision ordinances by obtaining the requisite approval, we will denote such formally approved division as "Subdivision," and characterize the property as "Subdivided."

[10] This point is of questionable import since under either the 1965 or 1997 Subdivision Ordinance any subdivision that occurred was, on its face, "illegal" for want of formal approval, a point the trial court notes in its Conclusions of Law. Trial Ct. Op. at 20.

Zoning Ordinance's exceptions, such as pre-existing non-conforming lots, the court held that the Gas Station Parcel satisfied the definition of non-conforming use because its lot size was "lawful" under the 1964 Zoning Ordinance, even if the property had not been formally Subdivided. Accordingly, the trial court held that the Gas Station Parcel constituted a permissible pre-existing non-conforming lot under the 1996 Zoning Ordinance. The court entered an order approving Dubois Dutch's Subdivision application. Guido timely appealed that decision to the Commonwealth Court.

A three-judge panel of the Commonwealth Court reversed the trial court by a vote of two to one.[11] See Guido v. Township of Sandy, 809 A.2d 1036 (Pa. Cmwlth. 2002). The majority found that a leasehold interest coupled with an option to purchase does not create a Subdivision of the property and, therefore, Dubois Dutch could not effectively "lock-in" the Gas Station Parcel as a pre-existing non-conforming lot by exercising its option to purchase a portion of the property after the 1996 Zoning Ordinance took effect. The Commonwealth Court held:

> There is simply no legal authority, or reason, to hold that the **potential** right to exercise an option to purchase, created by a lease in 1982, which Dubois Dutch did not seek to exercise until 1999, created a subdivision in 1982 under an ordinance which was no longer in existence when the option was exercised. In this case, Dubois Dutch's **right** to pursue subdivision approval was no different in 1982 than it was in 1998, when it finally initiated its first request before the Township Supervisors. Although that right might not have arisen until Dubois Dutch elected to exercise its option, its decision to exercise its right, or to forego its right, was the sole impediment to its right to official subdivision. Hence, any impairment to Dubois Dutch's right to apply under the 1965 Subdivision Ordinance, rather than the [1997 Subdivision Ordinance], is the result of Dubois Dutch's own decision to delay the exercise of its option.

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[11] Judge Simpson dissented without opinion.

Guido, 809 A.2d at 1041-42 (emphasis in original). The majority further rejected the trial court's conclusion that the Gas Station Property could satisfy the 1997 Subdivision Ordinance's requirement that the lots meet the "minimum requirements" of the 1996 Zoning Ordinance. It found that the "minimum requirements" could not be satisfied by way of exceptions to the 1996 Zoning Ordinance - e.g., by designation as a pre-existing non-conforming lot - and held that the only remedy available to Dubois Dutch was the modification provisions of the 1997 Subdivision Ordinance. The modification provision, modeled on MPC section 512, allows the municipality to modify any of its requirements if the literal enforcement of the provision would exact undue hardship due to the particular conditions pertaining to the land. See 53 P.S. § 10512.1(a). The court, however, noted that Dubois Dutch failed to provide the required written request for modification.[12] See 53 P.S. § 10512(b). Therefore, the majority found that, because Dubois Dutch had never sought Subdivision approval before the effective date of the 1996 Zoning Ordinance or properly requested modification, the trial court erred in approving the Subdivision application based on its finding of pre-existing non-conforming use.

Dubois Dutch filed a petition for reargument, which the Commonwealth Court denied. On January 2, 2003, Dubois Dutch timely filed a petition for allowance of appeal to this Court. By Order dated August 27, 2003, our Court granted the appeal limited to the following issue: Whether a leasehold interest with an option to purchase creates a property interest in the lessee sufficient to support a Subdivision under the terms of the MPC.

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[12] Guido asserts, without citation to the record, that Dubois Dutch originally applied for approval by submitting a modification request, which it later withdrew. As such modification request was not involved in the current approval proceeding, it is irrelevant to our discussion.

DISCUSSION

The parties do not materially dispute the facts stated above. Thus, the issue under consideration presents a question of law and our review is plenary. Naylor v. Township of Hellam, 773 A.2d 770, 773 (Pa. 2001).

I.

The parties agree that the 1982 Lease and Option, at inception, reflected their mutual intention to grant Dubois Dutch an option to purchase the Restaurant Parcel. This does not answer, in itself, Guido's argument that he should not be compelled to specifically perform his obligation thereunder by conveying that parcel to Dubois Dutch. Nevertheless, because the 1982 Lease and Option lie at the heart of this dispute, we must consider preliminarily its legal effect *vis-à-vis* the parties.

At the outset, we note that Dubois Dutch's status as optionee in the Restaurant Parcel conferred upon it a "substantial interest in the land" that, upon exercise of the Option, made it owner *ab initio* of the Restaurant Parcel. In Detwiler v. Capone we discussed the rights conferred by a lease containing a purchase option.

> An option to purchase is analogous to a contract for the sale of land; it is in nature an encumbrance on the land pledged. In such case, the [optionor] is a trustee of the legal title for the benefit of the purchaser [*qua* optionee] . . . . Equity regards the person bound to convey as having done what he should have done, i.e. made the conveyance, and treats him as trustee for the optionee. Where an option is exercised the title of the optionee relates back to the date of the option and his interest is regarded as real estate of that time . . . .

55 A.2d 380, 383 (Pa. 1947) (internal quotation marks and citations omitted); see In re Powell, 123 A.2d 650, 654 (Pa. 1956) ("An option to purchase land is a substantial interest in the land; and, when the option is exercised, the optionee's ownership reverts to the

granting of the option . . . ."); cf. Chelan County v. Wilson, 744 P.2d 1106, 1109 (Wash. App. 1987) (noting that even where issues regarding regulatory compliance inhere in a transaction conveying land, the vendee of property has a valid and subsisting interest therein). We also observed in Detwiler that "the landlord-tenant relationship between the parties ceased to exist upon verbal communication of plaintiffs' election [to exercise the option] and the lease was converted into a contract of sale." 55 A.2d at 384. This ruling reflects an historic account of the legal effect of the exercise of an option to purchase, the import of which brooks no misunderstanding. Thus, in People's Street-Railway Co. v. Spencer, 27 A. 113 (Pa. 1893), we wrote:

> It was held in [Kerr v. Day, 14 Pa. 112 (1850)], that an option to purchase is a substantial interest in land, which may be conveyed to a vendee; and the English chancery cases were reviewed by Bell, J., with the result that, 'when the lessee made his option to purchase, he was to be considered as the owner ab initio. Indeed, the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election.' And in [Frick's Appeal, 101 Pa. 485 (1882)], where the land was sold upon a prior judgment before payment or conveyance, it was held that the surplus was the property of the optional vendee.

Id. at 114. Accordingly, Dubois Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois Dutch effective June 16, 1982.

Guido does not materially contest this assertion; instead, he aims to minimize its importance. He argues first that the "relation back principle" relied upon by Dubois Dutch applies only as between contracting parties, and does not affect the enforcement of zoning ordinances. The authorities he relies upon, however, merely illustrate the primacy of

zoning authority over competing or inconsistent contractual arrangements.[13] These cases say nothing about the antecedent proposition that, upon exercise, the Option vested title to the parcel in Dubois Dutch as of June 16, 1982, notwithstanding the consequences of any subsequent zoning regulation on either party's use or enjoyment of that property. Although this result undeniably complicates zoning issues -- this case being one example -- Spencer, Detwiler, and Powell leave no room for doubt as to the legal status, or the legally effective date of inception, of Dubois Dutch's title to the property once it exercised the Option.

II.

Thus, we arrive at the vexing matter that lies at the heart of this case: whether and when the Property was divided-in-fact or Subdivided as a matter of law. Dubois Dutch's argument requires that the division-in-fact of the Property into the two smaller parcels legally coincided with the execution of the 1982 Lease and Option. In support of its argument, Dubois Dutch directs our attention to the MPC section 107, which defines "subdivision" as follows:

> the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development . . . .

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[13] In support of this claim, Guido appeals to our decision in In re Michener, 115 A.2d 367 (Pa. 1955), and the Commonwealth Court's disposition of Gulla v. North Strabane Township, 676 A.2d 709 (Pa. Cmwlth. 1996), *aff'd*, 712 A.2d 281 (Pa. 1998). In Michener, we considered and rejected the right of parties to affect zoning matters by private contract. In Gulla, the Commonwealth Court -- and, in turn, this Court -- affirmed the trial court's conclusion that the parties had no standing to protest a township's formal subdivision approval because their claim was based solely on a private right established by deed.

53 P.S. § 10107. Dubois Dutch in particular draws our attention to the "by any means" language in the definition to support its claim that formal municipal approval is not a necessary condition to the division-in-fact of one parcel into two or more smaller parcels.

Our analysis leads us to conclude that, when Dubois Dutch attempted to exercise the Option in 1998, Pennsylvania law related the transaction back to 1982 and recognized it as a conveyance, as of 1982, of the Restaurant Parcel. Thus, logic dictates that the property must have been divided-in-fact as of the effective date of that sale. We reject, however, Dubois Dutch's argument that MPC section 107's reference to "lease" compels the conclusion that the property was divided-in-fact at the time of execution of the lease. This contention, which echoes the trial court's ruling,[14] defies the plain language of the above definition. A careful reading reveals that division-in-fact may occur by any means, including changes in existing lot lines, and that such changes may occur *for the immediate or future purpose* of lease, or building or lot development. In contending that MPC section 107 contemplates the instantiation of property division *by way of* lease, Dubois Dutch and the trial court mistake ends for means and broaden the definition beyond its terms. We agree with the Commonwealth Court that "the **potential** right to exercise an option to purchase, created by a lease in 1982, which Dubois Dutch did not seek to exercise until 1999," cannot in itself have divided-in-fact the property as of 1982. Guido, 809 A.2d at 1041-42 (emphasis in original). To hold otherwise would lead to the absurd result that the Property would have been divided-in-fact by virtue of an inchoate interest in

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[14] See Trial Ct. Op. at 9 (ruling that the definition of "subdivision" contained in MPC section 107 "clearly contemplates that a division of land 'by any means,' including the signing of a lease, constitutes a subdivision" as of 1982); see also White v. Township of Upper St. Clair, 799 A.2d 188, 202 (Pa. Cmwlth. 2002) (holding that a lease conveying a discrete parcel of the town's land to a lessor "creates a subdivision" within the meaning of the MPC). But see id. (concluding "that the Township has subdivided Boyce Park for the purpose of the lease").

property the holder might opt not to exercise, leaving the owner with a division of his property he did not desire at the hands of someone with no interest in effecting such a division. However, just as the exercise of the Option passed equitable title to the optionee effective as of the date of the inception of the Option, so *must* it have effectuated division-in-fact of the Property without which the idea that equitable title was then conveyed would be incoherent.

Nevertheless, division-in-fact does not amount to a governmentally recognized Subdivision; indeed, an interested governmental body may view a particular division-in-fact as illegal.[15] Thus, notwithstanding our recognition of the applicability of the "relation back" doctrine to equitable ownership, we cannot conclude that the Property was legally Subdivided through some sophistry arising from the actions of the parties or operation of law absent active governmental contemplation and ratification.

III.

Having established that the law views Dubois Dutch's exercise of the Option as effectuating transfer of the Restaurant Parcel to Dubois Dutch as of the date of the 1982 Lease and Option, and that we must of necessity recognize that such conveyance resulted in the division-in-fact of the Property into the Restaurant Parcel and the Gas Station Parcel, we now must consider the impact of these determinations on the paramount question of how government should view the two lots resulting from these transactions. In addressing this issue, we must first examine why the legislature requires formal Subdivision approval.

The MPC provides that "[w]here a subdivision and land development ordinance has been enacted by a municipality under the authority of this article, no subdivision or land

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[15] The pragmatic implications, if any, of such illegality are unclear, and need not be determined herein.

development of any lot . . . shall be made . . . except in accordance with the provisions of such ordinance." 53 P.S. § 10507. Moreover, the MPC mandates that subdivision ordinances "shall require that all subdivision and land development plats of land situated within the municipality shall be submitted for approval to the governing body." 53 P.S. § 10501.

This formal approval process effectuates the purposes of the MPC which, *inter alia*, include protecting and promoting the safety and health of the public, accomplishing coordinated development, guiding the uses of land and structure, and preserving the Commonwealth's natural resources. 53 P.S. § 10105. The MPC additionally suggests appropriate contents of a municipality's subdivision ordinance including, *inter alia*, requiring conformance with the municipality's comprehensive development plan; street, curb, and walkway provisions; water and sewage requirements; and flooding abatement measures. See 53 P.S. § 10503. While such issues may not be relevant in every Subdivision, as they do not appear to be relevant in the current case, the approval process allows the municipality to protect the public's health and safety and to coordinate development in those instances where Subdivision could affect the community negatively.

In the case *sub judice*, while we recognize that Dubois Dutch could not have sought Subdivision approval until it exercised the Option, as discussed *supra*, we agree with the Commonwealth Court that Dubois Dutch's "decision to exercise its right, or to forego its right, was the sole impediment to its right to official subdivision." Guido, 809 A.2d at 1042. Had Dubois Dutch exercised the Option prior to the adoption of the new lot size requirements in the 1996 Zoning Ordinance and obtained formal approval under the 1965 Subdivision Ordinance, the two properties would have been conforming lots under the 1964 Zoning Ordinance, and would therefore have fit the 1996 Zoning Ordinance's definition of a pre-existing non-conforming lot. By choosing not to exercise the Option and seek Subdivision approval until 1998, Dubois Dutch assumed the risk that the ordinances might

change such that one or both of the individual parcels would not comply with "the minimum requirements of the Sandy Township Zoning Ordinance," which would prevent approval under the Subdivision Ordinance.[16]

As previously noted, the MPC and the 1997 Subdivision Ordinance nevertheless provide a procedure by which the municipality's governing body can excuse failures to conform to the ordinance. Parties may request modifications as set forth in MPC section 512.1:

> The governing body or the planning agency . . . may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

53 P.S. § 10512.1(a). As the Commonwealth Court observed, however, the MPC modification procedure requires the request for modification be provided in writing and "state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary." 53 P.S. § 10512.1(b). We agree with the Commonwealth Court that Dubois Dutch's argument before the Planning Commission in favor of designating the property a

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[16] Our limited grant in the case does not encompass whether the Commonwealth Court correctly determined that a designation of a parcel as a pre-existing non-conforming use could not satisfy the Subdivision Ordinance's requirement that the lots conform to the "minimum requirements" of the Zoning Ordinance. We note, however, that such a reading furthers the MPC's subdivision provisions' purpose of allowing municipalities to regulate community development by requiring those requesting Subdivision approval to meet the current zoning requirements, absent an approved request for modification.

pre-existing non-conforming use cannot be viewed as a "tacit request" for modification. Guido, 809 A.2d at 1043.[17]

Therefore, we affirm the Commonwealth Court's determination that while the 1982 Lease and Option in themselves did not divide-in-fact the property as a matter of logical necessity, division-in-fact necessarily occurred when Dubois Dutch exercised the Option and the law recognized the conveyance as relating back to 1982. We also hold that division-in-fact in no way impels governmentally sanctioned Subdivision. Consequently, we affirm the Commonwealth Court's ruling that the division-in-fact effectuated under the 1982 Lease and Option failed, under these circumstances, to satisfy the Subdivision approval requirements of the applicable 1997 Subdivision Ordinance. Finally, we agree with the Commonwealth Court that Dubois Dutch failed to request modification in compliance with MPC section 512.1. Accordingly, we affirm the Order of the Commonwealth Court reversing the decision of the Court of Common Pleas of Clearview County. We leave the parties with the opportunity to seek further relief pursuant to the modification procedure established by the MPC and Sandy Township and/or to complete the underlying litigation seeking specific performance, consistently with this decision.

Mr. Justice Saylor files a concurring opinion in which Mr. Chief Justice Cappy and Mr. Justice Nigro join.

Judgment Entered August 23, 2005

John A. Vaskov

Deputy Prothonotary

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[17] On the record before us, however, we see no obvious impediment to either party filing an appropriate modification request to permit the Planning Commission to determine whether this circumstance warrants a modification relating to the subdivision approval process. It appears that arguments could be made by both parties in favor of modification.

[J-14-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN A. GUIDO	:	No. 36 WAP 2003
v.	:	
TOWNSHIP OF SANDY AND DUBOIS DUTCH, LLC	:	Appeal from the Order of the Commonwealth Court entered October 17, 2002 at No. 1545CD2001, reversing the Order of the Court of Common Pleas of Clearfield County entered June 5, 2001 at No. 99-867CD.
APPEAL OF: DUBOIS DUTCH, LLC	:	ARGUED: March 2, 2004

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: AUGUST 23, 2005**

I join the majority opinion, except for portions of its discussion concerning the principle of relation back as applied in the circumstances of this case.

While the majority ultimately reaches the conclusion that relation back does not apply relative to the attempt to effect (retroactively) a de facto, legal subdivision, see Majority Opinion, slip op. at 15, I respectfully differ with certain of its efforts to reconcile the relation-back principle with this conclusion. In particular, my thinking does not align with the majority's indications that optioned property segments must be viewed as retrospectively divided in fact upon the exercise of an option. See, e.g., id. at 11, 15. To me, it is preferable merely to recognize from the outset that, while an optionee's equitable title may in fact be deemed to relate back to the date of the execution of the

option for certain purposes,[1] relation back serves no meaningful role in determining whether and when a legal subdivision has been effected, at least where the parties to the option made no effort to comply with governing land-use regulation prescribing a procedure for lawful real estate subdivision that was in place at the time of their initial agreement.

I also reiterate the majority's observation that application of general principles of law and equity to further address the parties' respective interests arising out of the option agreement in the circumstances as they have unfolded is beyond the limited scope of this appeal.

Mr. Chief Justice Cappy and Mr. Justice Nigro join this concurring opinion.

[1] See, e.g., BAXTER DUNAWAY, 1 L. DISTRESSED REAL EST. §11:46 (2004) (observing that "in most jurisdictions a prior lease which contains an option to purchase must be subordinated to the mortgage or the mortgage will be extinguished by the exercise of the option[;] [a]lthough the option is exercised after the recording of the mortgage, the conveyance generally 'relates back' to the recording of the lease and option to purchase and, consequently, wipes out the mortgage").

§ 10515.1. Preventive remedies

(a) In addition to other remedies, the municipality may institute and maintain appropriate actions by law or in equity to restrain, correct or abate violations, to prevent unlawful construction, to recover damages and to prevent illegal occupancy of a building, structure or premises. The description by metes and bounds in the instrument of transfer or other documents used in the process of selling or transferring shall not exempt the seller or transferor from such penalties or from the remedies herein provided.

(b) A municipality may refuse to issue any permit or grant any approval necessary to further improve or develop any real property which has been developed or which has resulted from a subdivision of real property in violation of any ordinance adopted pursuant to this article. This authority to deny such a permit or approval shall apply to any of the following applicants:

(1) The owner of record at the time of such violation.

(2) The vendee or lessee of the owner of record at the time of such violation without regard as to whether such vendee or lessee had actual or constructive knowledge of the violation.

(3) The current owner of record who acquired the property subsequent to the time of violation without regard as to whether such current owner had actual or constructive knowledge of the violation.

(4) The vendee or lessee of the current owner of record who acquired the property subsequent to the time of violation without regard as to whether such vendee or lessee had actual or constructive knowledge of the violation.

As an additional condition for issuance of a permit or the granting of an approval to any such owner, current owner, vendee or lessee for the development of any such real property, the municipality may require compliance with the conditions that would have been applicable to the property at the time the applicant acquired an interest in such real property.

1968, July 31, P.L. 805, No. 247, art. V, § 515.1, added 1988, Dec. 21, P.L. 1329, No. 170, § 44, effective in 60 days.

ues Planning Code. Kuhlins Roofing & Siding Co., Inc. v. Hidden Valley Development Corp., 31 Pa. D. & C.3d 151 (1983).

5. Statute of frauds

Statute of Frauds (33 P.S. § 1 et seq.) did not bar cause of action asserted by township against subdividers to recover costs incurred in paving segment of road which subdividers agreed to pave as precondition to township approval of subdivision plan. Hampden Tp., Cumberland County v. Tenny, 379 A.2d 635, 32 Pa. Cmwlth. 301, Cmwlth.1977.

§ 10512. Repealed. 1972, June 1, P.L. 333, No. 93, § 5

Historical and Statutory Notes

The repealed section was derived from Act 1968, July 31, P.L. 805, No. 247, § 512, and related to appeals to court from subdivision and land development decisions of the governing body or planning agency.

§ 10512.1. Modifications

(a) The governing body or the planning agency, if authorized to approve applications within the subdivision and land development ordinance, may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

(b) All requests for a modification shall be in writing and shall accompany and be a part of the application for development. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary.

(c) If approval power is reserved by the governing body, the request for modification may be referred to the planning agency for advisory comments.

(d) The governing body or the planning agency, as the case may be, shall keep a written record of all action on all requests for modifications.

1968, July 31, P.L. 805, No. 247, art. V, § 512.1, added 1988, Dec. 21, P.L. 1329, No. 170, § 40, effective in 60 days.

Notes of Decisions

In general 1

1. In general

In reversing township's denial of preliminary subdivision plan application, trial court properly granted developers waivers from curbing and sidewalk requirements for proposed subdivision, where trial court found that installation of sidewalk and curbing along one of abutting roads would frustrate effect of improvements designed to implement stormwater control, that putting sidewalk

July 6, 1998

Harley Hotels, Inc.
21 Terminal Tower
Cleveland, Ohio 44115

Dubois Dutch, LLC
RD. #2, Box 244
I-80 & S.R. 879
Dubois, PA 16830

Dear Sirs and Madams:

The undersigned is the Lessor by assignment, purchase or succession to Philip J. Dieringer as original Lessor under that certain Lease dated June 16, 1982 by and between Phillip J. Dieringer and Harley Hotels, Inc. (the "Lease").

You have informed the Lessor that Harley Hotels, Inc., as Lessee under the Lease, intends to sell and assign all of its right, title and interest in and to the Lease to Dubois Dutch, LLC.

Please be advised that the Lessee is currently in full compliance with all of the requirements and obligations imposed upon it by the Lease and is not in default of its obligations under the Lease. The Lessee's interest under the Lease is assignable provided that written notice is given to the Lessor, and, upon such assignment, the assignee shall be entitled to all of the Lessee's rights and privileges under the Lease, including, but not limited to, the right of occupancy, the right of peaceful possession, the right to exercise the purchase option and the right of first refusal option upon the sale or lease of the Leased Property, provided that Lessee performs all the covenants to be performed by it and complies with all of the terms and conditions of the Lease.

You are further advised that the term of the Lease will end no later than the 28th day of February, 1999, all of the options extended to the Lessee having heretofore been properly exercised.

Respectfully,

John A. Guido

(47603)

2900

DEFENDANT'S EXHIBIT 8 6/13/07

DEFENDANT DUBOIS DUTCH
Exhibit 8
APPENDIX J

DuBois Dutch
11-21-05
Document 4

HANAK, GUIDO and TALADAY
Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
Jeffrey S. DuBois

Telephone: (814) 371-7768
Fax: (814) 371-1974

498 Jeffers Street
P.O. Box 487
DuBois, PA 15801

July 7, 1998

M. Dale Leeper, Esq.
Theisen, Brock, Frye,
Erb & Leeper Co., L.P.A.
424 Second Street
Post Office Box 739
Marietta, OH 45750

Re: John A. Guido - DuBois Dutch, LLC

Dear Mr. Leeper:

This will confirm our telephone conversation yesterday morning relative to the above, which was in response to your letter of July 1st. As advised, my office represents John A. Guido, who also happens to be my son. As further advised, we hereby confirm that the subject Lease with Harley Hotels is in full force and effect and there are no defaults under the terms of the Lease as of this date.

As we discussed, Sandy Township adopted a rather extensive land subdivision and development ordinance in the year 1996. Unless a previous subdivision approval has been obtained on the subject property, it will be necessary to file and obtain subdivision approval to subdivide the property into two parcels as provided for in the Lease when your client exercises the option to purchase its portion of that property.

In addition as advised, approximately five years ago, Sandy Township amended the zoning ordinance applicable to the area at Exit 16 of I-80 where this property is located from urban/commercial to highway/commercial. Under the requirements of the new highway/commercial designation it is clear that if the overall property is separated into the two properties, the retained portion of my son will not comply with the mandates of the ordinance. In this regard, enclosed are the minimum set backs and lot requirements for a commercial lot under the highway/commercial zoning mandates.

Theisen, Brock, Frye, Erb,
and Leeper, L.P.A.

DuBois Dutch
11-21-05
Document 5

JUL 9 1998

Initialed By

Hopefully, the Sandy Township Zoning and Planning Commissioners will view this situation as a pre-existing condition and will grant approval on that basis. However, as we discussed, it is a problem that should be addressed at this point.

I thank you for your consideration in this matter and if you should have any further questions, please do not hesitate to let me know.

Very truly yours,

ANTHONY S. GUIDO

ASG:dfy

Enc.

cc: Eastdil Realty

P.S. I have forwarded the letters which you included with your letter and which have been signed by my son, John, to the parties involved.

LAW OFFICES

THEISEN, BROCK, FRYE, ERB & LEEPER CO., L.P.A.

PAUL T. THEISEN**
JERRY A. BROCK
GARY F. FRYE
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*ADMITTED IN OHIO AND WEST VIRGINIA

**OF COUNSEL

November 16, 1998
(Overnight Courier and Ordinary Mail)

John A. Guido
R.R. #1, Box 260
Game School Road
Brockway, PA 15824-9311

Dear Mr. Guido:

As you and your father know, we represent DuBois Dutch, LLC. By reason of an Assignment and Assumption of Lease from Harley Hotels, Inc. dated as of July 5, 1998 and recorded at Volume 1951, Page 453 of the records of Clearfield County, DuBois Dutch, LLC is the assignee of the various rights and obligations of Harley Hotels, Inc. under a Lease dated June 16, 1982 between Phillip J. Dieringer as Lessor and Harley Hotels, Inc. as Lessee. A copy of that Lease is attached, as is a copy of our Assignment, as recorded. A Memorandum of Lease, dated July 7, 1982, was recorded on July 12, 1982 in the records of Clearfield County in Book 843, at Page 79. By reason of the assignment, DuBois Dutch, LLC succeeded to the rights and obligations of the Lessee under the Lease.

Pursuant to Paragraph 9 of the Lease, DuBois Dutch, LLC, as assignee of the Lessee's rights, privileges and options thereunder, does hereby give notice to you, as assignee and successor to the rights and obligations of the Lessor under the Lease, of its intent to exercise its option to purchase the Leased Property (including ingress and egress and utility easements as provided in the Lease) for the sum of $30,000, being the purchase price provided for in the Lease. As you know, the option is exercisable upon 30 days' written notice. We therefore suggest December 23, 1998 as the closing date. DuBois Dutch, LLC stands ready, willing and able to pay the purchase price, through such instrument as you may reasonably require, and to do all other things which may be required under the Lease on its part to consummate the purchase.

We understand that the property is subject to a mortgage given to S & T Bank of DuBois and ask that you make

EXHIBIT "A"

DuBois Dutch
11-21-05
Document 6

331a

appropriate arrangements to have a release of the Leased Property available. As you know, DuBois Dutch, LLC has had the property surveyed in conformity with the requirements of Sandy Township and the survey is expected to be presented to the township for approval in late November. Your father has contacted us concerning certain subdivision requirements and we trust that you will take appropriate action to insure that our client's rights under the purchase option will not be adversely affected. Real estate taxes and related matters can be addressed once a final closing date has been selected.

Respectfully,

M. Dale Leeper

MDL:clt
cc: Anthony S. Guido, Esquire (telecopied and mailed)
Greg S. Ley
Denning Gearhart

(54904)

332a

HANAK, GUIDO and TALADAY

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498 Jeffers Street
P.O. Box 487
DuBois, PA 15801

November 17, 1998

M. Dale Leeper, Esq.
Theisen, Brock, Frye,
Erb & Leeper Co., L.P.A.
424 Second Street
Post Office Box 739
Marietta, OH 45750

Re: John A. Guido - DuBois Dutch, LLC

Dear Mr. Leeper:

In reply to your letter of November 16th, as I had previously advised you, Sandy Township amended the zoning ordinance applicable to the area in which the subject property is located. The amendments resulted in the fact that my son's remaining property will be a substandard lot under the terms of the amended zoning ordinance. My son had no way of anticipating that would occur when he purchased the property approximately ten years ago. Therefore, it is my opinion that this intervening legal factor is a legal impediment to closing on the transaction in accordance with the terms of the option.

If my son is left with a substandard lot that will severely limit his use of the property in the future. Again, this was not anticipated when he purchased the property since the zoning regulations applicable at that time were not very restrictive. Therefore, as previously advised, my son cannot look favorably upon the approval of the subdivision under these circumstances, unless the Sandy Township authorities in approving the subdivision grant full relief from the mandates of the amended ordinance insofar as set-backs, lot size, and coverage are concerned.

Further, your client was fully aware of the subdivision problem when he purchased the subject Lease. For some reason that completely eludes me. He elected to purchase the property before this problem was resolved.

DuBois Dutch
11-21-05
Document 7

M. Dale Leeper, Esq.
November 17, 1998
Page 2

My son and I stand ready, willing and able to negotiate a possible solution to this problem if your client so desires. Please advise.

Very truly yours,

Anthony S. Guido,

ANTHONY S. GUIDO

ASG:dfy

cc: John A. Guido

SANDY TOWNSHIP SUPERVISORS
12TH STREET AND CHESTNUT AVENUE
DUBOIS, PA 15801

REGULAR MEETING OF JULY 7, 1999 AT 7:00 P.M.

AGENDA

MEETING CALLED TO ORDER

ROLL CALL

PUBLIC COMMENTS *(Comments Regarding Agenda Items ONLY)*

APPROVAL OF THE PUBLIC HEARING MINUTES OF JUNE 16, 1999 FOR BECK SUBDIVISION

APPROVAL OF THE MINUTES OF THE REGULAR MEETING OF JUNE 16, 1999

TABLED BUSINESS
1. Larry Reed/Planning Module/ Resolution 1999-13

OLD BUSINESS

NEW BUSINESS
1. Larry Reed/Expansion of Country Place Mobile Home Park
2. Keene Subdivision
3. Dutch Pantry Subdivision/Greg Ley
4. Recreation Agreement YMCA/Sandy Township
5. Annual Police Shoot & Annual Firearms Qualifications/Subvention
6. Resolution 1999-14 Acceptance of Shaffer Road Extension
7. Central Christian School/Infrastructure
8. Lions Club/Drainage Assistance
9. Award Truck Bid

CORRESPONDENCE
1. City of DuBois/Drought Emergency Plan
2. Clearfield County/ GIS Department

ADMINISTRATIVE REPORTS
1. Fire Department Report - May 1999
2. Road Report - June 1999
3. Tax Collectors Report - June 1999
4. Zoning Report - June 1999
5. Managers Search Update

ELECTED OFFICIALS COMMENTS

OPEN MEETING TO THE FLOOR

CLOSE MEETING TO THE FLOOR

DuBois Dutch
11-27-05
Document 8

EXHIBIT "F"

5a

3. Dutch Pantry Subdivision/Greg Ley - Manager Rich read a memo from the Zoning Officer James H. Keck to the Supervisors dated July 6, 1999. This is a request for a minor subdivision for Gregory S. Ley - Dutch Pantry. The applicant proposes to subdivide 2.57 acres from property of John A. Guido located at Exit 16 of I-80 in Sandy Township. The Sandy Township Planning Commission reviewed this proposed subdivision at their regular meeting of June 23, 1999. The subdivision plan, as presented, results in a nonconforming parcel being created based on our current zoning ordinance minimum lot size requirement of 45,000 square feet. The parcel remaining for John A. Guido would be 32,910 square feet which is less than the required minimum lot size. Based on the fact that the subdivision would result in a nonconforming lot and it is possible to revise the plan to conform with the current ordinance, the Planning Commission voted to forward the subdivision request to the Supervisors with the recommendation that the request be denied.
Manager Rich said that for the record the Supervisors were here once before, however the Attorney for Dutch Pantry withdrew the request. Attorney for Dutch Pantry went back to the Planning Commission with a different approach as to why the request should be granted.

Attorney Toni Cherry, representing Gregory Ley/DuBois Dutch LLC, requested the Supervisors approve the subdivision request of Gregory S. Ley. She said that under the current zoning ordinance the parcel remaining for Mr. Guido is less than the size requirement. Attorney Cherry said her clients position is that the lot existed in its present condition prior to the enactment of the latest zoning ordinance and upon adoption of the Ordinance became a legal non-conforming lot. Attorney Cherry pointed out several sections of the Zoning Ordinance that she feels pertains to Mr. Leys request. She said Mr. Ley's option dates back to 1982 and at that time both lots were in conformance with the Ordinance. She said Mr. Guido cannot claim the same degree of title in the land that he owns and the land that DuBois Dutch is on. Attorney Cherry said the properties have always been treated as two separate properties. Attorney Cherry requested the Supervisors grant the subdivision request of Gregory S. Ley.

Attorney Anthony Guido, representing his son John A. Guido, requested the Supervisors deny the subdivision request of Gregory S. Ley because it would leave his parcel a non conforming lot. He said if the subdivision is granted his son will not be able to expand or sell the lot. Attorney Guido cited several sections of the Sandy Township Zoning Ordinance. Attorney Guido requested the subdivision be denied.

Manager Rich said that the Township Solicitor, Ed Ferraro, gave the Supervisors his views in a letter dated June 23, 1999. In his letter he said that since the parties have always treated this property as two (2) separate parcels, the Township always recognized it as two (2) separate parcels, and the fact that the exercise of an option can revert back to the time that the option was executed, it is the Solicitors opinion that the Planning Commission could approve this subdivision as presented with the lot sizes contained thereon.

Sherry Beers made a motion seconded by Ray Anderson to approve the subdivision request of Gregory S. Ley-DuBois Dutch, LLC, property located at Exit 16 of I 80 in Sandy Township. A roll call vote was taken.

Del Spafford - aye	Ray Anderson - aye
Michael Behringer - aye	Sherry L. Beers - aye

Motion carried a 4-0 vote.

6a

P 886— Assignment of lease by tenant, with consumption, plain English format: 11-78 © 1978 BY JULIUS BLUMBERG, INC. PUBLISHER, NYC 10013

Dubois, PA

ASSIGNMENT AND ASSUMPTION OF LEASE

VOL 1951 PAGE 453

The parties agree as follows:

Date: as of the 5th of July, 19 98

Parties:
Assignor: Harley Hotels, Inc., an Ohio corporation
Address: 17000 Bagley Road, Middleburgh Heights, Ohio

Assignee: Dubois Dutch, LLC, a Pennsylvania Limited Liability Company
Address: RD #1, Box 273-C
I-80 & S.R. 219, Dubois, PA 15801

If there are more than one Assignor or Assignee, the words "Assignor" and "Assignee" shall include them.

Lease assigned: The Lease which is assigned herein is indentified as follows:
Landlord Phillip J. Dieringer
Tenant Harley Hotels, Inc.
Date June 16, 1982 Premises: SE 1/4 of I-80 and US 219 Dubois, Sandy Township, Clearfield Co., PA

(This Lease was/not recorded in the Clearfield County Records in Book 893, Page 79.)

A memorandum of Lease dated July 7, 1982 was recorded on July 12, 1982 in the County of Clearfield, State of Pennsylvania, in Book 893, Page 79.

Consideration: Assignor has received TEN ($ 10.00) dollars and other good and valuable consideration for this Assignment.

Assignment: Assignor assigns to the Assignee all the Assignor's right, title and interest in a) the Lease and b) the security deposit, if any, stated in the Lease.

Assumption: Assignee agrees to pay the rent promptly and perform all of the terms of the Lease as of the date of this Assignment. Assignee assumes full responsibility for the Lease as if Assignee signed the Lease originally as Tenant.

Indemnity: Assignee agrees to indemnify and hold Assignor harmless from any legal actions, damages and expenses, including legal fees that the Assignor may incur arising out of the Lease.

Benefit to landlord: Assignee agrees that the obligations assumed shall benefit the landlord named in the Lease as well as the Assignor.

Assignor's statements: Assignor states that Assignor has the right to assign this Lease and that the premises are free and clear of any judgments, executions, liens, taxes and assessments.

Assignee's statement: Assignee states that Assignee has read the Lease and has received the original or an exact copy of the Lease.

Successors. This assignment is binding on all parties who lawfully succeed to the rights or take the place of the Assignor or Assignee.

Margin headings: The margin headings are for convenience only.

Signatures: The Assignor and Assignee have signed this Assignment as of the date at the top of the first page.

WITNESS: Amelia Marr

WITNESS: [signature]

ASSIGNOR
HARLEY HOTELS, INC.
By: [signature]
Abe Wolf, Vice President & Treasurer

ASSIGNEE
Dubois Dutch, LLC
By: [signature]
Gregory S. Loy, Member

DuBois Dutch
11-27-05
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EXHIBIT "C"

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STATE OF
COUNTY OF

On the day of 19 , before me personally came

to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that executed the same.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 14th day of July 19 98 , before me personally came Abe Wolf to me known, who, being by me duly sworn, did depose and say that he resides at No. 4 Dundale Place, Hazlet, NJ ; that he is the Vice President and Treasurer of Harley Hotels, Inc. , the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed h is name thereto by like order.

Elaine M. Golding
Notary Public

ELAINE M. GOLDING
Notary Public, State of New York
No. 52-9485032
Qualified in Kings County
Commission Expires May 31, 2000

STATE OF
COUNTY OF

On the day of July 19 98 . before me personally came to me known and known to me to be a manager of Dubois Dutch, LLC, a Pennsylvania limited liability company, and known to me to be the individual described in and who executed the foregoing instrument as a manager of Dubois Dutch, LLC, and acknowledged before me that he executed the same as a manager aforesaid for th uses and purposes in said instrument set forth.

Notary Public

STATE OF
COUNTY OF

On the day of 19 , before me personally came the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides at No.

that he knows to be the individual described in and who executed the foregoing instrument; that he, said subscribing witness, was present and saw execute the same; and that he, said witness, at the same time subscribed h name as witness thereto.

I hereby CERTIFY that this document is recorded in the Recorder's Office of Clearfield County, Pennsylvania.

Karen L. Starck
Recorder of Deeds

CLEARFIELD COUNTY
ENTERED OF RECORD
TIME 12:00 p 7-17-98
BY FOR Recorder
FEES 15.50
Karen L. Starck, Recorder

Assignment of Lease with Assumption

Assignor: HARLEY HOTELS, INC.,

Assignee: DUBOIS DUTCH, LLC,

Dated: July , 19 98.

3300

Entered of Record 7-17 1998 12:00 p Karen L. Starck, Recorder

VOL 1852 PAGE 85

THIS DEED,

MADE the 13th day of June in the year nineteen hundred and ninety-seven (1997),

BETWEEN ROBERTA A. GUIDO, of the Township of Sandy, Clearfield County, Pennsylvania, Grantor, party of the first part;

A N D

JOHN A. GUIDO, of R. D. #1, Brockway, Jefferson County, Pennsylvania, Grantee, party of the second part.

WITNESSETH, That in consideration of One Dollar ($1.00) in hand paid, the receipt whereof is hereby acknowledged, the said Grantors do hereby grant and convey to the said Grantee,

ALL of the Grantor's right, title and interest in and to ALL that certain piece or parcel of land situate in the Township of Sandy, Clearfield County, Pennsylvania, bounded and described as follows, to wit:

BEGINNING at a 2" iron pipe, said pipe being North 61° 47' 30" East 120 feet from Station 1611 plus 39.40 feet on Route 219 base line; thence by the legal right of way line of Ramp D, North 61° 47' 30" East 84.00 feet to a 2" iron pipe; thence still by same by a curve to the right having a 100 foot radius 232.66 feet to a 2" iron pipe; thence still by same, South 74° 54' 08" East 57.74 feet to a 2" iron pipe on original line of James M. Norwood lot; thence by same, South 38° 30' 21" East 31.44 feet to an old 2" iron pipe and still by same, North 46° 45' 09" East 21.94 feet to a 2" iron pipe on the legal right of way line of Ramp D; thence by same, South 74° 54' 08" East 162.82 feet to a 2" iron pipe by D. S. Hopkins tract, now McIntosh Coal Company; thence by same, South 38° 30' 21" East 102.25 feet to an old 2" iron pipe corner of James R. Taylor III; thence by same and by James R. Taylor and Robert N. Swisher, South 43° 01' 48" West 400.80 feet to an old 1" iron pipe corner of Robert N. Swisher, South 43° 01' 48" West 400.80 feet to an old 1" iron pipe corner of Robert N. Swisher; thence by same, South 38° 15' 00" East 170.70 feet to a 2" iron pipe by an old 1" iron pipe corner on line of James R. Taylor tract and now or formerly Penn Research and Development Corporation; thence by same, South 47° 00' 00" West 53.45 feet to a 2" iron pipe, still by same, South 29° 15' 37" West 91.78 feet to a 1" iron pipe on the Eastern legal right of way of Route 219; thence by same, North 38° 12' 30" West 324.17 feet to a 2" iron pipe, and still by same, North 61° 47' 30" East 20.00 feet to a 2" iron pipe; thence still by same, North 28° 12' 30" West 339.44 feet to a 2" iron pipe and place of beginning. Containing 3.643 acres.

DuBois Dutch
11-27-05
Document 10

EXCEPTING AND RESERVING from the above conveyance to the former grantor, his heirs and assigns:

BEGINNING at a point which is 132.40 feet perpendicularly right of way base line Station 160$+96.46 of Route 219; thence by the following courses and distances:

(1) North 21° 33' 52" West a distance of 196.82 feet;
(2) North 43° 01' 48" East a distance of 45.55 feet;
(3) South 38° 15' 00" East a distance of 170.70 feet;
(4) South 47° 00' 00" West a distance of 52.45 feet;
(5) South 29° 15' 37" West a distance of 53.52 feet;

and containing therein exactly 0.282 acre of land.

UPON the express condition that the above described parcel of ground retained by the former grantor as described herein shall not be used in whole or in part, directly or indirectly for automobile or truck service station purposes, or for the sale, offering for sale, storage or distribution of gasoline and/or diesel fuel or any motor vehicle fuel for a period of twenty (20) years from and after June 30, 1982. This condition and restriction is intended for the benefit of BP Oil, Inc., its successors and assigns.

TOGETHER with the perpetual and non-exclusive right to the use of the existing easement to the said former grantor, his heirs, personal representatives and assigns, over and upon an existing service road over and through lands granted herein and leading to the existing driveway of the former grantor.

ALSO excepting and reserving all of the coal, oil, natural gas, fire clay, and all other minerals of every kind and character as fully as the same may have been excepted and reserved in prior deeds of conveyance.

UNDER AND SUBJECT to a certain Lease between Phillip J. Dieringer, et ux., and Harley Hotels, Inc., as Lessee, dated July 7, 1983, memorandum of which was recorded in the Office of the Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No. 843, Page 281.

BEING the same premises which were conveyed to John A. Guido and Roberta A. Guido by deed of Phillip J. Dieringer, et ux., dated December 19, 1986, and recorded at Clearfield, Pennsylvania, in Deeds and Records Book No. 1130, page 150.

This deed is delivered pursuant to a Property Settlement Agreement entered into between the parties pursuant to a divorce action filed in the Court of Common Pleas of Jefferson County, Pennsylvania, to No. 907 of 1996.

AND the said Grantor will generally warrant and forever defend the property hereby conveyed.

IN WITNESS WHEREOF, said grantor has hereunto set her hand and seal the day and year first above written.

Roberta A. Guido (SEAL)
Roberta A. Guido

AND the said Grantor will generally warrant and forever defend the property hereby conveyed.

IN WITNESS WHEREOF, said grantor has hereunto set her hand and seal the day and year first above written.

Roberta A. Guido (SEAL)
Roberta A. Guido

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NOTICE

In accordance with the provisions of "The Bituminous Mine Subsidence and Land Conservation Act of 1966", I/we, the undersigned grantee/grantees, hereby certify that I/we know and understand that I/we may not be obtaining the right of protection against subsidence resulting from coal mining operations and that the purchased property may be protected from damage due to mine subsidence by a private contract with the owners of the economic interest in the coal. I/we further certify that this certification is in a color contrasting with that in the deed proper and is printed in twelve point type preceded by the word "notice" printed in twenty-four point type.

Witness:

_____

_____

This 17 day of June, 1992.

THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE OF THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR STRUCTURE ON OR IN SUCH LAND. THE INCLUSION OF THIS NOTICE DOES NOT ENLARGE, RESTRICT OR MODIFY ANY LEGAL RIGHTS OR ESTATES OTHERWISE CREATED, TRANSFERRED, EXCEPTED OR RESERVED BY THIS INSTRUMENT. (This Notice is set forth pursuant to Act No. 255, approved September 10, 1965, as amended.)

CERTIFICATE OF RESIDENCE

I/we hereby certify, that the precise residence for the Grantee herein is as follows:
R. D. #1, Box 260, Game School Road, Brockway PA 15824

_____
Attorney or Agent for Grantee

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COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF Clearfield :

On this, the 13th day of June, 1997, before me, the undersigned officer, personally appeared ROBERTA A. GUIDO, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

Notarial Seal
Diane L. Smith
Notary Public
My Commission Expires March 18, 2000
Member, Pennsylvania Association of Notaries

Diane L. Smith

I hereby CERTIFY that this document is recorded in the Recorder's Office of Clearfield County, Pennsylvania.

Karen L. Starck
Recorder of Deeds

CLEARFIELD COUNTY
ENTERED OF RECORD
TIME 12:57 p.m. 6-24-97
BY Karen L. Starck
FEES 15.50
Karen L. Starck, Recorder

Entered of Record June 24 19 97 12:57 p.m. Karen L. Starck, Recorder

WARRANTY DEED

The Flanbaum Co.
Williamsport, Pa. 17701

vol 1130 page 130

This Deed,

MADE the 19th day of December
in the year nineteen hundred and eighty-six (1986).

BETWEEN PHILLIP J. DIERINGER and SHERRY S. DIERINGER, husband and wife, of Union Township, Clearfield County, Pennsylvania, Grantors, parties of the first part;

A
N
D

JOHN A. GUIDO and ROBERTA A. GUIDO, husband and wife, of the City of DuBois, Clearfield County, Pennsylvania, as tenants by the entireties, Grantees, parties of the second part.

WITNESSETH, That in consideration of One Hundred Ten Thousand ($110,000.00) Dollars,
in hand paid, the receipt whereof is hereby acknowledged, the said grantors do hereby grant and convey to the said grantees,

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania, being more particularly bounded and described as follows:

BEGINNING at a 2" iron pipe, said pipe being North 61° 47' 30" East 120 feet from Station 1611 plus 39.40 feet on Route 219 base line; thence by the legal right of way line of Ramp D, North 61° 47' 30" East 84.00 feet to a 2" iron pipe; thence still by same by a curve to the right having a 100 foot radius 232.66 feet to a 2" iron pipe; thence still by same, South 74° 54' 08" East 57.74 feet to a 2" iron pipe on original line of James M. Norwood lot; thence by same, South 38° 30' 21" East 31.44 feet to an old 2" iron pipe and still by same, North 46° 45' 09" East 21.94 feet to a 2" iron pipe on the legal right of way line of Ramp D; thence by same, South 74° 54' 08" East 162.83 feet to a 2" iron pipe of D. S. Hopkins tract, now McIntosh Coal Company; thence by same, South 38° 30' 21" East 102.25 feet to an old 2" iron pipe corner of James R. Taylor III; thence by same and by James R. Taylor and Robert N. Swisher, South 43° 01' 48" West 400.80 feet to an old 1" iron pipe corner of Robert N. Swisher, South 43° 01' 48" West 400.80 feet to an old 1" iron pipe corner of Robert N. Swisher; thence by same, South 38° 15' 00" East 170.70 feet to a 2" iron pipe by an old 1" iron pipe corner on line of James R. Taylor tract and now or formerly Penn Research and Development Corporation; thence by same, South 47° 00' 00" West 52.45 feet to a 2" iron pipe, still by same, South 29° 15' 37" West 91.75 feet to a 1" iron pipe on the eastern legal right of way of Route 219; thence by same, North 28° 12' 30" West 224.17 feet to a 2" iron pipe, and still by same, North 61° 47' 30" East 20.00 feet to a 2" iron pipe; thence still by same, North 28° 12' 30" West 339.44 feet to a 2" iron pipe and place of beginning. Containing 3.643 acres.

EXCEPTING AND RESERVING from the above conveyance to the former grantor, his heirs and assigns:

BEGINNING at a point which is 132.40 feet perpendicularly right of way base line Station 1605+96.46 of Route 219; thence by the following courses and distances:

(1) North 21° 33' 52" West a distance of 196.82 feet;
(2) North 43° 01' 48" East a distance of 45.55 feet;

DuBois Dutch
11-21-05
Document 11

DEFENDANT DUBOIS DUTCH
Exhibit 7

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(3) South 38° 15' 00" East a distance of 170.70 feet;
(4) South 47° 00' 00" West a distance of 52.45 feet;
(5) South 29° 15' 37" West a distance of 53.32 feet;
and containing therein exactly 0.282 acre of land.

UPON THE express condition that the above described parcel of ground retained by the former grantor as described herein shall not be used in whole or in part, directly or indirectly for automobile or truck service station purposes, or for the sale, offering for sale, storage or distribution of gasoline and/or diesel fuel or any motor vehicle fuel for a period of twenty (20) years from and after June 30, 1982. This condition and restriction is intended for the benefit of BP Oil, Inc., its successors and assigns.

TOGETHER with the perpetual and non-exclusive right to the use of the existing easement to the said former grantor, his heirs, personal representatives and assigns, over and upon an existing service road over and through lands granted herein and leading to the existing driveway of the former grantor.

ALSO excepting and reserving all of the coal, oil, natural gas, fire clay, and all other minerals of every kind and character as fully as the same may have been excepted and reserved in prior deeds of conveyance.

BEING the same premises which were conveyed to Phillip J. Dieringer, et ux. by deed of James R. Taylor, Jr., dated July 2, 1982, and recorded at Clearfield, Pennsylvania, in Deed Book No. 843, page 337.

NOTICE

To comply with the Act of July 17, 1957 (52 P.S. Supp. Section 1551-1554) notice is hereby given as follows:

THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE TO THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL, AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR OTHER STRUCTURE ON OR IN SUCH LAND.

UNDER AND SUBJECT to a certain lease between Phillip J. Dieringer, as Lessor, and Harley Hotels, Inc., as Lessee, dated July 7, 1982, memorandum of which was recorded in the Office of the Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No. 843, page 79.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE
REALTY TRANSFER TAX
REVENUE STAMP
$50.00

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE
REALTY TRANSFER TAX
REVENUE STAMP
$50.00

842 8

NOTICE

In accordance with the provisions of "The Bituminous Mine Subsidence and Land Conservation Act of 1966", I/we, the undersigned grantor/grantee, hereby certify that I/we know and understand that I/we may not be obtaining the right of protection against subsidence resulting from coal mining operations and that the purchased property may be protected from damage due to mine subsidence by a private contract with the owners of the economic interest in the coal. I/we further certify that this certification is in a color contrasting with that in the deed proper and is printed in twelve point type preceded by the word "notice" printed in twenty-four point type.

Witness:

..... Roberta A. Dieringer

.....

This ..... day of .....

28 7 Cl

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AND the said grantors will GENERALLY WARRANT AND FOREVER DEFEND the property hereby conveyed.

IN WITNESS WHEREOF, said grantors have hereunto set their hands and seals, the day and year first above-written.

Sealed and delivered in the presence of

Phillip J. Dieringer (SEAL)

Sherry S. Dieringer (SEAL)

(SEAL)

(SEAL)

(SEAL)

(SEAL)

CERTIFICATE OF RESIDENCE

I hereby certify, that the precise residence of the grantee herein is as follows:
930 Chestnut Avenue
DuBois, PA 15801

Attorney or Agent for Grantee

Commonwealth of Pennsylvania
County of Clearfield } SS:

On this, the 19 day of December 19 86 before me a Notary Public the undersigned officer, personally appeared PHILLIP J. DIERINGER and SHERRY S. DIERINGER known to me (or satisfactorily proven) to be the person s whose name s are subscribed to the within instrument, and acknowledged that they executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

Notary Public

My Commission Expires March 7, 1987

Commonwealth of Pennsylvania
County of _____ } SS:

On this, the day of 19 , before me the undersigned officer, personally appeared known to me (or satisfactorily proven) to be the person whose name subscribed to the within instrument, and acknowledged that executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

My Commission Expires

2846

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State of
County of } SS:

On this, the day of 19 , before me
the undersigned officer, personally appeared
known to me (or satisfactorily proven) to be the person whose name subscribed to the within
instrument, and acknowledged that executed the same for the purpose therein
contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

My Commission Expires

State of
County of } SS:

On this, the day of 19 , before me
the undersigned officer, personally appeared
known to me (or satisfactorily proven) to be the person whose name subscribed to the within
instrument, and acknowledged that executed the same for the purpose therein
contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

My Commission Expires

MOYS AREA SCHOOL DISTRICT
1% REALTY TRANSFER TAX
AMOUNT $ 1100.00
PAID 12-22-86 MICHAEL R. LYTLE
Date Agent

1100.00
550.00
550.00

Deed

WARRANTY DEED - Published and Sold by The Finkbeiner Co., Williamsport, Pa. 1-42

PHILLIP J. DIERINGER, et ux.

-to-

JOHN A. GUIDO, et ux.

Dated .....
For .....
Consideration .....
Recorded .....
Record for Record in the Recorder's Office of ..... County, the ..... day of ..... Tax, $ ..... Fees, $ ..... Recorder

ANTHONY S. GUIDO, P.C.
ATTORNEY AT LAW
P.O. BOX 515
MOYS, PA. 15091

LEVY FILED OC U. TY
E RECORDED 12-22-86
TIME 11:40:00 AM
BY
FEES
Michael R. Lytle, Recorder

Commonwealth of Pennsylvania
County of Clearfield } SS:

RECORDED in the Office for Recording of Deeds, etc., in and for said County, in Deed Book No. 1130, Page 150

WITNESS my Hand and Official Seal this 22 day of Dec. , 1986

Michael R. Lytle
Recorder of Deeds

My Commission Expires
First Monday in January, 1988

Entered of Record Dec 22 19 86 1240 PM Michael R. Lytle, Recorder

2890

BUILDING PERMIT NO. 251

Issued by Sandy Township, DuBois, Pa., this Oct. 28 **19** 70

To Hospitality Motor Inn, Inc. **at** Falls Creek Interchange **For** Restaurant

This Permit Expires OCT 27-1971 **Days From Date**

Edward Watson Jr.
ZONING OFFICER

THIS PERMIT MUST BE POSTED AT SITE OF CONSTRUCTION

DuBois Dutch
11-21-05
Document 12

DEFENDANT DUBOIS DUTCH
Exhibit 18

THIS LEASE dated the 7th day of July, 19 82 by and between

PHILLIP J. DIERINGER

whose address is RD # ROCTON, PENNSYLVANIA 15856

hereinafter (whether one or more), called "Lessor", and HARLEY HOTELS, INC. an Ohio corporation, with its principal office in the Terminal Tower, Cleveland, Ohio 44113, hereinafter called "Lessee".

WITNESSETH, That:

Lessor, in consideration of the sum of One Dollar ($1.00) and other valuable consideration received by Lessor from Lessee, does hereby lease and let to Lessee, upon and subject to the covenants, terms, rentals and agreements set forth in a certain instrument of lease between Lessor and Lessee dated JUNE 16, 19 82, (herein called the "Lease"), the following described premises (herein called the "Leased Premises") situated in the Township of Sandy, County of Clearfield, and State of Pennsylvania:

As described in attached Exhibits, A, B, D AND E.

CLEARFIELD COUNTY
ENTERED OF RECORD
TIME 12:25 PM 7-12-82
BY [signature]
FEES 17.50
TIM MORGAN, Recorder

TO HAVE AND TO HOLD the same for a term of Six years - 7 months, commencing on the 1st day of August, 19 82, and ending on the 28th day of February, 19 89, unless sooner terminated or further extended as in said Lease provided or permitted. Lessee is granted by the terms of said Lease a continuing option of "First Refusal" to meet any bona fide offer received by Lessor from a third party to purchase or lease the Leased Premises and Lessee has the right to purchase or lease said premises on the same terms as contained in such offer. Lessee is further granted by said Lease the following option(s) to extend the term thereof and/or to purchase the Leased Premises: Two (2) additional successive periods of five (5) years with Purchase Option at end of original term or at any time during any extension.

Lessor and Lessee agree that the description of the Leased Premises as contained in the Lease is hereby amended to substitute therefor the description of said premises as herein above set forth, and that each and every other provision, covenant and condition with respect to the rights and obligations of the parties hereto and the use and occupancy of the above described Leased Premises as set forth in said Lease shall remain in full force and effect without modification and are incorporated herein and made a part hereof by reference thereto as fully and effectively as if rewritten herein at length.

IN WITNESS WHEREOF, this Lease has been duly executed in duplicate, each copy to be deemed an original, by Lessor and Lessee, as of the day and year first above written.

Executed in the presence of:

[signature]

[signature]

Phillip J. Dieringer, Lessor

Sherry S. Dieringer (Wife), Lessor

By Harley Hotels, Inc., Lessee

ATTEST BY: R. J. HARLEY, VICE PRESIDENT, SECY.

CLV-1321-C

EXHIBIT "B"

DuBois Dutch
11-21-05
Document 13

2970

BOOK 843 PAGE 080

STATE OF Pennsylvania }
COUNTY OF Clearfield } SS:

INDIVIDUAL ACKNOWLEDGMENT

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above named Phillip J. Deeringer,

who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at DuBois, Pa.

this 7th day of July, A.D., 1982.

SUSAN M. HARTFIELD, Notary Public
DuBois, Clearfield County, Pa.
My Commission Expires July 29, 1985

My commission expires My Commission Expires July 29, 1985.

Susan M. Hartfield
Notary Public

STATE OF OHIO }
COUNTY OF CUYAHOGA } SS:

CORPORATE ACKNOWLEDGMENT

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above named HARLEY HOTELS, INC.,

by R. J. HARPST, its VICE PRESIDENT, and SECRETARY, its ,

who acknowledged that he did sign the foregoing instrument and that the same is the free act and deed of said corporation and the free act and deed of himself personally and as such officers.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Cleveland, Ohio,

this 29th day of June, A.D., 1982.

My commission expires 12/7/85.

Thomas J. Bahn, Jr.
Notary Public
THOMAS J. BAHN, JR.
THOMAS J. BAHN, JR., Notary Public
Residence - Summit County
State Wide Jurisdiction, Ohio
My Commission Expires Dec. 7, 1985

This instrument was prepared by

LEASE
From

To

Return to:
1800-M Midland Building
Cleveland, Ohio 44115

2980

DL 343 PAGE 807

EXHIBIT "A"

I-80 & Rt. 219
DuBois, PA
EXHIBIT A

All that certain Lot or piece of ground situate in the Township of Sandy, County of Clearfield, and Commonwealth of Pennsylvania, bounded and described as follows:

Beginning at a 2" iron pipe, said pipe being North 61°-47'-30" East a distance of 120 feet from Station 1611+39.40 feet on the Route 219 base line;

Thence by the Legal Right-of-Way line of Ramp "D" North 61°-47'-30" East a distance of 84.00 feet to a 2" iron pipe;

Thence 232.66 feet on the arc of a curve to the right, said curve having a radius of 100.00 feet, with a chord bearing North 38°-26'-41" East a distance of 183.62 feet to a 2" iron pipe;

Thence continuing with said Right-of-Way South 74°-54'-08" East a distance of 57.74 feet to a 2" iron pipe on the original line of the James M. Norwood lot;

Thence with the westerly line of said Norwood lot, South 38°-30'-21" East a distance of 31.44 feet to a 2" iron pipe;

Thence with southerly line of said Norwood lot, North 46°-45'-09" East a distance of 21.94 feet to a 2" iron pin on the Legal Right-of-Way line of Ramp "D";

Thence with said Legal Right-of-Way line of Ramp "D", South 74°-54'-08" East a distance of 162.83 feet to a 2" iron pipe at the corner of the parcel now or formerly owned by the McIntosh Coal Company;

Thence with the line of said McIntosh Coal Company, South 38°-30'-21" East a distance of 102.25 feet to a 2" iron pipe;

Thence South 43°-01'-48" West a distance of 120.30 feet to the most westerly corner of the Boron Oil Company parcel;

Thence with the line of said Boron Oil Company the following six courses;

North 46°-58'-12" West a distance of 37.00 feet;

South 43°-01'-48" West a distance of 41.00 feet;

South 46°-58'-12" East a distance of 27.00 feet;

South 43°-01'-48" West a distance of 152.50 feet;

North 46°-58'-12" West a distance of 115.01 feet;

South 61°-47'-30" West a distance of 120.46 feet to the easterly right-of-way line of Route 219;

Thence North 28°-12'-30" West with said Right-of-Way line of Route 219 to the iron pipe at the point of beginning, a distance of 186.44 feet, containing 2.605 Acres, more or less, but subject to all legal highways and easements of record.

299a

EXHIBIT "B" VOL 843 PAGE 81

LEGAL DESCRIPTION

Easement Parcel:

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point which is 100.00 feet perpendicularly right of base line station 1605 + 75.79 of Rt. 219; thence by the following courses and distances:

(1) N 28 12' 30" W for a distance of 12.17 feet;

(2) N 21 33' 52" W for a distance of 367.46 feet;

(3) N 61 47' 30" E for a distance of 26.18 feet;

(4) S 21 33' 52" E for a distance of 362.55 feet;

(5) S 29 15' 37" W for a distance of 31.72 feet;

and containing therein exactly 0.222 acres of land.

COMMONWEALTH OF PENNSYLVANIA
STEVE D. FINNEY
SURVEYOR
16574-E

R.S

300a

EXHIBIT "D"

LEGAL DESCRIPTION

S/S Parcel

Parcel No. 2:

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point 100.00 feet perpendicularly right of base line station 1605 + 75.79 of Rt. 219; thence by the following courses and distances:

(1) N 28° 12' 30" W a distance of 224.17 feet;
(2) N 61° 47' 30" E a distance of 20.00 feet;
(3) N 28° 12' 30" W a distance of 153.00 feet;
(4) N 61° 47' 30" E a distance of 120.46 feet;
(5) S 46° 58' 12" E a distance of 115.01 feet;
(6) N 43° 01' 48" E a distance of 152.50 feet;
(7) N 46° 58' 12" W a distance of 27.00 feet;
(8) N 43° 01' 48" E a distance of 41.00 feet;
(9) S 46° 58' 12" E a distance of 37.00 feet;
(10) S 43° 01' 48" W a distance of 326.05 feet;
(11) S 21° 33' 52" E a distance of196.82 feet;
(12) S 29° 15' 37" W a distance of 38.43 feet;

to the point of beginning and containing therein exactly 0.775 acres of land.

COMMONWEALTH OF PENNSYLVANIA
STEVE D. FINNEY
SURVEYOR
16574-E

Steve D. Finney, R.S.

301a

EXHIBIT "E"

VOL 843 PAGE 83

LEGAL DESCRIPTION

Easement Parcel: SERVICE ROAD

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point which is 100.00 feet perpendicularly right of base line station 1605 + 75.79 of Rt. 219; thence by the following courses and distances:

(1) N 28 12' 30" W for a distance of 12.17 feet;

(2) N 21 33' 52" W for a distance of 367.46 feet;

(3) N 61 47' 30" E for a distance of 26.18 feet;

(4) S 21 33' 52" E for a distance of 362.55 feet;

(5) S 29 15' 37" W for a distance of 31.72 feet;

and containing therein exactly 0.222 acres of land.

COMMONWEALTH OF
STEVE D. FINNEY
SURVEYOR
16574-E
PENNSYLVANIA

Steve D. Finney R.S.

ARFIELD COUNTY
RED OF RECORD 9-12-82
12:25 PM
Tim Morgan
1750
ORGAN, Recorder

OF PENNSYLVANIA: SS
Y OF CLEARFIELD: SS
DED in the Recorder's Office in and for said
n Deeds and Records Book No. 843
79 etc.
WITNESS my hand and seal of office this
24th day of September A.D. 1982
Tim Morgan Recorder

My Commission Expires
First Monday in January 1984

3020

Entered of Record Sept. 12 1982 12:25 PM Tim Morgan Recorder

EXHIBIT "B"

LEGAL DESCRIPTION

Retained Parcel

Parcel No. 1:

ALL that certain piece or parcel of land situate in Sandy Township, Clearfield County, Pennsylvania being more particularly bounded and described as follows:

Beginning at a point which is 132.40 feet perpendicularly right of base line station 1605 + 96.46 of Rt. 219; thence by the following courses and distances:

(1) N 21° 33' 52" W a distance of 196.82 feet;

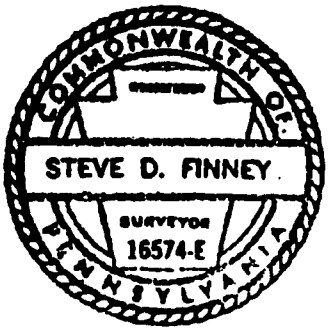
(2) N 43° 01' 48" E a distance of 45.55 feet;

(3) S 38° 15' 00" E a distance of 170.70 feet;

(4) S 47° 00' 00" W a distance of 52.45 feet;

(5) S 29° 15' 37" W a distance of 53.32 feet;

and containing therein exactly 0.282 acres of land.



Steve D. Finney, P.S.

3030

EXHIBIT "C"

LEASE

THIS LEASE, dated the 16th day of June, 1982, by and between PHILLIP J. DIERINGER, whose address is R. D., Brockton, Pennsylvania 15856 and whose phone number is 814/583-5359 hereinafter (whether one or more) called "Lessor", and Harley Hotels, Inc., a corporation whose address is 2100 Terminal Tower, Cleveland, Ohio 44115, hereinafter called "Lessee",

WITNESSETH, That:

1. LEASED PROPERTY. Lessor hereby leases to Lessee the following premises (hereinafter called the "Leased Property") situated in Township of Sandy, County of Clearfield, State of Pennsylvania,
A parcel on the SEQ of I-80 and Rt. 219 more fully described in Exhibit A attached hereto and made a part hereof; together with the right of ingress and egress to Rt. 219 across an area described in Exhibit B attached hereto and made a part hereof; and together with the right to use, maintain and repair existing sewer, water, power/telephone lines and any other existing facilities that serve the restaurant property leased hereunder. Together with all oppurtenances thereto, and all rights and interests of Lessor in public highways, roads, streets and ways adjoining said premises.

This Lease shall take effect only in the event Lessor acquires the fee to the above described premises. In the event Lessor fails to acquire ownership prior to July 31, 1982, this Lease shall be null and void.

2. TERM. TO HAVE AND TO HOLD the same for a term of six years and seven months commencing on the 1st day of August, 1982, and ending on the 28th day of February, 1989.

3. RENTAL. Lessee agrees to pay as rent for the Leased Property the sum of One Hundred Seventy Seven Dollars and Fifty Cents ($177.50) per month, payable monthly in advance on the first day of each month during said term by check payable to Lessor at Lessor's address shown above until Lessee is notified by Lessor as to change of address.

4. OPTION(S) TO EXTEND TERM. Lessee is hereby granted the option(s) to extend the term of this Lease beyond the original term for two (2) additional successive periods of five (5) years each at the same rental and on the same terms and conditions as herein provided, except as may be otherwise expressly stipulated hereinbelow. Said option(s) shall be exercisable only if Lessee gives Lessor notice of exercise prior to expiration of the original term or the then current additional period for which said term theretofore has been extended, as the case may be.

5. SUPPLEMENTAL LEASE AGREEMENT: Lessee shall have the right at its expense, to have the premises surveyed by a Registered Surveyor. After the survey has been completed and inspected by the parties, Lessor and Lessee shall execute a Supplemental Lease Agreement, recordable in form, for the purpose of substituting the legal description derived from the survey for the description herein contained, provided however that if Lessee elects to cause a Memorandum of Lease to be executed as hereinafter provided, and if said Memorandum of Lease contains the legal description derived from said survey, a Supplemental Lease Agreement shall not be executed, and the Memorandum of Lease shall serve the purpose thereof.

6. MEMORANDUM OF LEASE. Lessor and Lessee agree that this Lease shall not be recorded but a Memorandum of this Lease shall be executed (which memorandum may contain the description derived from the survey referred to in paragraph 5 above) by the parties for recording purposes and Lessee shall have the right to record the same, but if such Memorandum of Lease shall not be executed by Lessor, then Lessee may, at its option, record this Lease.

7. LESSEE'S RIGHT OF TERMINATION. Since Lessee expects to use the Leased Property for restaurant purposes, it is mutually agreed that if Lessee is unable by reason of injunction or other legal interference to use any part of the Lease Property or the improvements thereon for such purposes, or if such use is prohibited by any present or future law, ordinance, zoning or other regulation of any duly constituted governmental authority, or by any restriction on the Leased Property not removed within ninety (90) days, or if building permits (including permits for curb cuts, sanitary facilities, and any other permits required in order to construct and operate on the Leased Property restaurant facilities of the type desired by Lessee shall not be issued by the appropriate governmental authority (or, if issued, are revoked), or if such use should be prevented or in the judgment of Lessee materially impaired by the widening, altering or improving of any adjoining street or road or as a result of taking all or part of the Leased Property for public or quasi-public use in condemnation proceedings or other exercise of the right of eminent domain, or by agreement in lieu thereof, (all herinafter collectively called "Condemnation Proceedings"), then, in any such event, Lessee shall have the right, in addition to any other rights it may have, to terminate this Lease by giving Lessor not less than thirty (30) days notice and in the event of such termination, rentals and any other charges hereunder shall be prorated as of the date that construction or operation of a restaurant business on the Leased Property is so prevented or materially impaired and all further rentals and other changes shall abate. In the event that a portion, but not all of the Leased Property shall be taken in Condemnation Proceedings and Lessee does not exercise the foregoing election to terminate this Lease, then this Lease shall continue in full force and effect as to the portion of the Leased Property not so taken and Lessee shall be entitled to a prorated reduction in the rentals and any other charges prvided for herein, as of the date that construction or operation of business upon the Leased Property is prevented or materially inpaired, and such reduction is to be not less than that based on the proportion which the area so taken bears to the area originally leased, and provided that further consideration by Lessor and Lessee shall be given to the respective values of the area taken and the area not taken to reflect any additional reduction indicated. Lessor shall be entitled to any Condemnation Proceedings award for its fee simple interest and its other interest in the Leased Property and Lessee shall be entitled to any award for its leasehold interest, buildings and other improvements upon the Leased Property, and for any relocation costs. Notwithstanding anything to the contrary contained in this Lease, Lessee shall have the right, at its sole cost and expense, to assert a separate claim in any Condemnation Proceedings for the value of its leasehold, buildings or other improvements upon the Leased Property an any relocation costs pertaining to such improvements. Whenever notice of a taking of Lease Property or improvements thereon is received by either Lessor or Lessee, such party shall notify the other thereof, and Lessor and Lessee shall jointly negotiate with the taking authority as to the value of their respective interests in the Lease Property or improvements thereon to the end of being fairly compensated therefor. Nothing contained herein shall, however, restrict Lessee to use the Leased Property only for service station purposes, but Lessee may use the same for any lawful purpose whatsoever.

8. TAXES AND ENCUMBRANCES. Lessee shall pay all taxes and assessments levied upon the leased land and any and all buildings, structures and improvements, thereon belonging to Lessee. All other obligations of the Lessor which are or may become a lien on the Leased Property by actions of or against the Lessor shall be paid by Lessor as they become due. Any taxes levied upon any buildings, improvements or equipment belonging to Lessee shall be promptly paid by Lessee as they become due.

9. PURCHASE OPTION. Lessee, as part of the consideration hereof, is hereby granted the privilege and option of purchasing the Leased Property at the end of the term of this Lease or at any time during any extension thereof for the sum of Thirty Thousand Dollars ($30,000). Said purchase option shall be exercisable by Lessee's giving Lessor at least thirty (30) days written notice of its exercise said option. The purchase price herein specified shall be reduced by any Condemnation Proceedings awards received by Lessor, its successors and assigns, since commencement of this Lease. Purchase shall include ingress and egress and utility easements as provided in this lease.

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10. FIRST REFUSAL OPTION ON SALE OR LEASE. If during the term of this lease, or any extension hereof, Lessor receives a bona fide offer from a third party to buy the Leased Property (or to lease the same for a period after the expiration of this lease) which after Lessor sha-l desire to accept, Lessor shall immediately notify Lessee giving Lessee all of the terms and conditions of such offer, including price (or rental) and Lessee shall have the right and option for thirty (30) days after receipt of such notice to elect to buy the Leased Property (or lease it) for the same donsideration and on the same terms and conditions as contained in such offer. Said option shall be exercisable by Lessee's giving notice to Lessor thereof within such thirty (30) days period and if said option is not exercised by Lessee within such period, Lessor shall have the right to sel (or lease) the said premises to such third party, but only at the price (or rental) and on the terms and conditions contained in said offer and in any case subject to the within Lease which shall remain in full force and effect. No sale, transfer (or lease) of said Leased Property shall be valid unless and until the foregoing requirements are fully complied with. The term "Leased Property" as used in the foregoing "first refusal" option includes all or any portion of the Leased Property and land of which the Leased Property is a part. Said option shall run with the land and failure of Lessee to exercise said option in any one case shall not affect Lessee's right to exercise and option in any cases thereafter arising.

11. TERMS IN THE EVENT OF SALE. Upon receipt of notice of Lessee's election to purchase the lease property, pursuant to the option herein granted, Lessee shall procure from a responsible title company a preliminary title report on the condition of Lessor's title. Lessee shall have a reasonable time to examine same. Upon completion of such examination, Lessee shall notify Lessor of any defects, restrictions, liens, encumbrances or encroachments affecting the leased property, in which event, Lessor agrees to promptly correct or cure the same if so requested by Lessee, or in the alternative, Lessee, at its option, may undertake whatever action may be necessary to correct or cure any such defects, restrictions, liens, encumbrances or encroachments. At such time as title is satisfactory to Lessee it will pay the purchase price to Lessor in exchange for Lessor's general warranty deed conveying the Lease Property to Lessee with all rights of dower released, free and clear of all encumbrances except restrictions and easements of record and current taxes not then due and payable. Lessor agrees to furnish to Lessee, upon the closing, a policy of Title Insurance issued by the title company in the amount of the purchase price, showing good and marketable title in Lessee subject only to the exceptions to be contained in the deed from Lessor conveying title to Lessee. The cost of such title policy and the preliminary title report shall be borne by Lessor. Transfer of personal property incuded in said sale shall be made by Lessor's bill of sale with full warranty of clear title. Unless otherwise expressly stipulated all taxes, assessments, and rentals shall be prorated as of date of transfer of record title. Reassessed special assessments, if any, shall be paid in full by Lessor whether due or to become due.

12. ASSIGNMENT AND SUBLETTING. Lessor agrees that Lessee may assign this Lease or sublet all or part of the Leased Property, and in the event Lessee does assign or sublet, and Lessor is so notified in writing, Lessor agrees to give Lessee's assignee or sublessee written notice of any default hereunder, and Lessor agrees that such assignee or sublessee may comply with all of the provisions of this Lease as to the Leased Property assigned or subleased, be entitled to possession of such portion of the Leased Property pursuant to the terms of this Lease and to attorn to Lessor.

13. LESSOR'S RIGHTS IF LESSEE DEFAULTS. Lessee agrees that if default be made in the payment of rent or in the performance of any provisions to be performed by it Lessor may at Lessor's election, after giving Lessee not less than thirty (30) days' written notice to cure such default, at any time while such default continues declare said term ended and enter into possession of the Leased Property and sue for and recover all rents and damages occrued under this Lease

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14. SURRENDER AND HOLDOVER. Lessee agrees to surrender possession of the Lease Property to the Lessor at the end of the original term or any extension thereof. If, after the expiration of this Lease, Lessee shall remain in possession of the Leased Property and continue to pay rent without a written agreement as to such possession, Lessee shall be regarded as a tenant from month to month and such rent shall be payable at the monthly rate and in the manner herein provided.

15. QUIET ENJOYMENT. Lessor covenants that Lessor is well seized of and has good right to lease the Leased Property, agrees to defend the title thereto and warrants that Lessee shall at all times during said term, and any extension thereof, have peaceable and quiet enjoyment and possession of said premises without le or hindrance from Lessor or any person whomsoever. If Lessor's title or right to receive rent or any other payments hereunder be disputed or in the event of a change of ownership of Lessor's estate by voluntary transfer or operation of law, Lessee may withold rent thereafter accruing until Lessee is furnished with proof satisfactory to it as to the party entitled thereto.

16. SAVE HARMLESS. Lessee agrees to protect, indemnify and save harmless the Lessor, his heirs and assigns, from any and all losses, damages and claims, suits or costs which shall arise or grow out of the construction, reconstruction, operation, or maintenance of said property, and/or any injury to any person or persons, or any property cuased by or resulting in anyway from the operation, use or condition of the facilities of the demised property, including the driveways, sidewalks, buildings or equipment now or hereafter erected or installed thereon.

17. NOTICES. It is mutually agreed that any and all notices herein provided for must be given in writing and shall be deemed given if and when delivered in person or duly deposited in the United States mails, postage prepaid for regular or certified mail, or filed for transmission with a recognized telegraph company, properly addressed to the party to whom given at the address of such party shown in this Lease, provided, however, that either party may specify any other post office address in the United States by giving at least ten (10) days' written notice thereof to the other party.

18. RIDERS. Any riders attached to this instrument shall be considered as a part of this Agreement and incorporated herein as if originally written herein. Any reference to "see Rider" with a number designation shall refer to the rider so numbered as attached.

19. ENTIRETY OF AGREEMENT, SIGNING BY LESSEE, SUCCESSORS AND ASSIGNS. This Lease merges all prior negotiations and understandings and there are no other agreements or understandings, oral or otherwise, between the parties pertaining to the Leased Property. This Lease and any written agreement hereafter made by the parties pertaining thereto shall be binding upon Lessee only when executed on Lessee's behalf by an officer or authorized representative of Lessee at its address above set forth. A signed copy of this Lease will be mailed or delivered to Lessor after execution thereof by Lessee. This Lease and all of the covenants hereof, including without limitation any options herein contained, shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, devises, representatives, successors and assigns.

WHEREOF, Lessor and Lessee have hereunto subscribed their names to duplicate copies of this instrument, each of which shall be deemed an original the day and year first above written.

3070

IN WITNESS WHEREOF, Lessor and Lessee have hereunto subscribed their names to duplicate copies of this instrument, each of which shall be deemed an origina the day and year first above written.

In the presence of:

Phillip J. Dieringer Lessor

Sherry S. Dieringer
[redacted] Dieringer (wife) Lessor
SHERRY S.

Harley Hotels, Inc.
Lessee

BY

AND

INDIVIDUAL ACKNOWLEDGMENT

STATE OF PENNSYLVANIA)
) SS:
COUNTY OF CLEARFIELD)

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above named PHILLIP J. DIERINGER and Sherry S. Dieringer, who is personally known to me and who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

In witness whereof, I have hereunto set my hand and official seal at DuBois, Pa this 18th day of June, 1982.

Susan M. Hartzfeld
Notary Public
SUSAN M. HARTZFELD, Notary Public
DuBois, Clearfield County, Pa.
My Commission Expires July 29, 1985

CORPORATE ACKNOWLEDGMENT

STATEOF)
) SS:
COUNTY OF)

BEFORE ME, a Notary Public in and for said County, personally appeared the above named _____ by _____ its _____ and _____ its _____, who are personally known to me and who acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said corporation and the free act and deed of each of them personally and as such officers.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ this _____ day of _____, 1982.

Notary Public

3080

pursuant to Section 406.1 of the Act, *as amended*, 77 P.S. § 717.1.

Consequently, the May 28, 1991 order of the Board is affirmed as applied to the awarding of specific loss benefits to Claimant. However, that portion of the Board's order granting 845 weeks of compensation for specific loss is modified to 215 weeks with interest to be awarded at the rate of 10% from February 29, 1988.

ORDER

AND NOW, this 20th day of December, 1991, the order of the Workmen's Compensation Appeal Board in the above-captioned matter awarding specific loss benefits to Walter Barclay is affirmed with modification. The number of weeks of such award is modified to 215 weeks with interest thereon at 10% beginning February 29, 1988.

Russell J. HOLDEN and Judith E. Holden, his wife, Appellants,

v.

Donald D. KAY and Arlyne M. Kay, his wife, Appellees.

Commonwealth Court of Pennsylvania.

Argued Oct. 8, 1991.
Decided Dec. 20, 1991.

Action was brought for a specific performance of option allowing lessee to buy leased portion of property. The Court of Common Pleas of Lawrence County, No. 102-1988, J. Quint Salmon, Senior Judge, granted the petition, and owners appealed. The Commonwealth Court, No. 638 C.D. 1991, Barry, Senior Judge, held that if parcel was possible, owners would not be permitted to avoid their contractual obligation by refusing to obtain a subdivision.

Vacated and remanded.

1. Specific Performance ⇐55

Court will not order specific performance of contractual obligation to perform an illegal transaction.

2. Vendor and Purchaser ⇐90

Vendor cannot avoid otherwise legal transaction where illegality of performance is caused by vendor's failure to obtain approval of proposed subdivision.

3. Zoning and Planning ⇐86

Subdivision ordinance is not unconstitutional if it is necessary for preservation of health, safety or general welfare of community.

4. Zoning and Planning ⇐672

Zoning ordinances carry heavy presumption of constitutional validity.

5. Eminent Domain ⇐2(1.2)

If subdivision of parcel were denied for reasons unrelated to valid exercise of police power, unconstitutional taking might occur. U.S.C.A. Const.Amends. 5, 14.

6. Specific Performance ⇐55

Court should not grant specific performance of contract to perform illegal transaction based upon speculation that administrative authorities might act in an unconstitutional manner when enforcing local ordinances.

7. Specific Performance ⇐126(1)

Court may enter order requiring specific performance of contract to sell land pending approval of required subdivision.

8. Specific Performance ⇐55

Courts will not order specific performance of contract to perform illegal act; parties to such contract will be left where court finds them.

9. Specific Performance ⇐57

Owners would not be permitted to avoid contractual obligation under option allowing lessee to buy leased portion of property by refusing to obtain subdivision if subdivision was possible.

Bruno A. Muscatello, for appellants.

DuBois Dutch
11-21-05
Document 14

No appearance for appellees.

Before McGINLEY and SMITH, JJ., and BARRY, Senior Judge.

BARRY, Senior Judge.

Russell J. and Judith E. Holden (the Holdens) appeal from an order of the Court of Common Pleas of Lawrence County which makes final a decree nisi which granted the petition of Donald D. and Arlyne Kay (the Kays) for specific performance of a contract for the sale of land.[1] The following facts are undisputed. The Kays sold a parcel of land approximately ten acres in size to the Holdens and leased back a smaller portion of the land sold. (Notes of Testimony [N.T.], 11/13/89, pp. 23, 25–26). The lease contained an option for Kathy R. Becker, The Kays' granddaughter, to buy the leased portion of the parcel. (N.T., p. 4). The terms of the option allowed Becker to exercise it in favor of the Kays. (N.T., p. 7). Becker exercised the option and assigned it the Kays. (N.T., pp. 7–8). The Holdens refused to convey the leased portion and the petition for specific performance followed. (N.T., p. 11).

There is no dispute that the sale of the leased portion will result in a subdivision of the parcel. The Holdens allege that, under the Pennsylvania Municipal Planning Code and a local Neshannock Township Ordinance, this subdivision must be approved by the appropriate Township authorities. The Holdens also claim that this subdivision cannot be approved because the land is located in a flood plain. The trial court granted the petition for specific performance, holding that the statute and the ordinance could only restrict the use of the land, not its alienability. (Trial Court Opinion at 3).

On appeal, the Holdens argue that the order is erroneous because it compels them to perform an illegal transaction. They correctly note that an action for specific performance will not lie if the underlying contract requires the performance of an illegal act. The Holdens also contend that the trial court erred in refusing to allow testimony regarding a previously denied application for the proposed subdivision. We find merit in the Holdens' arguments, vacate and remand for further proceedings.

Our scope of review on appeal from a final decree is well settled.

> ... the findings of the Chancellor will not be reversed unless it appears that he has clearly abused his discretion or committed an error of law.... Where a reading of the record reasonably can be said to reflect the conclusions reached by the Chancellor, a reviewing court may not substitute its judgement for that of the Chancellor. A reviewing court, however, is not bound by findings which are without support in the record or have merely been derived from other facts.

Rusiski v. Pribonic, 511 Pa. 383, 389–90, 515 A.2d 507, 510 (1986), *quoting*, *Frowen v. Blank*, 493 Pa. 137, 142, 425 A.2d 412, 415 (1981).

[1, 2] It is also well settled that a court will not order specific performance of a contractual obligation to perform an illegal transaction. *Holst v. Butler*, 379 Pa. 124, 108 A.2d 740 (1954). A vendor of land, however, may not avoid an otherwise legal transaction where the illegality of performance is caused by the vendor's failure to obtain approval of a proposed subdivision. *Messina v. Silberstein*, 364 Pa.Super.Ct. 586, 528 A.2d 959 (1987), *petition for allowance of appeal denied*, 518 Pa. 619, 541 A.2d 746 (1988).

The Holdens correctly note that the proposed sale of the leased portion is a subdivision of the larger parcel of land under both state statute and local ordinance. A subdivision is defined as:

> ... the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs

1. This appeal was transferred from the Superior Court. Because this case involves the application and interpretation of a local ordinance this Court has jurisdiction pursuant to 42 Pa.C.S. § 762(a)(4)(i)(B).

devisees, transfer of ownership or building or lot development: Provided, however, That the subdivision by lease of land for agricultural purposes into parcels of more than ten acres, not involving any new street or easement of access or any residential dwelling, shall be exempted.

Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10107. The local ordinance employs the same language to define a subdivision with additions not relevant here. Neshannock Township, Pa., Subdivision and Land Development Ordinance, Ordinance 1969–2, Art. II, § 200, December 10, 1969, *as amended by* Ordinance 1987–3, July 10, 1987.

The Municipalities Planning Code also prohibits the subdivision of a parcel of land where a municipality has enacted a subdivision ordinance unless the proposed subdivision complies with the local ordinance. Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10507. Neshannock Township has such a subdivision ordinance. "No lot in a subdivision or land development may be sold, no permit to erect, alter or repair any building upon land in subdivision or land development, unless and until a plan of such subdivision or land development shall have been approved and properly recorded. Neshannock Township, Pa., Subdivision and Land Development Ordinance, Ordinance 1969–2, Art. VII, § 702, December 10, 1969. Any person who sells land in a subdivision without proper approval is guilty of a misdemeanor. Neshannock Township, Pa., Subdivision and Land Development Ordinance, Ordinance 1969–2, Art. VIII, § 800, December 10, 1969, *as amended by* Resolution of May 16, 1980.

[3–6] Although the trial court recognized that the proposed transaction was subject to these statutory provisions and local ordinances it granted specific performance, and held that enforcement of the prohibition on alienation of the leased portion without approval of the subdivision would constitute an unconstitutional taking of property without compensation. We disagree. The ordinance at issue does not prevent alienation of the parcel or any portion thereof under all circumstances. It does make it illegal to subdivide the parcel without approval. The subdivision ordinance is not unconstitutional if it is necessary for the preservation of the health, safety or general welfare of the community. *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967). Zoning ordinances carry a heavy presumption of constitutional validity. *Guadenzia, Inc. v. Zoning Board of Adjustment*, 4 Pa.Cmwlth.Ct. 355, 287 A.2d 698 (1972). If subdivision of this parcel were denied for reasons unrelated to a valid exercise of the police power, an unconstitutional taking *might* occur; a court should not grant specific performance of a contract to perform an illegal transaction based upon speculation that administrative authorities might act in an unconstitutional manner when enforcing local ordinances.

[7] The Holdens contend that the trial court's order requires them to commit a misdemeanor by subdividing the parcel without approval by the appropriate authorities. We agree. We do not agree, however, with the Holdens' conclusion that this state of affairs requires that the petition for specific enforcement be denied. *Messina* is clear that a court may enter an order requiring specific performance of a contract to sell land pending approval of a required subdivision. *Messina*, 364 Pa.Super.Ct. at 591, 528 A.2d at 961. Thus, if a subdivision is possible, the relief requested can be granted.

[8, 9] The Holdens also argue that it was error for the trial court to exclude testimony that a previous application for subdivision of the parcel had been denied because it lies in a flood plain. The subdivision ordinance prohibits residential use of land located in a flood plain. Neshannock Township, Pa., Subdivision and Land Development Ordinance, Ordinance 1969–2, Art. III, § 302(1)(e)(2). The excluded evidence is crucial to the proper determination of this case. If no subdivision of this parcel is possible, the petition for specific performance must be denied. Our courts will not

order specific performance of a contract to perform an illegal act; the parties to such a contract will be left where the court finds them. *Holst*, 379 Pa. at 131, 108 A.2d at 743. If, however, subdivision of the parcel is possible the Holdens will not be permitted to avoid their contractual obligation by refusing to obtain a subdivision. *Messina*.

Accordingly, we vacate the trial court's final decree which granted specific performance and remand for a determination of whether it is possible to subdivide the parcel as contemplated in the lease and purchase option.

ORDER

NOW, December 20, 1991, the order of the Court of Common Pleas of Lawrence County, at Civil Action—Equity, 102-1988, is vacated. This case is remanded for proceedings in accordance with the above opinion.

Jurisdiction relinquished.

COMMONWEALTH of Pennsylvania, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING, Appellant,

v.

Kathleen DUNCAN, Appellee.

Commonwealth Court of Pennsylvania.

Submitted Aug. 9, 1991.
Decided Dec. 20, 1991.

After Common Pleas Court vacated order dismissing motorist's appeal from Department of Transportation's (DOT's) suspension of her operating privileges, on ground that district justice had discharged motorist's citation, DOT appealed, and case was remanded for further proceedings, 134 Pa.Cmwlth. 214, 578 A.2d 89. On remand, the Common Pleas Court, Allegheny County, No. SA 1299 of 1986, Raymond L. Scheib, J., again sustained motorist's appeal. DOT appealed. The Commonwealth Court, No. 267 C.D. 1991, Byer, J., held that: (1) district justice lacked jurisdiction to discharge citation, and (2) DOT's delay in imposing suspension did not prejudice motorist.

Suspension reinstated.

Colins, J., dissented.

1. Criminal Law ⇐260.2, 260.5

Exclusive means of challenging summary conviction is by filing appeal to Court of Common Pleas within 30 days of conviction. Rules Crim.Proc., Rule 86, 42 Pa. C.S.A.

2. Criminal Law ⇐258

Where defendant failed to appeal summary conviction, district justice lacked jurisdiction to alter conviction after 30 days had elapsed, and order discharging that citation was nullity. Rules Crim.Proc., Rule 86, 42 Pa.C.S.A.

3. Automobiles ⇐144.2(5)

Common pleas court did not have "extraordinary cause" to vacate, after 30-day limitation period had expired, its order dismissing motorist's appeal from Department of Transportation's (DOT's) suspension of her license; although motorist did not appear before common pleas court for her scheduled hearing on her license suspension because underlying criminal conviction had been discharged, there was no oversight or act by common pleas court nor failure of judicial process which operated to deny motorist knowledge of order dismissing her appeal. 42 Pa.C.S.A. § 5505.

See publication Words and Phrases for other judicial constructions and definitions.

4. Automobiles ⇐144.2(5)

In license suspension appeal, only issues before common pleas court are whether licensee was in fact convicted, and whether Department of Transportation (DOT) acted in accordance with applicable law.

feet for Lot No. 2, and an on-lot sewage system area of 3000 square feet. Dura testified:

> Q. In your opinion does the plan illustrate compliance with Section 3101 of the Zoning Ordinance?
>
> A. It illustrates compliance except for the fact that may be we should show an area of 3,000 square feet outside of the building envelope for the septic system.
>
> Q. Is that something that is simply a minor drafting matter?
>
> A. Yes. It can be done. It's there. The area is there.

August 27, 1997 Hearing, N.T., pp. 25–26. Moreover, the Township civil engineer clearly testified that his calculations based on the information contained in the revised subdivision plan indicated the Rufs' compliance with the natural resource protection standards.[5]

Thus, the record established that the Rufs complied with Section 3101A.1 and 2 of the Zoning Ordinance by providing the Board with "sufficient information" regarding the availability of the minimum buildable area and the area for an on-lot sewage system.

Accordingly, the order of the trial court is affirmed.

ORDER

AND NOW, this 11th day of January, 2001, the order of the Court of Common Pleas of Bucks County in the above-captioned matter is affirmed.

5. The Township's land planner, Froelich, also testified that the Rufs' proposal would disturb approximately 40.7% of the 8 to 15% grade steep slopes in violation of Section 3100.B.3 of the Zoning Ordinance, which prohibits disturbance of more than 40% of such area. However, she later indicated only that "it would be difficult for the Rufs to comply with the natural resource protection standard." September 24, 1997 Hearing, N.T., p. 9. In light of the Township civil engineer's clear testimony regarding the Rufs' compliance with the natural resource protection standards and the undisputed information set forth in the revised subdivision plan, Froelich's testimony does not provide a support for the Board's finding.

DALTON POLICE ASSOCIATION, Petitioner,

v.

PENNSYLVANIA LABOR RELATIONS BOARD, Respondent.

Commonwealth Court of Pennsylvania.

Argued Dec. 4, 2000.

Decided Jan. 11, 2001.

Police association appealed from an order of the Pennsylvania Labor Relations Board, No. PF-R-99-130-E, finding that police chief was a managerial employee and, thus, excluded from the collective bargaining unit certified by the Board to represent police officers. The Commonwealth Court, No. 1321 C.D. 2000, Pellegrini, J., held that substantial evidence supported Board's decision.

Affirmed.

1. Labor Relations ⇐206

Substantial evidence supported Pennsylvania Labor Relations Board's decision that police chief was a managerial employee who should be excluded from the collective bargaining unit certified by Board to represent police officers; chief had extensive purchasing responsibilities as he could purchase items without borough council's approval, personnel responsibilities because he recommended who was to be hired, and policymaking functions because he formulated the police procedure manual, not to mention his day-to-day control

Hence, we conclude that the Board abused its discretion in refusing to grant the requested waivers from Sections 9.7.C.7 and 9.23.C.2.a of the Subdivision Ordinance pursuant to Section 512.1(a) of the MPC.

[5] The Township next contends that the record supports the Board's finding that the Rufs failed to comply with Section 3101A.1 and 2 of the Zoning Ordinance. Under Section 3101.A.1, a lot for a single-family dwelling in AG–1Agricultural zoning district must have a contiguous buildable area of at least 8500 square feet "to provide sufficient area for the location of the building, driveway, parking areas, patios, other improvements and site alterations while meeting the natural resource protection standards and minimum setback requirements." Section 3101.A.2. requires that at least 3000 square feet, not including natural features with a 100% protection standard, be identified for the location of on-lot sewage systems.

To support its contention, the Township relies on the testimony of its land planner, Lynn Froelich, that the Rufs failed to identify at least 8500 square feet of a contiguous building area and 3000 square feet of an area for an on-lot sewage system in the revised subdivision plan.

However, Section 3101 only requires the applicant to indicate the existence of a minimum building area outside the natural resource protection area or provide sufficient information necessary for a determination of whether the minimum building area can be achieved without violating the natural resource protection standards.[4] The Township does not dispute the testimony of the Ruf's civil engineer, John Dura, that the revised subdivision plan showed the buildable areas of 10,222 square feet for Lot No. 1 and 8,572 square

that "streets in and bordering a subdivision on all land development... be coordinated, and be of such widths and grades and in such locations as deemed necessary to accommodate prospective traffic, and facilitate fire protection." However, the municipality may not impose such requirement on the property owner where, as here, literal enforcement is unreasonable and cause undue hardship. Sections 503(8) and 512.1(a) of the MPC. The Township's counsel elicited the following testimony during cross-examination of the Rufs' civil engineer:

> Q. Now, Mr. Dura, do you understand that municipalities generally have one change every several hundred years to get roads widened, and that that change occurs when somebody comes in with a subdivision plan?
> A. I understand that.
> Q. And do you understand that if this subdivision were approved there would be some 500 feet of Holicong Road that probably would not be back before this township for a century or so. Do you believe that?
> A. Yes, I do.
> Q. That this is the only chance really that a municipality gets to try to improve a road that is only, in this case, 12 feet wide. Do you understand that?
> A. Yes, I do.
> Q. Unless, of course, all the taxpayers pitch in to fix the road. You've seen that happen; haven't you?
> A. Yes, I have.

August 27, 1997 Hearing, N.T., pp. 44–45. We agree with the observation of the trial judge, the Honorable Michael J. Kane, in his well-reasoned opinion that "we are troubled by this testimony which indicates more of a desire for a free ride on the back of a landowner than a compulsion to maintain literal compliance with [the requirement] which is clearly unduly harsh and burdensome given the natural composition of the property and the neighboring area." Slip op. at 6.

4. Section 3101 provides:

> In order to meet the natural resource protection standards of Section 3100 B., the applicant shall provide the following information with applications for a zoning permit or building permit. Where subdivision and land development approval is requested, the applicant shall provide the information necessary to ensure that each proposed lot is buildable under the terms of this Ordinance by indicating that a minimum building area free of resource-restricted lands exists for each proposed lot or by providing sufficient information for the Planning Commission and Board of Supervisors to determine that the minimum building area can be achieved for each proposed lot without violating the resource protection standards for the entire site.

In seeking the waivers from Sections 9.7.C.7 and 9.23.C.2.a, the Rufs proposed to widen Holicong Road to 12½ feet from its center line along the 75–foot portion of the property frontage, regrade the roadside swale, and install slotted metal culvert pipes to control the surface water runoff, as recommended by the Township civil engineer and Public Works Director. The Rufs' civil engineer, James Ceglia, testified that the Township civil engineer indicated that the proposed stormwater management plan would be acceptable, if there would be an "insignificant increase" in surface water runoff resulting from construction of an additional dwelling on Lot No. 2, i.e., an increase of approximately one cubic foot of water runoff per second. August 27, 1997 Hearing, N.T., p. 49. Ceglia estimated that there would be a net increase of 0.7 cubic foot of water runoff per second.

The Township civil engineer testified that the Rufs' entire tract is covered by trees and slopes greater than 25% and that the revised subdivision plan met the natural resource protection standards under the Zoning Ordinance limiting development of steep slope areas. He also stated that it is very doubtful that Holicong Road may be widened and improved complying with Section 9.7.C.7 of the Subdivision Ordinance without violating the natural resource protection standards. He estimated the cost for widening and improving Holicong Road along the frontage of the subject property would be $45,064. John Dura, who prepared the revised subdivision plan, testified that if blasting is involved, the cost for widening and improving Holicong Road would double or triple that amount.

[3, 4] In deciding whether to grant a modification pursuant to Section 512.1(a) of the MPC, "[the governing body's] duty is to actively oppose schemes of development unreasonably proposed and conceived, but likewise, [its] duty is to sanction well planned development." *Raum v. Board of Supervisors of Treduffrin Township*, 29 Pa.Cmwlth. 9, 370 A.2d 777, 781 (1976). Further, where literal enforcement of a requirement under the subdivision and land development ordinance will frustrate the effect of the improvements designed to implement other requirements, grant of a waiver is proper under Section 512.1(a) of the MPC. *Levin v. Township of Radnor*, 681 A.2d 860 (Pa. Cmwlth.1996).

In refusing to grant the requested waivers, the Board totally disregarded the recommendations of the Township civil engineer and Public Works Director who considered the peculiar physical conditions of the subject property. The overwhelming, undisputed evidence in the record establishes that due to the unique topography of the property located on the steep slope of the mountain, the Rufs cannot comply with the road widening and stormwater control requirements without violating the natural resource protection standards set forth in the Zoning Ordinance. Given the unique physical condition of the Rufs' property and the costs involved, literal enforcement of the road widening and stormwater control requirements would be unreasonable and cause undue hardship.

Further, the Township does not dispute that no other property owners have been required to widen or improve Holicong Road along the frontage of their properties. As the Township civil engineer testified, an additional single-family dwelling in the minimally developed area will not have such an impact to warrant widening of Holicong Road along the entire frontage of the Rufs' property, and the proposed subdivision design will greatly improve the stormwater management system. The Rufs therefore established that grant of the requested waivers will serve the purpose and intent of the Subdivision Ordinance and will not be contrary to the public interest.[3]

3. Under Section 503(2)(ii) of the MPC, 53 P.S. § 10503(2)(ii), a municipality may require

water runoff.[1] The Board also found that the revised subdivision plan failed to comply with the natural resource protection standards set forth in Section 3101.A.1 and 2 of the Zoning Ordinance. After subsequent review of the record, the trial court reversed the Board's decision.

[1] The Township first contends that the Board did not abuse its discretion in refusing to grant the Rufs' request for waivers from the road widening and stormwater control requirements under Sections 9.7.C.7 and 9.23.C.2.a of the Subdivision Ordinance.[2]

Section 512.1(a) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, added by Section 40 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10512.1(a), provides:

> (a) The governing body or the planning agency, if authorized to approve applications within the subdivision and land development ordinance, may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

[2] To support the request for waivers, the Rufs presented the following evidence. The area of Holicong Road along the Rufs' property is on the steep slope of Buckingham Mountain containing solid rocks. Thus, blasting of the rocky composition of the mountain would be required to widen Holicong Road to 24 feet along the 500 foot frontage of the subject property. To widen Holicong Road complying with Section 9.7.C.7 of the Subdivision Ordinance, the Rufs would have to provide a 50 foot wide flat area to accommodate a right-of-way.

In a memorandum dated June 26, 1995 and sent to the Township civil engineer, Ernest Knight, the Township Public Works Director, Donald G. Naylor stated: "Proper road widening may not be feasible to do along the entire property length because of the existing conditions and cost factor, but the area along the curve where the proposed driveway is located should be taken into consideration for possible widening."

In a letter dated July 19, 1996, the Township civil engineer advised the Township manager:

> In correspondence with Donald Naylor, Buckingham Township Public Works Director, it is our understanding that the Township wishes to have the Applicant install a 'slotted culvert pipe' at both the existing and proposed driveway entrances. The stormwater runoff from the proposed impervious surfaces (dwelling unit, driveway, etc.) could be channeled to the 'slotted culvert' and then directed into a roadside swale. The roadside swale could then be improved to a natural outfall. This would greatly improve the stormwater management system in the area and, therefore, support a request for a waiver of Section 9.23.C.2.a.

1. In its decision, the Board did not expressly reject, and thereby implicitly granted, the Rufs' request for waivers from (1) Section 9.4.E, requiring that side lot lines be substantially at right angles; (2) Section 9.10.D, prohibiting access from a major collector roadway; and (3) Section 9.18.A, requiring curbs and sidewalks.

2. This Court's scope of review in a land use appeal, where, as here, the trial court did not take additional evidence, is limited to determining whether the governing body committed an error of law or abused its discretion. *Herr v. Lancaster County Planning Commission*, 155 Pa.Cmwlth. 379, 625 A.2d 164 (Pa.Cmwlth.1993), *appeal denied*, 538 Pa. 677, 649 A.2d 677 (1994). The governing body abuses its discretion when its findings are not supported by substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Ass'n v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983).

Planning Code (MPC). 53 P.S. § 10512.1(a).

5. Zoning and Planning ⇐382.2

Record established that property owners complied with township's zoning ordinance by providing township board of supervisors with sufficient information regarding availability of minimum buildable area and area for on-lot sewage system; township did not dispute testimony of owners' civil engineer that revised subdivision plan showed sufficient area, and township civil engineer testified that his calculations based on information contained in revised subdivision plan indicated owners' compliance with natural resource protection standards.

Craig A. Smith, Newtown, for appellant.

William E. Benner, Doylestown, for appellees.

Before COLINS, Judge, SMITH, Judge and MIRARCHI, Jr., Senior Judge.

MIRARCHI, Jr., Senior Judge.

Buckingham Township (Township) appeals from an order of the Court of Common Pleas of Bucks County that reversed the decision of the Township Board of Supervisors (Board) rejecting the revised subdivision plan submitted by John F. and Susanne Ruf. We affirm.

The Rufs are the owners of a 5.04–acre parcel of land (subject property) located in the Township's AG–1 Agricultural zoning district, in which a detached single-family dwelling is permitted by right under Section 501.A of the Township Zoning Ordinance (Zoning Ordinance). On May 19, 1994, the Rufs obtained a building permit to construct a detached single-family residence on the subject property. On May 17, 1995, the Rufs submitted a subdivision plan with the Township, proposing to subdivide the 5.04–acre parcel into two lots: a 2.623–acre lot for their residence under construction (Lot No. 1), and a 2.421–acre lot for another detached single-family dwelling (Lot No. 2).

The following facts presented at hearings are undisputed. The subject property has a 500–foot frontage on the east side of Holicong Road, a 10 to 18 foot wide macadam road without shoulders, sidewalks or curbs, which extends up to the top of Buckingham Mountain and down to the other side of the mountain. The width of Holicong Road along the frontage of the Rufs' property is 10 to 14 feet. In the 0.9–mile stretch of Holicong Road between Lower Mountain Road and Upper Mountain Road, there are only two homes including the Rufs' residence on the subject property. There are several homes on the top of Buckingham Mountain along a private unpaved road.

The Board rejected the Rufs' initial subdivision plan for their failure to meet (1) the natural resource protection standards under the Zoning Ordinance and (2) certain requirements under the Township Subdivision and Land Development Ordinance (Subdivision Ordinance). The Rufs appealed the Board's decision to the trial court, but later discontinued the appeal after the Township agreed to permit them to revise the subdivision plan. The Rufs thereafter submitted a revised subdivision plan and requested waivers from five provisions of the Subdivision Ordinance. The Board rejected the revised subdivision plan. On appeal, the trial court remanded to the Board, directing the Board to make a stenographic record and consider the Rufs' request for waivers.

After hearings held on remand, the Board again rejected the revised subdivision plan. The Board denied the request for waivers from the following provisions of the Subdivision Ordinance: (1) Section 9.7.C.7, requiring an applicant to widen a roadway fronting the property to be subdivided to 24 feet; and (2) Section 9.23.C.2.a, requiring at least 75% reduction of storm

Accordingly, we affirm the order of the Board.

ORDER

NOW, January 10, 2001, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

The decision in this case was reached before the expiration of the appointment of Senior Judge LEDERER to the Commonwealth Court by the Supreme Court of Pennsylvania.

John F. RUF and Susanne Ruf

v.

BUCKINGHAM TOWNSHIP, Appellant.

Commonwealth Court of Pennsylvania.

Argued Oct. 5, 2000.

Decided Jan. 11, 2001.

Property owners sought review of township's rejection of their revised subdivision plan. The Court of Common Pleas, Bucks County, No. 96-6979-16-5, Kane, J., reversed township's decision. Township appealed. The Commonwealth Court, No. 210 C.D. 2000, Mirarchi, Jr., Senior Judge, held that: (1) owners were entitled to waivers from road widening and stormwater control requirements of township zoning ordinance, and (2) record established that property owners complied with township's zoning ordinance by providing sufficient information regarding availability of minimum buildable area and area for on-lot sewage system.

Affirmed.

1. Zoning and Planning ⇐745.1, 746

Commonwealth Court's scope of review in a land use appeal where the trial court did not take additional evidence is limited to determining whether the governing body committed an error of law or abused its discretion; the governing body abuses its discretion when its findings are not supported by substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

2. Zoning and Planning ⇐382.2

Property owners were entitled to waivers from road widening and stormwater control requirements of township zoning ordinance; owners could not comply with requirements without violating natural resource protection standards set forth in ordinance, and no other property owners had been required to widen or improve road along the frontage of their properties. 53 P.S. § 10512.1(a).

3. Zoning and Planning ⇐381.5

In deciding whether to grant a modification of a requirement of a subdivision and land development ordinance pursuant to Municipalities Planning Code (MPC), the governing body's duty is to actively oppose schemes of development unreasonably proposed and conceived, but likewise, its duty is to sanction well planned development. 53 P.S. § 10512.1(a).

4. Zoning and Planning ⇐381.5

Where literal enforcement of a requirement under the subdivision and land development ordinance will frustrate the effect of the improvements designed to implement other requirements, grant of a waiver is proper under Municipalities

positions offered. In accord with our holding in *Castro*, we do not believe that serially modifying Claimant's benefits under these facts compromises the humanitarian objectives of the Act.

DuBois Dutch
11-21-05
Document 15

IN THE TOWNSHIP OF SANDY

CLEARFIELD COUNTY, PENNSYLVANIA

RE: Objection to Request for Subdivision Modification of the Lands Titled to John A. Guido

OBJECTIONS TO REQUEST BY DUBOIS DUTCH, LLC FOR MODIFICATION OF MINIMUM LOT SIZE REQUIREMENT FOR COMMERCIAL-HIGHWAY DISTRICT UNDER SANDY TOWNSHIP ZONING ORDINANCE NO. 1996-2

AND NOW, comes John A. Guido, by and through his attorneys, Hanak, Guido and Taladay, and files objections to a request for a modification filed by DuBois Dutch of the minimum lot size for the commercial-highway district as follows:

I. ERROR AND/OR MISSTATEMENTS IN THE REQUEST FOR MODIFICATION FILED BY DUBOIS DUTCH, LLC.

A. In paragraph 11, DuBois Dutch alleges that the Dutch Pantry Restaurant and Harley Hotels and its successors have continued to pay taxes on the portion of land occupied by DuBois Dutch Restaurant from the time that the restaurant was constructed through to the present. In fact, for the years 1999 through 2003, DuBois Dutch refused to pay its proportionate share of the taxes and finally paid its portion of the real estate taxes for those years in June of 2004 with the intervention of the Court.

B. In paragraph 17, DuBois Dutch refers to a letter from John A. Guido addressed to both Harley Hotels and DuBois Dutch, LLC which in effect is the usual letter requested by a purchaser of leased land to the effect that there are no defaults under the terms of the

lease. No entity will purchase a lease and in this case a lease option without being assured that the agreement is not in default. However, DuBois Dutch fails to mention that by letter from Anthony S. Guido, dated July 7, 1998, a copy of which is attached hereto and marked Exhibit "A", one of the attorneys for Dubois Dutch was informed of the existing problems concerning the lot size requirements of the current Sandy Township Zoning and Subdivision Ordinances. Further, as will be noted the letter refers to a telephone conversation between Anthony S. Guido and Mr. Leeper on the same day concerning the subdivision issue and the lot size requirement.

C. In paragraph 19 DuBois Dutch purports to state the intent of the letter of John Guido's attorney dated November 17, 1998 which is attached to DuBois Dutch's Request as Exhibit "E". The intent of the letter was to advise Mr. Leeper, the attorney for DuBois Dutch, that subdivision of the property in accordance with the terms and conditions of the lease option would leave the gas station parcel as a substandard or non-conforming lot with limited usage in the future due to the changes in the zoning requirements as set forth in the present Sandy Township Zoning Ordinance and as a result would oppose any subdivision application that did not comply with the mandates of the present Township Subdivision and Zoning Ordinances.

D. In paragraph 20, DuBois Dutch alleges that John Guido did not proceed before the Planning Commission and the Board of Supervisors to request a subdivision in accordance with the terms and conditions of the lease option. What DuBois Dutch fails to mention is the fact DuBois Dutch had filed its first subdivision application with

the Township in October of 1998 requesting a modification of the minimum lot size for the gas station parcel which would leave John A. Guido with a substandard lot if the property was subdivided in accordance with the terms of the lease option. By letter dated December 16, 1998, DuBois Dutch, by its attorneys, Gleason, Cherry and Cherry, outlined the alleged basis for its modification request. A copy of that letter is attached hereto as Exhibit "B". Then, by letter dated January 20, 1999, DuBois Dutch, by its attorneys, Gleason, Cherry and Cherry, advised the Township that it was withdrawing its modification request. A copy of that letter is attached hereto as Exhibit "C". It appears that the reason for the withdrawal was that the Township intended to reject DuBois Dutch's modification request as per memo of R. Edward Ferraro, Esq., the Township Solicitor, copy of which is attached hereto as Exhibit "D".

After that, DuBois Dutch filed its compliant in specific performance with the Court of Common Pleas of Clearfield County on or about February 12, 1999. We hereby submit that the filing of the specific performance complaint could not be related to the failure of John Guido to file a subdivision request when prior thereto DuBois Dutch had filed a subdivision request requesting a modification which it withdrew.

E. In paragraph 27, DuBois Dutch alleges that the Supreme Court determined that DuBois Dutch would have to file a modification of the requirements of the current ordinance in effect in order to obtain a legal subdivision approval. What the Supreme Court held is that the subdivision of the property in question must comply with the current Sandy Township Zoning and Subdivision Ordinances

unless if there is a proper case for a modification which the Township decides to approve, which we submit there is not.

F. In paragraph 25, DuBois Dutch alleges that the Board of Supervisors has jurisdiction to modify the minimum lot size requirements to allow lots that have already been divided by actions of the party to be legally subdivided so that both parties will be left in position that they created for themselves. To the contrary, in its Opinion dated August 23 the Supreme Court held as follows:

> The Commonwealth Court held that government recognition of a subdivision is not proper at either time (at the time the lease option was executed or when the purchase option was exercised) because the petitioning party failed to satisfy the requirements of the municipalities relevant ordinances. We (the Supreme Court) affirm.

On page three of said Opinion, the Supreme Court held:

> As is relevant in this case, property owners seeking approval under the 1997 Subdivision Ordinance must comply inter alia with the requirements of the application 1996 Zoning Ordinance.

G. On page six the Supreme Court cited with approval a portion of the Commonwealth Court's Opinion as follows:

> The majority (of the Commonwealth Court) found that a leasehold interest coupled with an option to purchase does not create a Subdivision of the property and, therefore, Dubois Dutch could not effectively "lock-in" the Gas Station Parcel as a pre-existing non-conforming lot by exercising its option to purchase a portion of the property after the 1996 Zoning Ordinance took effect.
>
> There is simply no legal authority or reason to hold that a potential right to exercise an option to purchase, created by a lease in 1982, which Dubois Dutch did not seek to exercise until 1999, created a subdivision in 1982 under an ordinance which was no longer in existence when the option was exercised. In this case, Dubois

> Dutch's right to pursue subdivision approval was no different in 1982 than it was in 1998, when it finally initiated its first request before the Township Supervisors. Although that right might not have arisen until Dubois Dutch elected to exercise its option, its decision to exercise its right, or to forego its right, was the sole impediment to its right to official subdivision. Hence, any impairment to Dubois Dutch's right to apply under the 1965 Subdivision Ordinance, rather than the [1997 Subdivision Ordinance], is the result of Dubois Dutch's own decision to delay the exercise of its option.

H. On page 13, the Supreme Court further held:

> By choosing not to exercise the option and seek subdivision approval until 1998, DuBois Dutch (and its predecessors in title) assumed the risk that the ordinances might change such that one or both of the individual parcels would not comply with the minimum requirements of the Sandy Township Zoning Ordinance which would prevent approval under the subdivision ordinance.

Therefore, it is the Supreme Court's firm opinion that the subdivision of the subject property must comply with the current Sandy Township Zoning and Subdivision Ordinances unless a proper case can be made for a modification which the Township decides to accept. We submit for the reasons hereinafter set forth that a proper case for modification does not exist.

I. In paragraph 38, DuBois Dutch alleges that the land remaining to John Guido is 42,305 square feet with the actual lot upon which the gas station is erected being 32,910 square feet. Those dimensions are incorrect. The total gas station parcel as per the lease option contains 32,910 square feet, which includes the area shown as Parcel C, the access road, which contains 9,395 square feet or a maximum usable area of 23,515 square feet, which is approximately one-half of the required area of 45,000 square feet, which would

severely limit the authorized use of the subject property in view of the designated uses for the district in which this property is located, being a commercial - highway district, copy of letter of Lionel Alexander dated October 24, 2004 confirming the square footage of the gas station parcel is attached hereto as Exhibit "E". What is disturbing is that 42,305 square footage was advocated by DuBois Dutch pursuant to its original modification request and at the time it was pointed out to DuBois Dutch and its attorneys that that square footage was in error.

II. NO GROUNDS EXIST FOR GRANTING A MODIFICATION UNDER THE FACTS OF THIS CASE PURSUANT TO THE CURRENT TOWNSHIP SUBDIVISION AND ZONING ORDINANCES.

In order for a modification request to be granted as provided in Sec. 1004 of the Subdivision Ordinance, the applicant has a heave burden or proving that literal enforcement of the requirements of the land use regulations will exact undue hardship because of peculiar conditions pertaining to land in question provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

The key words are "undue hardship" and "peculiar conditions pertaining to the land in question". Subsection (2) of Article III of the May 9, 1997 Sandy Township Subdivision Ordinance No. 1997-3 specifically defines "hardship" as follows:

> Hardship: Physical circumstances or conditions of the land to be subdivided which prevents strict conformity with the provisions of this ordinance and that the authorization of a modification may be necessary to enable the reasonable use of the property.

Therefore, the conditions and hardships that must exist in order to obtain a modification pursuant to the Sandy Township Subdivision Ordinance, must involve physical conditions or circumstances of the land itself. In its modification request, DuBois Dutch does not set forth a single physical circumstance or condition of the land that would prevent strict conformity with the provisions of the ordinance. The reason being none exist. Further, DuBois Dutch fails to set forth how or why the modification is necessary to enable the reasonable use of the property.

At best, what DuBois Dutch alleges as a basis for hardship is a personal hardship or an inconvenience to DuBois Dutch. The appellate cases have consistently held that economic or financial hardship is not sufficient to establish unnecessary hardship so as to justify the grant of a zoning variance. See *In Re: Pierorazio, 419 A.2d 221 Cmwlth. Crt. 1980.*

DuBois Dutch purchased the subject Lease Option even though it knew or should have known of the subdivision and zoning problems. A purchaser of real estate is bound to investigate zoning issues before it purchases the real estate interest.

What must be kept in mind is the fact that DuBois Dutch is requesting a modification of the gas station parcel not the Dutch Pantry parcel. Accordingly, how will the reduction of the required minimum lot size requirement of 45,000 square feet relieve hardship and be necessary to enable the reasonable use of the property? That is not possible since the opposite is the case.

To the contrary, the reduction of the required size minimum will limit the use of the gas station property and in fact will

render the gas station property practically valueless due to the reduced size in view of the limited use that can be made of the property under the uses permitted in the commercial - highway district in which this property is located.

A modification request under a subdivision ordinance is a first cousin to a request for a variance under the zoning ordinance. The burden upon the applicant party, in this case DuBois Dutch, in each case is a heavy burden and should be granted sparingly and only under exceptional circumstances. *Worthington vs. Zoning Hearing Board, 669 A.2d 497, Cmwlth. Court 1996.*

The essence of the basis of DuBois Dutch for modification is the reduction the required minimum size of the gas station parcel in order to accommodate the Dutch Pantry parcel under the said 1982 lease option agreement, which is not a basis for granting a modification.

If the Township should approve that request when no physical circumstances or conditions that prevents strict conformity with the subdivision and zoning ordinances have been demonstrated because of peculiar conditions pertaining to the land then the Township would in effect be amending the terms and mandates of Section 1004 of the Subdivision Ordinance which governs this issue without following the required procedures to amend the ordinance.

Appellate Courts cannot uphold subdivision rulings which would effectively amend applicable zoning which would be equivalent to letting the municipality hold in reserve unpublished requirements capable of general application for occasional use. See *L.H.T.L.C. vs. Township of Hampton, 809 A.2d 1072.*

In the case of Worthington vs. Zoning Hearing Board, 669 A.2d 497 (1996), the Commonwealth Court upon the issue of undue hardship held as follows:

> In order of an applicant to demonstrate an unnecessary hardship, he or she must prove that either (1) the physical characteristics of the property are such that it could not in any case be used for any permitted purpose or that it could only be arranged for such purposes as prohibitive expense or (2) the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by the ordinance. The applicant must show that the hardship is unique or peculiar to the property as distinguished from a hardship existing from the impact of zoning regulations on the entire district.

Since the Dutch Pantry parcel complies with all of the mandates of the present Sandy Township Subdivision and Zoning Ordinances, that parcel will suffer no hardship as defined under the Township Subdivision Ordinance regardless of the outcome of the subdivision issue. On the other hand, reducing the required minimum lot size of the gas station parcel under said agreement as requested by DuBois Dutch will create a hardship for the gas station parcel and not relieve the hardship with the result that the use of the gas station parcel would be severely limited which obviously would not enable the reasonable use of the property as required.

Further, if the DuBois Dutch request for modification is granted, the Township will create a non-conforming or substandard lot of the gas station parcel which will, again, be of limited use and rendering it practically valueless, contrary to the requirements for modification under any definition of that term.

In its request, DuBois Dutch reiterates the circumstances and reasons it has advanced before three different courts, the

Clearfield County Court, the Commonwealth Court and the Supreme Court, which the Commonwealth Court and the Supreme Court have rejected. The alleged hardships, if they exist, are personal to DuBois Dutch and have no bearing on the requirements for a modification under the Subdivision Ordinance.

As demonstrated by the application for subdivision presented by John A. Guido, there is ample room to subdivide the property so that both parcels will comply with the Sandy Township Subdivision and Zoning Ordinances. Therefore, on that basis alone, the request for modification by DuBois Dutch must be rejected.

In its application, DuBois Dutch is requesting that the Township grant a modification based upon the terms of the lease option which is not in accordance with the mandates of the subdivision ordinance and which is contrary to the holding of the Supreme Court, *In Re: Michener's Appeal, 115 A.2d 367*, which held as follows:

> Contracts have no place in a zoning plan. Zoning if accomplished at all must be accomplished under the police power. It is a form of regulation for community welfare. Contracts between property owners or between a municipality and a property owner should not enter into the enforcement of zoning regulations.

The overriding interest in any land use case is the public interest in uniform development which must take precedence as in any zoning case over the private interest of the parties. *Depaul Realty Company vs. Borough of Quakertown, 324 A.2 832 (1974).*

"Landowners are subject to one of the common risks of a democracy, that is the right to do something that is permitted today may be lost through legislative enactment. There is no such thing as

vested interest or unexercised right under a zoning ordinance." *See Ryan on Zoning, Section 8.1.1.*

Further, in its request, DuBois Dutch contends that under Section 515.1 of the MPC does not require a municipality to refuse to grant subdivision approval if the property has been developed or resulted from a subdivision violation in violation of the subdivision ordinance.

DuBois Dutch, through its attorney, advanced this argument in both the Commonwealth and Supreme Courts. A copy of the portion of DuBois Dutch's Brief covering that issue before the Supreme Court is attached hereto as Exhibit "F". Neither the Commonwealth Court nor the Supreme Court makes any mention of Section 515.1 or the corresponding section in the Subdivision Ordinance in its opinion. Therefore, it consequently did not address the argument apparently due to the fact that it obviously did not believe that the argument had merit.

In any event, the Courts have consistently ruled that except for deminimus variations, a subdivision plan, with the exception of course where a proper case can be made for modification, which a municipality agrees to accept, must comply with the Subdivision and Zoning Ordinance before the plan may be approved. Otherwise, orderly land development would be impossible. See *Leonard vs. Zoning Hearing Board of the City of Bethlehem, 583 A.2d 11, Pa.Cmwlth. 1990.*

In the case of *Wiggs vs. North Hampton County Hanover Township Board of Supervisors, 441 A.2d 1361, 1982,* ruled:

> Of course, it is axiomatic that subdivision plans which do not comply with valid zoning regulations cannot be approved.

Adoption of DuBois Dutch's position on this issue would result in an absurd and irrational conclusion. All subdivision would be required to meet the mandates of the subdivision and zoning ordinances except privately concocted arrangements or unapproved subdivisions which did not receive governmental approval. If that position is correct, such actions would be free of all constraints, standards and legitimate public concerns and municipalities would be thwarted from performing the land use regulatory function invested in them by the legislature.

Adoption of such a principle in all probability would result in approval of unapproved or illegal subdivisions on subjective political considerations which would not foster coordinated developments, which is one of the principal purposes of the Municipalities Planning Code.

Further, Section 508(4) of the MPC (Section 405 of the Subdivision Ordinance) essentially provides that applications for approval of subdivisions are governed by the ordinances in effect at the time the application was filed.

In fact, that section provides in part that if a zoning or subdivision ordinance is amended while a subdivision application is pending and if that plan is properly and finally denied a subsequent application shall be subject to the intervening change in zoning regulations.

If DuBois Dutch's argument is accepted, then the municipality would have the option of grandfathering an unapproved or

illegal subdivision while on the other hand would not have the option to grandfather a subdivision plan which had been submitted before the zoning change but was rejected. The rejected plan would be required to comply with the change in the zoning ordinance while the unapproved plan would not necessarily have to do so.

Therefore, for the above stated reasons we respectfully submit that the application for modification submitted by DuBois Dutch must be rejected.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esq.
Attorney for John A. Guido

Note 1: For some unknown reason, in paragraph 48, DuBois Dutch refers to an ejectment action which John Guido has filed against DuBois Dutch. The basis of that action is that Dubois Dutch refused to timely pay its pro-rata share of real estate taxes and further has refused to pay rental as required by the lease option from March of 1999 to the present. Consequently, the outcome of these subdivision proceedings has no bearing on the issues involved in that case.

Note 2: In its application, DuBois Dutch contends that the Township has always treated the properties as separate properties. There is no evidence of this fact other than the two property have separate utilities which is the case in every case where there are two separate buildings on the same lot or parcel of land. All separate buildings regardless of whether they have common ownership or not have separate utilities.

HANAK, GUIDO and TALADAY
Attorneys at Law

Robert M. Hanak
Anthony S. Guido
Matthew B. Taladay

Nicole Hanak Bankovich
Jeffrey S. DuBois

Telephone: (814) 371-7768
Fax: (814) 371-1974

498 Jeffers Street
P.O. Box 487
DuBois, PA 15801

July 7, 1998

M. Dale Leeper, Esq.
Theisen, Brock, Frye,
Erb & Leeper Co., L.P.A.
424 Second Street
Post Office Box 739
Marietta, OH 45750

Re: John A. Guido - DuBois Dutch, LLC

Dear Mr. Leeper:

This will confirm our telephone conversation yesterday morning relative to the above, which was in response to your letter of July 1st. As advised, my office represents John A. Guido, who also happens to be my son. As further advised, we hereby confirm that the subject Lease with Harley Hotels is in full force and effect and there are no defaults under the terms of the Lease as of this date.

As we discussed, Sandy Township adopted a rather extensive land subdivision and development ordinance in the year 1996. Unless a previous subdivision approval has been obtained on the subject property, it will be necessary to file and obtain subdivision approval to subdivide the property into two parcels as provided for in the Lease when your client exercises the option to purchase its portion of that property.

In addition as advised, approximately five years ago, Sandy Township amended the zoning ordinance applicable to the area at Exit 16 of I-80 where this property is located from urban/commercial to highway/commercial. Under the requirements of the new highway/commercial designation it is clear that if the overall property is separated into the two properties, the retained portion of my son will not comply with the mandates of the ordinance. In this regard, enclosed are the minimum set backs and lot requirements for a commercial lot under the highway/commercial zoning mandates.

EXHIBIT "A"

Hopefully, the Sandy Township Zoning and Planning Commissioners will view this situation as a pre-existing condition and will grant approval on that basis. However, as we discussed, it is a problem that should be addressed at this point.

I thank you for your consideration in this matter and if you should have any further questions, please do not hesitate to let me know.

Very truly yours,

ANTHONY S. GUIDO

ASG:dfy

Enc.

cc: Eastdil Realty

P.S. I have forwarded the letters which you included with your letter and which have been signed by my son, John, to the parties involved.

LAW OFFICES
GLEASON, CHERRY AND CHERRY, L.L.P.
P. O. BOX 505
DUBOIS, PENNSYLVANIA 15801-0505

ONE NORTH FRANKLIN STREET

TONI M. CHERRY
PAULA M. CHERRY
EDWARD V. CHERRY
1950-1990
JAMES A. GLEASON
1946-1975

AREA CODE 814
371-5800
FAX NUMBER
(814) 371-0936

December 16, 1998

Board of Sandy Township Supervisors
Sandy Township Municipal Building
R. D.
DuBois, PA 15801

RE: **Request for Modification of the Requirement of Minimum Lot Size of 45,000 Square Feet for a Subdivision in Commercial Highway District**

Lady and Gentlemen of the Board of Sandy Township Supervisors:

This office represents Mr. Gregory Ley who is the owner of DuBois Dutch, L.L.C., a Pennsylvania Limited Liability Company which is the owner and operator of the Dutch Pantry Family Restaurant located along Route 219 North adjacent to ramp D to I-80 in the Township of Sandy.

Mr. Ley, through his Company, DuBois Dutch, L.L.C., purchased the Dutch Pantry Restaurant from Harley Hotels, Inc., on July 5, 1998. On that same date the Harley Hotels, Inc., assigned its interest in a lease for the real estate upon which the restaurant is located. That lease is dated June 16, 1982, and was entered into between Phillip J. Dieringer and Harley Hotels, Inc. The lease was for an original term of six years and seven months commencing on the first day of August, 1982 and ending on the 28th day of February, 1989, with two optional five-year periods extending the lease to February 28, 1999.

Paragraph 9 of the lease gives to the lessee, then Harley Hotels, Inc., and now DuBois Dutch, L.L.C., an option to purchase the land which is the subject of the lease for $30,000.00 but the lease must be exercised during either the original lease term or during any extension thereof by giving the lessor at least 30 days written notice of the lessee's intention to exercise the option.

At the time that the lease was signed and the option granted and when the original lessor conveyed the property to its current owner in 1986, the property in question was zoned C-T Commercial Transient Interchange Service District in accordance with the Sandy Township Zoning Ordinance adopted on December 17, 1972. The regulations for that zoning district did not impose a minimum lot size.

After Mr. Ley, through DuBois Dutch, L.L.C., purchased the Dutch Pantry Restaurant and was assigned all of the rights under the lease, including the option to purchase the land on which the Dutch Pantry is

located, he discovered that a new zoning ordinance had been adopted by Sandy Township in 1996. Not only had the Commercial Transient Interchange Service District been eliminated and his property now located in a district known as C-H Commercial Highway, there was now a minimum lot size of 45,000 square feet imposed where there had previously been no minimum lot requirements.

DuBois Dutch, L.L.C., has notified the lessor, who is successor to Mr. Dieringer, that it intends to exercise the option and to purchase the land upon which the Dutch Pantry is located. The amount of land that was previously agreed upon to be conveyed meets all of the minimum lot size requirements imposed by the new ordinance. Unfortunately, the land remaining to the lessor after the sale would be less than the 45,000 minimum lot size required for lots in the Commercial Highway District. At the time that the option was granted and throughout the term of the lease agreement until the new Zoning Ordinance took effect on June 19, 1996, the subdivision of the land planned between the parties met all requirements of the ordinances of Sandy Township. Because of the elimination of the Commercial Transient Interchange Service District and the placement of this land into the Commercial Highway District and the imposition of a minimum lot size requirement, the subdivision does not comply with all regulations imposed by the Land Use Ordinance of Sandy Township.

On behalf of our client, DuBois Dutch, L.L.C., we now bring a request before the Board of Sandy Township Supervisors to grant a modification of the requirement of a 45,000 square feet minimum lot size for this subdivision in accordance with the provisions of Section 1004 of the Sandy Township Subdivision and Land Development Ordinance No. 1997-3 on the grounds that the enforcement of that requirement will exact an undue hardship in this case because of the peculiar conditions pertaining to the land in question in that there are already sturctures erected on both the land that is the subject of the option and the land remaining. Both are fully developed and a modification will not be contrary to the public interest and the purpose and intent of the Ordinance itself.

The DuBois Dutch, L.L.C., lease for the property will expire on February 28, 1999, and there are no further extensions or successive periods of the lease term provided. If DuBois Dutch, L.L.C., is not permitted to purchase the land, then Mr. Ley will not be able to continue with the operation of his restaurant that he has already purchased and the Township of Sandy will lose a business that currently employs 35 people during the Spring, Summer and Fall months and 23 individuals during the Winter season.

Mr. Ley has sunk his entire life's savings into the purchase of this business. He started with Dutch Pantry as a dishwasher and worked his way up to the point where he could purchase the business. In order to do that, he had to secure a mortgage against not only property that he owned but against his mother's home and real estate that his deceased father left to her. If this modification is not granted and a subdivision

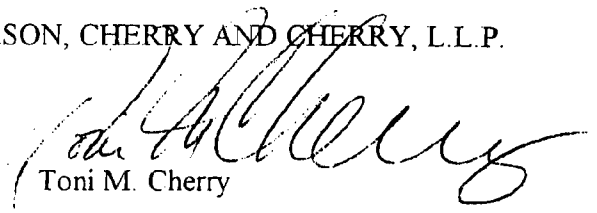
allowed so that Mr. Ley can purchase the ground upon which his business is located, he and his family will lose everything.

We believe that the request we make does not in any way adversely affect the public interest and, in fact, is in accordance with the stated purposes of the Sandy Township Subdivision and Land Development Ordinance for proper growth and development in Sandy Township.

We thank you for your kind consideration of this request and an opportunity to present this matter to you at your next meeting.

Very truly yours,

GLEASON, CHERRY AND CHERRY, L.L.P.

By 
Toni M. Cherry

TMC:mls

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371-5800
FAX NUMBER
(814) 371-0936

VIA FACSIMILE TRANSMISSION AS WELL AS UNITED STATES FIRST CLASS MAIL

January 20, 1999

Board of Sandy Township Supervisors
Sandy Township Municipal Building
R. D.
DuBois, PA 15801

Ladies and Gentlemen of the Board of Sandy Township Supervisors:

On behalf of our client, DuBois Dutch, L.L.C., and its owner, Mr. Gregory Ley, we hereby advise that we are withdrawing our request for a subdivision of the property located along Route 219 North adjacent to Ramp D to I-80 in the Township of Sandy. That property is the current location of the DuBois Dutch Pantry and the BP Service Station.

This will also serve as notice to you that we are hereby withdrawing the request for modification of the requirement of the minimum lot size of 45,000 square feet for a subdivision in a Commercial Highway District made by letter dated December 16, 1998, and by presentation to you at your meeting of December 16, 1998.

If we should desire any further action by you in the future or believe we need subdivision in this case, we will make application again. We would respectfully request the return of all maps submitted to you and we will pick the same up at the Municipal Building at your convenience.

Since we are now withdrawing our request, there will be no need for further action on your part and we will not be appearing before you this evening.

Thanking you for your kind attention to this matter and your consideration, we remain

Very truly yours,

GLEASON, CHERRY AND CHERRY, L.L.P.

By
Toni M. Cherry

TMC:mls
cc: R. Edward Ferraro, Esq.
Anthony S. Guido, Esq.

EXHIBIT "C"

SANDY TOWNSHIP

MODIFICATION REQUEST OF
DUTCH PANTRY/BP OIL

The Supervisors of Sandy Township have received a request from the owners of Dutch Pantry to approve a sub-division of the larger tract of land that would result in a smaller parcel being created that does not meet the basis requirements of zoning in size and usage.

Since the request has failed to show the existence of undo hardship or peculiar conditions of the land, and one (1) remaining parcel would result in a sub-standard lot that is not even close to the subdivision requirements, and it is the Supervisors obligation to consider this as one (1) large parcel for which a sub-division is being requested, the request must be denied.

Sandy Township Supervisors
R. Edward Ferraro, Esq.
Township Solicitor

EXHIBIT "D"

Alexander & Associates Inc.

(Land & GPS Surveying Services)
112 CHURCH STREET
P.O. BOX 378
FALLS CREEK, PA 15840
(814) 371-5578
e-mail balexander@adephia.net

October 24, 2005

Mr. Anthony S. Guido, Esq.
Hanak, Guido, and Taladay
498 Jeffers Street
DuBois, PA 15801

Re: Subdivision Plan for John

Dear Mr. Guido;

In response to your letter dated October 21, 2005 with regard to items A & B, I have included the same verb age on the subdivision plan as you have indicated in your letter.

With regard to the area given on the Gregory S. Ley (Dutch Pantry) plan dated November 16, 1998 for Parcel "B" of 32,910 square feet or 0.756 acre, this area does in fact include the area given on the same map for what is shown as Parcel "C", the area given for Parcel "C" is the "Easement Area" for the access road and is included in the area shown for Parcel "B" of 32,910 square feet.

Sincerely;

Lional Alexander, PLS
President

EXHIBIT "E"

remained an encumbrance upon the land. There was no such encumbrance upon the remainin portion of the land and the legal title owner held that remainder free and clear to do with as h pleased.

While it is true that all of the predecessors in title to both Appellant and Appellee and even Appellee himself violated the ordinances of Sandy Township by not seeking formal approval of the subdivision that had been created by the grant of the option, the permissive language of §515.1(b) of the Municipalities Planning Code allowed Sandy Township to disregard this violation and to grant *nunc pro tunc* subdivision approval. See 53 P.S. §10515.1(b).

In the case of Peoples Street Ry. Co. v. Spencer, 156 Pa. 85 (1893), a plaintiff conveyed land to a defendant by deed and received $20,000.00, the consideration money mentioned therein. By a lease of the same date, the defendant leased the premises back to plaintiff for one year at a nominal rent. The lease also gave to the plaintiff an option to purchase the land at the end of that year for $20,000.00 with interest. At the end of the year the option was extended for another year. Plaintiff insured the buildings on the property for defendant's protection with a policy to be "payable to him as his interest may appear". Before the expiration of the second year, the buildings were burned. After the fire, the plaintiff exercised the option and secured a deed from defendant and paid him the $20,000.00. Defendant then claimed the insurance money.

The Pennsylvania Supreme Court declared that the only substantial question in the case was the date at which the plaintiff's equity became complete. 156 Pa. at 90. Even though the fire took place prior to the time that plaintiff company exercised its option to purchase the

property, the Court determined that plaintiff's interest related back to the beginning of the transaction. Plaintiff became the owner of the land as it was on the date that the option had originally been granted to it and that ownership interest gave it the right to the insurance mo which stood *pro tonto* in its place. Peoples Street Ry. Co., 156 Pa. at 90-91.

In the foregoing case, the defendant tried to argue that at the time of the fire his intere in the land was an absolute fee simple title and thus he was entitled to the proceeds from the insurance claim arising out of the fire. The Supreme Court of Pennsylvania rejected the argument that his title was absolute. On the contrary, the Court held that, "It was the legal titl in fee, but subject to the equitable interest of the [plaintiff company], an interest in the land, capable of being specifically enforced, and good not only against the [defendant] but all others, creditors, purchasers or strangers, to whom the recorded deeds and the [plaintiff's] possession gave notice.

Likewise, the legal title of JOHN A. GUIDO was at all times subject to the equitable interest of DUBOIS DUTCH and its predecessors in the 2.605-acre parcel of land. That substantial interest in land is capable of being specifically enforced and whether or not formal approval of the subdivision of that property was requested, it existed nonetheless and it created a subdivision recognizable under law that could not be denied by the Township nor the trial court and cannot be disputed by Appellee.

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION

JOHN A. GUIDO,
Plaintiff,

vs.

TOWNSHIP OF SANDY,
Defendant,

and

DUBOIS DUTCH, LLC,
Intervening Defendant.

No. 99-867-CD

ANSWERS TO
Plaintiff's Interrogatories to
Defendant, DUBOIS DUTCH, LLC

Counsel on behalf of PLAINTIFF:
ANTHONY S. GUIDO, ESQ.
Hanak, Guido and Taladay
498 Jeffers Street
PO Box 487
DuBois, PA 15801
(814) 371 7768
PA Atty. ID #05877

John Guido
11-21-05
Document 2

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION

JOHN A. GUIDO, Plaintiff,	:	
vs.	:	
TOWNSHIP OF SANDY, Defendant,	:	No. 99-867-CD
and	:	
DUBOIS DUTCH, LLC, Intervening Defendant.	:	

ANSWERS TO
PLAINTIFF'S INTERROGATORIES TO DEFENDANT,
DUBOIS DUTCH, LLC

The Plaintiff, JOHN A. GUIDO (GUIDO), by his attorney, Anthony S. Guido, respectfully requests Intervening Defendant, DUBOIS DUTCH, LLC (DUBOIS DUTCH), within 30 days from the service thereof in accordance with Pa.R.C.P. Nos. 405 and 406. These Interrogatories are deemed to be continuing to the extent provided in Pa.R.C.P. No. 4007.4.

INSTRUCTIONS AND DEFINITIONS

A. Unless otherwise indicated, these interrogatories refer to the times, places and circumstances of the approval of the Subdivision Plan of DuBois Dutch Plan by the Defendant Township of Sandy.

B. The pronoun"you" refers to the party to whom these interrogatories are addressed; all agents, employees, servants, officers, directors or other persons acting or purporting to act on behalf of the party to whom these interrogatories are addressed, and the party's attorneys; each parent, predecessor, subsidiary, affiliate of a corporation or other business entity to whom these interrogatories are addressed, and each present and former officer, director, employee, agent and attorney thereof.

C. You must make inquiries of your attorneys, agents, servants, employees, and representative, if necessary in order to answer these interrogatories completely and accurately.

D. When an interrogatory requires you to "describe," to "state the basis of," or to "state the facts" on which you rely to support a particular claim, contention, or allegation, state in your answer each and every fact and identify each and every communication or document which you contend supports, refers to, or evidences such claim, contention, or allegation.

E. When an interrogatory requires you otherwise to describe or state the facts relating to any particular set of circumstances, act, event, transaction, occurrence, meeting, purchase, sale, agreement, contract, venture, relationship, conversation, representation, communication, or other item of information, state briefly in your answer the facts (including dates and places) relating to such transaction, occurrence, relationship, set of circumstances, etc.; identify any persons who are or were parties thereto or have knowledge thereof; and identify any communications and documents relating to or evidencing such transaction, occurrence, relationship, set of circumstances, etc.

F. When an interrogatory asks you to identify:

i) a natural individual - state his or her full name and present or last known residential address, business address, and telephone number;

ii) a corporation - state its full corporate name and any names under which it does business, its state of incorporation, the address and telephone number of its principal place of business, and the address and telephone number(s) of all its officers;

iii) a business other than a corporation - state the full name or style under which the business is conducted, its business addresses, its telephone numbers, and the identity of the persons who own, operate and control the business;

iv) a document - state its title, its date, the names of its authors and recipients, and its present or last known location and custodian, including any documents prepared subsequent to any time period;

v) a communication - state the subject matter and substance of the communication, identify any document(s) which refer to or evidence the communication, and, to the extent that the communication was nonwritten, identify the persons participating in the communication.

G. The term "document" means any medium in which information or intelligence can be recorded or retrieved, and includes, without limitation, the original or copy, regardless of origin and location, of any book, pamphlet, periodical, letter memorandum, (including any memorandum or report of a meeting or conversation) invoice, bill, order, form, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, report, record, contract, study, handwritten note, draft, working paper, chart, paper, print, laboratory record, drawing sketch, graph, index, list, tape, photograph, microfilm, data sheet, or date processing card, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, which is or was in your possession, custody or control.

H. The term "communication" means any oral or written utterance, notation or statement of any nature whatsoever between or among two or more persons, by or to whomsoever made, and including without limitation correspondence, documents, conversations, dialogues, discussions, interviews, consultations, agreements and other understandings.

INTERROGATORIES

1. Please state the names and addresses of all attorneys who represented your interests in the Assignment of Lease dated July 5, 1998, which assigned to you the leasehold interest of Harley Hotels in and to that certain Lease between Phillip J. Dieringer as Lessor and Harley Hotels as Lessee, dated June 16, 1982.

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

2. Please state the date of closing said Assignment of Lease from Harley Hotels to you, which closing date shall be deemed to be the date when you paid to Harley Hotels the consideration for said Lease Assignment.

Closing took place prior to July 5, 1998. First date of operation of the Dutch Pantry in DuBois by DuBois Dutch,LLC was July 5, 1998.

3. Please state the names and addresses of all parties, including brokers and attorneys who represented the interests of Harley Hotels in the negotiations and closing of said Lease Assignment to you.

UNKNOWN.

4. Please state the reason why the Assignment of Lease from Harley Hotels to you was dated as of July 5, 1998, when the Acknowledgments attached to said Assignment were dated July 14, 1998.

UNKNOWN.

5. Do you admit that by letter dated July 7, 1998, that Anthony S. Guido, attorney for GUIDO, advised your attorney, M. Dale Leeper, that Sandy Township had adopted an extensive land subdivision development Ordinance in the year 1996 and that it would be necessary to file and obtain subdivision approval to subdivide the property into two parcels as provided for in the Lease when you exercised the option and that there may be a problem in securing subdivision approval to divide the property into two parcels due to the fact that the parcel to be retained by GUIDO would not comply with the lot size requirements of said Ordinance?

NO. Information contained in letter of July 7, 1998, speaks for itself.

6. Do you admit that on the same date, July 7, 1998, Anthony S. Guido advised your then attorney M. Dale Leeper by telephone of the problems involved in obtaining subdivision approval from the Township of Sandy due to the fact that the subdivision would create an undersized lot insofar as the parcel to be retained by GUIDO is concerned?

NO.

7. Did Mr. Leeper advise you of the said letter dated July 7, 1998, and the subject telephone conference of the same date?

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

8. If the answer to Interrogatory No. 7 is in the affirmative, please state the date when such notification occurred and by what means of communication.

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

9. Please state the reasons why you proceeded with the closing in view of the potential problems in securing subdivision approval.

Closing took place prior to Mr. Guido ever advising that he would object to subdivision approval. By letter dated July 6, 1998, addressed to both Harley Hotels, Inc., and DuBois Dutch, LLC, John A. Guido acknowledged that the Lessee, Harley Hotels, Inc., was currently in full compliance with all of the requirements and obligations of the Lease and did consent to the assignment of the Lease by Harley Hotels, Inc., to DuBois Dutch, LLC, and specifically set forth that DuBois Dutch, LLC, would have all of the rights and privileges under the Lease including, but not limited to, the right to exercise the Purchase Option for the property upon which the DuBois Dutch Pantry was located and which property was the subject of the Lease.

10. Did you receive any concessions from Harley Hotels on the Lease Assignment from Harley Hotels due to the potential problems in securing subdivision approval in the event you exercised the purchase option?

NO.

11. If your answer to Interrogatory No. 10 is in the affirmative, please state what concessions were obtained by you.

N/A

12. Do you admit that as part of the subdivision plan which is the subject of these proceedings you did not request a hardship modification pursuant to Section 1004 of the Sandy Township Subdivision Land Development Ordinance No. 1997-3, adopted in May, 1997?

DENIED. DuBois Dutch, LLC has no hardship and is in complete compliance with the Sandy Township Subdivision Land Development Ordinance.

13. Did Attorney R. Denning Gearhart perform any legal services for you in the acquisition of said Assignment of Lease from Harley Hotels?

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

14. If your answer to Interrogatory No. 13 is in the affirmative, describe the legal services performed by R. Denning Gearhart.

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

15. As part of the legal services performed by Attorney R. Denning Gearhart, did he advise you of the requirement of a subdivision approval in the event you exercised your option to purchase the leased property?

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

16. If your answer to Interrogatory No. 15 is in the affirmative, please state in detail the advice given to you by R. Denning Gearhart concerning the requirement obtaining subdivision approval from the Township of Sandy in the event you exercise your option to purchase the leased property.

OBJECTION. This Interrogatory is objected to under Pa.R.C.P. Nos. 4003.1 and 4011(c) in that it seeks information which is privileged in violation of Pa.R.C.P. Nos. 4003.1 and 4011(c). This information is protected by the attorney-client privilege.

17. Do you admit to your prior to acquiring the Lease Assignment from Harley Hotels that the property was not the subject of subdivision proceedings with the Township of Sandy?

DENIED. This information is unknown.

18. If your answer to Interrogatory No. 17 is in the negative, please state the date of the subdivision application, the date or dates of any action by Sandy Township on said subdivision plan.

N/A

19. Do you admit that Hospitality Motel Inns, Inc., was a wholly owned subsidiary of Boron Oil Company prior to the year 1983?

NO. DuBois Dutch, LLC does not have sufficient information to answer this question.

20. If your answer to Interrogatory No. 19 is in the negative, please state the reasons for your denial.

N/A

21. State the name, address and official position of your representative who has answered these Interrogatories.

GREGORY S. LEY, CEO & Secretary-Treasurer
R. D. #3, Box 273C
DuBois, PA 15801

Respectfully submitted,

HANAK, GUIDO AND TALADAY

By: _____
Anthony S. Guido, Esq.
Attorney for Plaintiff

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF CLEARFIELD :

TONI M. CHERRY, Attorney at Law, being duly sworn according to law, deposes and says that she is authorized to make this Affidavit on behalf of GREGORY S. LEY as his attorney because he is out of the jurisdiction of the Court; that the facts set forth in the foregoing Answers to Interrogatories are true and correct, partly from her own knowledge and partly from information supplied to her by GREGORY S. LEY; that the purpose of this Affidavit is to expedite the litigation and that an affidavit of GREGORY S. LEY will be supplied if requested.

Toni M. Cherry

Sworn to and subscribed before me this 15TH day of May, 2000.

Notarial Seal
Paula M. Cherry, Notary Public
DuBois, Clearfield County
My Commission Expires Sept. 16, 2001

report in the rendering of any decision or determination. All reports shall be deemed recommendatory and advisory only and shall not be binding upon the recipient, board, officer, body or agency, nor shall any appeal lie therefrom. Any report used, received or considered by the body, board, officer or agency rendering a determination or decision shall be made available for inspection to the applicant and all other parties to any proceeding upon request, and copies thereof shall be provided at cost of reproduction.

Reverse Frontage Lot - A lot having its front and rear lot lines abutting the right-of-way of a street.

Right-of-Way - A strip of land reserved or dedicated for a street, alley, or other public improvement purpose.

Road, Private - Any road which is not a public street may serve not more than three (3) lots and which is intended for private construction, use and maintenance. (See Section 609.)

Sight Distance - Refers to the maximum distance that a driver can see objects, such as traffic signs, pavement markings, fixed objects, vehicles and pedestrians (See Article 6).

Street (MPC) - Includes street, avenue, boulevard, road, highway, freeway, parkway, lane, alley, viaduct and other ways used or intended to be used by vehicular traffic or pedestrians whether public or private.

Street, Cul-De-Sac - A local street having one (1) end open to vehicular traffic and being permanently terminated by a vehicular turn-around at the opposite end.

Street, Commercial - Paving - Commercial roads service areas whose predominant use is commercial. In function, design and specification, they will be considered as a collector street.

Street, Industrial - Industrial roads are primarily designed to serve industrial and manufacturing development. These roads will be designed to accommodate extensive truck traffic of all types.

Structure (MPC) - Any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land.

Subdivision (MPC) - The division or redivision of a lot, tract or parcel of land by any means into two (2) or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot

at a given distance from the intersection of the street center lines. (See Section 608.)

Code Officer - The Zoning Officer of Sandy Township, Clearfield County, Pennsylvania.

Comprehensive Plan - The general plan utilized to guide the growth, for the protection and development of Sandy Township Clearfield County), adopted by the Board of Sandy Township Supervisors.

Commission (or Planning Commission): The Planning and Zoning Commission of Sandy Township, Clearfield County, Pennsylvania.

Decision (MPC) - Final adjudication of any board or other body granted jurisdiction under any land use ordinance or this Ordinance to do so, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations. All decisions shall be appealable to the Court of Common Pleas of the Clearfield County and Judicial District wherein the Township lies.

Developer (MPC) - Any landowner, agent of such landowner, or tenant with the permission of such landowner who makes or causes to be made a subdivision of land.

Development - Any man-made change to improved or unimproved real estate, including, but not limited to, buildings, mobile homes, or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations.

Development Plan (MPC) - The provisions for development, including a planned residential development, a plat of subdivision, all covenants relating to use, location and bulk of buildings and other structures, intensity of use or density of development, streets, ways and parking facilities, common open space and public facilities. The phrase "provisions of the development plan" when used in this Ordinance shall mean the written and graphic materials referred to in this definition.

Easement - A defined right of use for certain lands granted for a special purpose not inconsistent with the general property rights of the owner.

Flood Plain - See the Sandy Township Flood Plain Ordinance.

Floodway - See the Sandy Township Flood Plain Ordinance.

Hardship - Physical circumstances or conditions of the land to be subdivided which prevent strict conformity with the provisions of this Ordinance and that the authorization of a

modification may be necessary to enable the reasonable use of the property.

Homeowners Association - An incorporation of lot owners for the purpose of providing for ownership and maintenance of community improvements.

Improvement - The physical additions, installations and changes required to render usable and desirable lots from raw acreage.

Improvement Guarantee - Any acceptable financial security acceptable under the Pennsylvania Municipalities Planning Code and approved by the Board of Township Supervisors as being adequate to cover the construction costs of any and all required improvements.

Land Development (MPC) - Any of the following activities:

(1) The improvement of one (1) lot or two (2) or more contiguous lots, tracts or parcels of land for any purpose involving:

   (a) a group of two (2) or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or

   (b) the division or allocation of land or space, whether initially or cumulatively, between or among two (2) or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.

(2) A subdivision of land.

(3) Development in accordance with Section 503(1.1) of the Pennsylvania Municipalities Planning Code.

Landowner (MPC) - The legal or beneficial owner or owners of land including the holder of an option or contract to purchase (whether or not such option or contract is subject to any condition), a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land.

Lot (MPC) - A designated parcel, tract or area of land established by a plat or otherwise as permitted by law and to be used, developed or built upon as a unit. The term "lot" shall also mean "parcel," "plot," "site" or similar term.

ARTICLE 10
ADMINISTRATION

1001 - Grant of Power

The Board of Sandy Township Supervisors hereby designates the Sandy Township Planning Commission to act and have full authority in the administration of this Ordinance and any subsequent amendments thereto.

1002 - Appeals

Any person, firm, or corporation which deems itself aggrieved by any decision of the Board of Township Supervisors may appeal the decision to the Clearfield County Court of Common Pleas.

1003 - Application Fees

The Board of Sandy Township Supervisors may establish and/or amend by resolution a schedule of review fees which shall be charged to the developer. Fees shall be payable to the "Township of Sandy" when the Preliminary and Final subdivision applications are submitted. The application shall not be considered as complete until such time as the fees have been paid in full. Review fees may include reasonable and necessary charges by the Township's Professional Engineer or consultant for review and report thereon to the Township.

1004 - Modifications

The Board of Township Supervisors may grant a modification of the requirements of one (1) or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of this Ordinance is observed.

All requests for a modification shall be in writing and shall accompany and be a part of the application for subdivision approval. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the Ordinance involved and the minimum modification necessary.

The Township Supervisors shall keep a written record of all action on all requests for modification.

1005 - Revision and Amendment

The Board of Sandy Township Supervisors may revise, modify, and amend this Ordinance by appropriate action taken at a scheduled public meeting, all in accordance with the applicable provisions of the Pennsylvania Municipalities Planning code, Act 247, as amended.

John Guido
11-21-05
Document 5

·tisement and availability of ordi-

land development ordinances and
ed unless notice of proposed enact-
set forth in this section, and shall
ıe meeting at which passage will be
lace within the municipality where
:e or amendment may be examined
a charge not greater than the cost
ıll publish the proposed ordinance or
)aper of general circulation in the
ays nor less than seven days prior to
)osed ordinance or amendment shall
of or the title and a brief summary,
:itor and setting forth all the provi-
full text is not included:

supplied to a newspaper of general
y at the time the public notice is

)roposed ordinance shall be filed in
ıer county office designated by the
ay impose a fee no greater than that
l costs of storing said ordinances.

endments are made in the proposed
voting upon enactment, the govern-
prior to enactment, readvertise, in
ılation in the municipality, a brief
visions in reasonable detail together
ıts.

'elopment ordinances and amend-
ıfficial ordinance books by reference
if duly recorded therein.

rt. V, § 506. Reenacted and amended
34, effective in 60 days.

Statutory Notes

copies of such ordinance or amendment shall be obtainable for a charge not greater than the cost thereof and available for examination without charge. Subdivision and land development ordinances and amendments may be incorporated into official ordinance books by reference with the same force and effect as if duly recorded therein."

4

Notes of Decisions

Unpublished requirements 1

1. Unpublished requirements

The board of supervisors of township cannot lawfully hold in reserve unpublished requirements capable of general application for occasional use as supervisors deem desirable. County Builders, Inc. v. Lower Providence Tp., 287 A.2d 849, 5 Pa.Cmwlth. 1, Cmwlth.1972.

§ 10507. Effect of subdivision and land development ordinance

Where a subdivision and land development ordinance has been enacted by a municipality under the authority of this article no subdivision or land development of any lot, tract or parcel of land shall be made, no street, sanitary sewer, storm sewer, water main or other improvements in connection therewith shall be laid out, constructed, opened or dedicated for public use or travel, or for the common use of occupants of buildings abutting thereon, except in accordance with the provisions of such ordinance.

1968, July 31, P.L. 805, No. 247, art. V, § 507. Reenacted 1988, Dec. 21, P.L. 1329, No. 170, § 35, effective in 60 days.

Historical and Statutory Notes

The 1988 amendment reenacted the section without apparent change.

Prior Laws:

53 P.S. §§ 46605, 46608, 58063.

1966, Feb. 1, P.L. (1965) 1656, §§ 1605, 1608.
1951, July 19, P.L. 1026, No. 217, § 7.
1949, May 27, P.L. 1955, § 58.
1947, May 31, P.L. 362, No. 166, § 1.

Law Review and Journal Commentaries

Procedure under Pennsylvania Municipalities Planning Code. Lenard L. Wolffe (1975) 14 Duq.L.Rev. 1.

Underused form of land use control—subdivision improvement bond requirements. Donald P. McPherson, III (1974) 45 Pa.B.A.Q. 461.

Notes of Decisions

Denial of permit and application 5
Discretion 2
Estoppel 7
Findings 6
Injunction 8
Land development 1
Review 9
Streets 3
Time limitations 4

1. Land development

Where owners of 13¼-acre tract, located in two boroughs, sought municipal authorities' approval to construct apartment buildings, even though one-quarter acre located in one borough would contain only an access way, parts must be viewed as a whole and such portion fell within definition of "land development." DeFeo v. Borough Council Borough of Brookhaven, 283 A.2d 505, 3 Pa.Cmwlth. 377, Cmwlth.1971.

2. Discretion

When the subdivision plan conforms to the requirements of the ordinance, approval is not discretionary and must be granted. Appeal of Shearer, 22 Cumb. L.J. 146 (1972).

Where plan of proposed land subdivision complies with regulations concerning such plans, township commissioners had no discretionary power to approve or

John Guido
11-21-05
Document 6

EXHIBIT 3
SANDY TOWNSHIP
APPLICATION FORM AND CHECKLIST
FOR SUBDIVISION AND LAND DEVELOPMENT ORDINANCE

The Sandy Township Planning Commission meets the third Wednesday of each month at 7:00 P.M.. **All applications must be presented at least <u>five</u> (5) working days prior to their meeting to be considered.**

<u>INCOMPLETE PLANS WILL BE RETURNED</u> - the official review begins only with a <u>complete</u> submission.

PROPERTY OWNER*

Name DUBOIS DUTCH, LLC
Address Dutch Pantry Restaurant, 2044 Rich Highway,
DuBois, PA 15801
Phone No. (814) 371-6987

*Unless otherwise specified, <u>all</u> correspondence will be sent to this address.

APPLICANT - if other than the owner

Name TONI M. CHERRY, Gleason, Cherry and Cherry, L.L.P.
Address One North Franklin Street, P. O. Box 505,
DuBois, PA 15801
Phone No. (814) 371-5800
Applicant's Interest Attorney for DuBois Dutch, LLC

SURVEYOR/ENGINEER:

Name Lional Alexander, PLS
Address 112 Church Street, Falls Creek, PA 15840
Phone No. (814) 371-5578

Signature of Owner/Applicant Toni M. Cherry Date 10/13/05
attorney for DuBois Dutch, LLC

Note: ALL PLANS <u>MUST</u> BE FILED WITH THE SANDY TOWNSHIP ZONING OFFICER. This application/checklist is for the purpose of review only. It is the developer's responsibility to comply with the Township's Ordinance.

DEVELOPMENT DESCRIPTION:

Location or Street Address 2044 Rich Highway, DuBois, (Sandy Township) PA 15801

Tax Assessment Parcel Number(s) 128-A02-60

County Deed Book 1852 Page 85

Deed Date June 13, 1997 Date of Recording June 24, 1997

Total Property Area 3.643 acres Area covered by this Proposal: 2.605 acres

Zoning District C-H - Commercial Highway

Has a plan been submitted for this property before? Yes X No ____

If yes, when? November 24, 1998 on behalf of DuBois Dutch, LLC

Fee $ 40.00 Paid $ 40.00 Date November 24, 1998

Sandy Township granted subdivision approval on 7/07/99.

TOWNSHIP ACTION:

Initial Submission _____

Reviewed _____ Found Complete _____

Returned as Incomplete _____

SANDY TOWNSHIP PLANNING AND ZONING COMMISSION ACTION:

Preliminary _____ Date _____ Action _____

Final _____ Date _____ Action _____

Referred to the **Clearfield County Planning Commission** on _____.

Preliminary _____ Date _____ Action _____

Final _____ Date _____ Action _____

SANDY TOWNSHIP BOARD OF SUPERVISORS' ACTION:

Preliminary _____ Date _____ Action _____

Final _____ Date _____ Action _____

This is a:

Minor Subdivision	■	(Use Form 1)
Major Subdivision	☐	(Use Form 2)
Land Development	☐	(Use Form 3)
Mobile Home Park	☐	(Use Form 4)

SANDY TOWNSHIP
MINOR SUBDIVISION CHECKLIST
Form 1

Preface: Minor subdivisions are filed in only the Final form (See **Section 408**). Plans may be approved, approved conditionally, or denied for cause. **Any conditional approval must be formally accepted in writing by the developer. If not accepted, it will be a denial per state law.**

- Complete plans must be submitted at least five working days in advance of the next regular Planning meeting. Meetings are held on the third Wednesday of each month at 7:00 p.m.
- Plans which are incomplete, lack supporting documentation, or fail to pay the required fee may be returned as incomplete.
- Decisions are made at public meetings - you are encouraged to attend.

The Township Zoning Officer and Township Engineer will provide assistance to you - (814) 371-4220.

All drawings must be on approved media.

☑ Prepared by Registered Surveyor/Seal ☐

☑ Scale 1" = 100' (or as approved)

Certifications

- ☐ Clearfield County Planning Commission
- ☐ Clearfield County Recorders Office
- ☐ Sandy Township Planning and Zoning Commission
- ☐ Sandy Township Board of Supervisors
- ☐ Sandy Township Engineer
- ☑ Owner

☑ Tract and Lot

- ☑ Bearings and distances
- ☑ Lot area
- ☑ Pins and markers
- ☑ Closure (1:15,000 required)

☑ Sanitary Sewer

☐ DEP Module
☑ Sanitary sewer system connection, access confirmed

☑ Water

☐ Well
☑ Public water system, access confirmed

Located in Flood Plain

☑ No
☐ Yes - comply with **Section 603** ? ☐

THIS DEED,

MADE the 13th day of June in the year nineteen hundred and ninety-seven (1997),

BETWEEN ROBERTA A. GUIDO, of the Township of Sandy, Clearfield County, Pennsylvania, Grantor, party of the first part;

A N D

JOHN A. GUIDO, of R. D. #1, Brockway, Jefferson County, Pennsylvania, Grantee, party of the second part.

WITNESSETH, That in consideration of One Dollar ($1.00) in hand paid, the receipt whereof is hereby acknowledged, the said Grantors do hereby grant and convey to the said Grantee,

ALL of the Grantor's right, title and interest in and to ALL that certain piece or parcel of land situate in the Township of Sandy, Clearfield County, Pennsylvania, bounded and described as follows, to wit:

BEGINNING at a 2" iron pipe, said pipe being North 61° 47' 30" East 120 feet from Station 1611 plus 39.40 feet on Route 219 base line; thence by the legal right of way line of Ramp D, North 61° 47' 30" East 84.00 feet to a 2" iron pipe; thence still by same by a curve to the right having a 100 foot radius 232.66 feet to a 2" iron pipe; thence still by same, South 74° 54' 08" East 57.74 feet to a 2" iron pipe on original line of James M. Norwood lot; thence by same, South 38° 30' 21" East 31.44 feet to an old 2" iron pipe and still by same, North 46° 45' 09" East 21.94 feet to a 2" iron pipe on the legal right of way line of Ramp D; thence by same, South 74° 54' 08" East 162.83 feet to a 2" iron pipe by D. S. Hopkins tract, now McIntosh Coal Company; thence by same, South 38° 30' 21" East 102.25 feet to an old 2" iron pipe corner of James R. Taylor III; thence by same and by James R. Taylor and Robert N. Swisher, South 43° 01' 48" West 400.80 feet to an old 1" iron pipe corner of Robert N. Swisher, South 43° 01' 48" West 400.80 feet to an old 1" iron pipe corner of Robert N. Swisher; thence by same, South 38° 15' 00" East 170.70 feet to a 2" iron pipe by an old 1" iron pipe corner on line of James R. Taylor tract and now or formerly Penn Research and Development Corporation; thence by same, South 47° 00' 00" West 93.45 feet to a 2" iron pipe, still by same, South 29° 15' 37" West 91.75 feet to a 1" iron pipe on the Eastern legal right of way of Route 219; thence by same, North 28° 12' 30" West 224.17 feet to a 2" iron pipe, and still by same, North 61° 47' 30" East 20.00 feet to a 2" iron pipe; thence still by same, North 28° 12' 30" West 339.44 feet to a 2" iron pipe and place of beginning. Containing 3.643 acres.

EXCEPTING AND RESERVING from the above conveyance to the former grantor, his heirs and assigns:

BEGINNING at a point which is 132.40 feet perpendicularly right of way base line Station 1605+96.46 of Route 219; thence by the following courses and distances:

(1) North 21° 33' 52" West a distance of 196.82 feet;
(2) North 43° 01' 48" East a distance of 45.55 feet;
(3) South 38° 15' 00" East a distance of 170.70 feet;
(4) South 47° 00' 00" West a distance of 52.45 feet;
(5) South 29° 15' 37" West a distance of 53.32 feet;

and containing therein exactly 0.282 acre of land.

UPON the express condition that the above described parcel of ground retained by the former grantor as described herein shall not be used in whole or in part, directly or indirectly for automobile or truck service station purposes, or for the sale, offering for sale, storage or distribution of gasoline and/or diesel fuel or any motor vehicle fuel for a period of twenty (20) years from and after June 30, 1982. This condition and restriction is intended for the benefit of BP Oil, Inc., its successors and assigns.

TOGETHER with the perpetual and non-exclusive right to the use of the existing easement to the said former grantor, his heirs, personal representatives and assigns, over and upon an existing service road over and through lands granted herein and leading to the existing driveway of the former grantor.

ALSO excepting and reserving all of the coal, oil, natural gas, fire clay, and all other minerals of every kind and character as fully as the same may have been excepted and reserved in prior deeds of conveyance.

UNDER AND SUBJECT to a certain Lease between Phillip J. Dieringer, as Lessor, and Marley Hotels, Inc., as Lessee, dated July 7, 1982, memorandum of which was recorded in the Office of the Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No. 843, page 79.

BEING the same premises which were conveyed to John A. Guido and Roberta A. Guido by deed of Phillip J. Dieringer, et ux., dated December 19, 1985, and recorded at Clearfield, Pennsylvania, in Deeds and Records Book No. 1130, page 150.

This deed is delivered pursuant to a Property Settlement Agreement entered into between the parties pursuant to a divorce action filed in the Court of Common Pleas of Jefferson County, Pennsylvania, to No. 907 of 1996.

AND the said Grantor will generally warrant and forever defend the property hereby conveyed.

IN WITNESS WHEREOF, said grantor has hereunto set her hand and seal the day and year first above written.

Roberta A. Guido (SEAL)
Roberta A. Guido

VOL 1852 PAGE 88

NOTICE

In accordance with the provisions of "The Bituminous Mine Subsidence and Land Conservation Act of 1966", I/we, the undersigned grantee/grantees, hereby certify that I/we know and understand that I/we may not be obtaining the right of protection against subsidence resulting from coal mining operations and that the purchased property may be protected from damage due to mine subsidence by a private contract with the owners of the economic interest in the coal. I/we further certify that this certification is in a color contrasting with that in the deed proper and is printed in twelve point type preceded by the word "notice" printed in twenty-four point type.

Witness:

_____ _____

_____ _____

This 17 day of June, 1992.

THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE OF THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR STRUCTURE ON OR IN SUCH LAND. THE INCLUSION OF THIS NOTICE DOES NOT ENLARGE, RESTRICT OR MODIFY ANY LEGAL RIGHTS OR ESTATES OTHERWISE CREATED, TRANSFERRED, EXCEPTED OR RESERVED BY THIS INSTRUMENT. (This Notice is set forth pursuant to Act No. 255, approved September 10, 1965, as amended.)

CERTIFICATE OF RESIDENCE

I/we hereby certify, that the precise residence for the Grantee herein is as follows:
R. D. #1, Box 260, Glass School Road, Emeigh PA 15824

_____
Attorney or Agent for Grantee

VOL 1852 PAGE 89

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF Clearfield :

On this, the 13th day of June, 1997, before me, the undersigned officer, personally appeared ROBERTA A. GUIDO, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

Notarial Seal
Diane L. Smith, Notary Public
My Commission Expires March 18, 2000
Member, Pennsylvania Association of Notaries

Diane L. Smith

I hereby CERTIFY that this document is recorded in the Recorder's Office of Clearfield County, Pennsylvania.

Karen L. Starck
Recorder of Deeds

CLEARFIELD COUNTY
ENTERED OF RECORD
TIME 12:45 p 6-24-97
BY Karen L. Starck
FEES 15.50
Karen L. Starck, Recorder

Entered of Record June 24 19 97 12:45 p Karen L. Starck, Recorder

Post-it® Fax Note 7671	Date /	# of pages ▶ 1
To NICK, Barb + Jim	From JAMES KRUK	
Co./Dept.	Co.	
Phone #	Phone #	
Fax #	Fax #	

LLP

R. EDWARD FERRARO
GREGORY M. KRUK
ROSS F. FERRARO

Phone: (814) 268-2202
Fax: (814) 265-8740

..... 9, 2005

Toni M. Cherry, Esq.
GLEASON CHERRY & CHERRY
PO Box 505
DuBois, PA 15801

Anthony S. Guido, Esq.
HANAK, GUIDO & TALADAY
PO Box 487
DuBois, PA 15801

In re: Subdivision Requests – Sunoco/Dutch Pantry
Modification Request – Dutch Pantry

Dear Attorneys Cherry & Guido:

Each of you has submitted a Subdivision Request for a certain property in Sandy Township near the intersection of Route 219 and I-80. You have done so on behalf of your clients, DuBois Dutch LLC, and John A. Guido, respectively.

In addition, Attorney Cherry has submitted a modification request on behalf of her client, DuBois Dutch LLC.

The purpose of this letter is to inform you that both subdivision requests will be considered by the Planning Commission and will be added to their agenda for their regular meeting on Wednesday, November 16, at 7:00 P.M. It is anticipated that the Planning Commission, which is a recommending body, will make their recommendations and forward the two (2) Subdivision Requests to the Supervisors for consideration by the Supervisors at the Supervisors' regular meeting on Monday, November 21, 2005.

In addition, the Modification Request of Attorney Toni Cherry for Dutch Pantry, which is an item which can only be heard by the Supervisors in accordance with the Subdivision and Land Development Ordinance of Sandy Township, will be considered by the Supervisors at their regular meeting on November 21. Attorney Cherry should be prepared to present her Modification Request to the Supervisors at the end of the meeting on the 21st (8:00 P.M.) and then Attorney Guido can make his comments/objections on behalf of the landowner. It is anticipated the Supervisors will make their decision that evening on the Modification Request and both Subdivision Requests.

If there are any questions, please advise.

Very truly yours,

Gregory M. Kruk

Gregory M. Kruk

c: Richard Castonguay, Township Manager – Fax Only
Barbara D. Hopkins, Township Secretary – Fax Only
James Keck, Township Zoning Officer – Fax Only

Sandy Township Supervisors

P.O. BOX 267 • DUBOIS, PA 15801 • PHONE (814) 371-4220 • FAX (814) 375-7837 • E-MAIL sandytwp@adelphia.net

Brady LaBorde
Chairman

Richard Castonguay
Manager

To: Board of Supervisors
From: James H. Keck
Zoning Officer
Date: 11/17/2005
Re: Subdivision Request – DuBois Dutch, LLC "DuBois Dutch Pantry"

Attached for your review and action is a request for a minor subdivision for DuBois Dutch, LLC. The applicant proposes to subdivide a 3.353-acre parcel into two (2) parcels. Parcel "A" will contain 2.597 acres which will be conveyed to DuBois Dutch, LLC. John Guido will retain the residual parcel of 0.756 acres, Parcel "B". Parcel "B" will also include the area referenced as Parcel "C", which contains 0.216 acres. Parcel "C" is also a "service Road Easement" for both Parcels "A" and "B". The sewage planning has been met for both parcels via existing sanitary sewer line. This subdivision is located off of PA State Route 219 in Sandy Township, Clearfield County.

Gleason, Cherry and Cherry on behalf of DuBois Dutch, LLC, has submitted a Request for Modification of the Minimum Lot Size in a Commercial-Highway District, under Sandy Township Zoning Ordinance 1996-2. The Township Ordinance minimum lot size requirement for a Commercial-Highway District is 45,000 square feet. Parcel "B" has a proposed area of 32,910 square feet.

The Sandy Township Planning Commission recommended approval of this subdivision at their November 16, 2005 meeting, contingent upon the Board of Supervisors approval of the Request for Modification submitted.

Toni M. Cherry, Gleason, Cherry, & Cherry, LLP
DUBOIS DUTCH, LLC
Minor Subdivision
PA State Route 219

Property is located off of PA State Rt. 219 and Interstate 80, Exit 97 in Sandy Township. The Property is in a C-H (Commercial Highway) zoned district.
Proposing to subdivide a 3.353 acre parcel into two (2) parcels.
Parcel "A" will contain 2.597 acres.
Parcel "B" will contain 0.756 acres.
The area referenced as Parcel "C" is a *"Service Road Easement"* for both Parcel "A" and Parcel "B".
The 0.216 acres of Parcel "C" is included in the total acreage of Parcel "B".
Both Parcels are severed by public water and sanitary sewer service

A request for modification for the minimum lot size requirement for a Commercial-Highway District under Sandy Township Ordinance 1996-2. The Township Ordinance minimum lot size requirement for a Commercial-Highway District is 45,000 Sq. Ft., Parcel "B" has a proposed area of 32,910 Sq. Ft.

General Information

- Location Map
- Scale, North Arrow & Title Block
- Property corner types and property lines
- Name, Address of property owners
- Existing & Proposed roads, streets and right-of-ways
- Lot lines & sizes
- Yard setback requirements
- Adjoining Property Owners
- Flood plain note
- Wetlands note
- Fee has been paid

Certifications included

- Surveyor
- Owner & notary
- Sandy Township Planning Commission
- Sandy Township Engineer
- Clearfield County Planning Commission
- Sandy Township Supervisors
- Clearfield County Recorders Office

For your information the Pennsylvania Supreme Court has made a ruling on a former minor subdivision submission for this property.

Sandy Township

P.O. BOX 267 • DUBOIS, PA 15801 • PHONE (814) 371-4220 • FAX (814) 375-7837 • E-MAIL sandytwp@adelphia.net

November 23, 2005

Toni M. Cherry, Esq.
Gleason, Cherry and Cherry, L.L.P.
One North Franklin Streert
DuBois, PA 15801

Re: Minor Subdivision - *DuBois Dutch, LLC*

Dear Ms. Cherry:

Your requests for a modification, minor subdivision, for DuBois Dutch, LLC, "DuBois Dutch Pantry Restaurant" of 2044 Rich Highway, DuBois, PA 15801 were denied by the Sandy Township Board of Supervisors at their November 21, 2005 meeting.

Enclosed are four (4) of the five (5) copies of the plat map that you submitted. Sandy Township is retaining one copy for our files.

If you have any questions, please call me at 371-4220.

Sincerely,

James H. Keck
Sandy Township Zoning Officer

cc: Sandy Township Board of Supervisors
Sandy Township Planning Commission
Richard Castonguay, Sandy Township Manager
Gregory S. Ley, DuBois Dutch, LLC
File ✓

12/5/05

TONI,

FOR YOUR FILES.

December 2, 2005

Anthony Guido, Esq.
P.O. Box 257A
DuBois, PA 15801

Re: MINOR SUBDIVISION APPROVAL: John A. Guido

Dear Mr. Guido:

The request for a Minor Subdivision for John A. Guido of 588 Zachary Taylor Highway, Flint Hill, VA 22627 has been approved by the Sandy Township Planning Commission, the Clearfield County Planning Commission, and the Sandy Township Supervisors as of November 28, 2005. The approval is for the subdivision of a 3.35 acre parcel into two (2) parcels. Parcel "A" will contain 2.23 acres and Parcel "B" will contain 1.03 acres. Parcel "B" will also includes the area referenced as Parcel "C", which contains 0.23 acres. Parcel "C" is the "Service Road Easement" for both Parcels "A" and "B". Both parcels have existing uses with public water and sewage. Cross Easements with regards to the DuBois Dutch Pantry restaurant grease trap and sanitary sewer line along with noted use of nine (9) parking spaces for the DuBois Dutch Pantry restaurant are addressed on the approved minor subdivision plans. This subdivision is located off of PA State Route 219 in Sandy Township, Clearfield County.

Enclosed are two (2) copies of the plat map for your use. **As required by Sandy Township regulations, the plat map must be Recorded at the Clearfield County Recorder's Office in Clearfield within ninety (90) days of the above approval date. Proof of recording of the plat map along with a copy of the recorded deed must be submitted to the Sandy Township Zoning Officer prior to issuance of any building permits for this property.**

If you have any questions, please call me at 371-4220.

Sincerely,

James H. Keck
Sandy Township Zoning Officer

cc: Sandy Township Board of Supervisors
Sandy Township Planning Commission
Richard Castonguay, Sandy Township Manager
Lional Alexander, Alexander & Associates, Inc.
John A. Guido
File

1094 Chestnut Ave. • P.O. Box 267 • DuBois, PA 15801
(814) 371-4220 Office • (814) 375-7837 FAX • E-Mail sandytwp@adelphia.net

Sandy Township

P.O. BOX 267 • DUBOIS, PA 15801 • PHONE (814) 371-4220 • FAX (814) 375-7837 • E-MAIL sandytwp@adelphia.net

December 6, 2005

Toni M. Cherry, Esq.
Gleason, Cherry and Cherry, L.L.P.
One North Franklin Streert
DuBois, PA 15801

HAND DELIVERED 12/6/05 3:40 PM

Re: Minor Subdivision - *DuBois Dutch, LLC*

Dear Ms. Cherry:

In compliance with the Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 4, Section 403.7, Step 7 (Final Plan Review) this letter is to inform you that your requests for a modification, minor subdivision, for DuBois Dutch, LLC, "DuBois Dutch Pantry Restaurant" of 2044 Rich Highway, DuBois, PA 15801 were denied by the Sandy Township Board of Supervisors at their November 21, 2005 meeting.

The Sandy Township Board of Supervisors denied the DuBois Dutch, LLC subdivision plan and accompanying request for modification of the minimum requirements for the following reasons:

1. One of the lots of the minor subdivision plan failed to meet the Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 6, Section 611A, Lots and Lost Sizes.

2. One of the lots of the minor subdivision plan failed to meet the Sandy Township Zoning Ordinance 1996-2, Section 307.10 Lot Yard and Height requirement for a Commercial Highway (CH) zoned district, minimum lot size of 45,000 Sq. Ft.

3. The request for modification failed to meet the requirements of Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 10, Section 1004 ,Modifications, by failing to demonstrate the *"exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of this Ordinance is observed."*, as defined in Sandy Township Subdivision and Land Development Ordinance 1997-3 Article 3, Section 302, Definitions.

12/6/05
To: Greg Kruk
From: JHK Sandy Twp.

SECTION 307.10 LOT YARD AND HEIGHT REQUIREMENT TABLE (Continued)

ZONING DISTRICT	Min. Lot* Areas (Sq. Ft.) or Acres	Min. Lot Width (Feet)	Min.[1] Front Yard (Feet)	Min. Side Yard (Feet)	Min. Rear Yard (Feet)	Max.** Height Structure (Feet)	Max. Lot Coverage Percent
C - Commercial	10,000	60	50	10	30	35	65%
CU - Commercial Urban	10,000	60	0	10	30	35	65%
C-H - Commercial Highway	45,000	250	50	20	30	35	40%
I - Industrial	40,000	200	40	20	50	50	40%
CON - Conservation and Recreation	40,000	150	50	30	50	35	20%

*Parcels lacking public sanitary sewer services must meet all DEP on-lot sewage requirements as set forth by the Township's Sewage Enforcement Officer. Non-residential uses in "R" zones must meet the lot, yard, and area requirements of single-family dwellings.

**For barns and agricultural silos, the height limit is seventy (70) feet (see below).

***Must be serviced by public water system and community sanitary sewer facilities.

[1] Corner lots may decrease required front yards on the long dimension by thirty percent (30%).

Note: Special regulations may require different standards than are shown on this table.

To: Greg Kruk

From: JHL
Savoy Twp.

TABLE 307.10 LOT YARD AND HEIGHT REQUIREMENTS

ZONING DISTRICT	Min. Lot* Areas (Sq. Ft.) or Acres	Min.[1] Lot Width (Feet)	Min Front Yard (Feet)	Min. Side Yard (Feet)	Max. Rear Yard (Feet)	** Max. Height Structure (Feet)	Max. Lot Coverage Percent
R-U Residential Urban,							
Single-Family Dwellings	10,000 s.f.	80	30	10	20	35	30%
R-1 Residential Single-Family Dwellings	10,000 s.f.	80	30	5	20	35	30%
Two-Family Dwellings***	10,000 s.f.	80	30	10	20	35	30%
Multi-Family Dwellings***	10,000 s.f. or at least 4,000 s.f. per dwelling unit	80	30	15	20	70	30%
R-A Residential Agricultural Single-Family Dwelling	10,000 s.f.	100	30	10	20	35	30%
Two-Family Dwelling	12,000 s.f.	100	30	10	20	35	30%
Multi-Family Dwellings***	the greater of 15,000 s.f. or 4,000 s.f. per family	100	30	10	20	70	30%

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS DUTCH, LLC, Appellant vs. SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee and JOHN A. GUIDO, Intervening Appellee	CIVIL ACTION - AT LAW No. 05-1983 C.D. Type of Pleading: **Notice of Intervention** Filed on behalf of: Intervening Appellee John A. Guido Counsel of Record for This Party: Anthony S. Guido, Esq. Supreme Court No. 05877 Hanak, Guido and Taladay 498 Jeffers Street P. O. Box 487 DuBois, PA 15801 814-371-7768

Date: December 27, 2005

FILED NO CC
10:34 BL
DEC 28 2005
William A. Shaw
Prothonotary/Clerk of Courts

#5

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

NOTICE OF INTERVENTION

TO WILLIAM SHAW, PROTHONOTARY:

John A. Guido, being an owner of the property directly involved in the above appeal, hereby intervenes in this action as an Interveneing Appellee pursuant to the terms of §11004-A, titled "Intervention", of the Pennsylvania Municipalities Planning Code, the terms of which are incorporated herein by reference thereto.

Respectfully submitted,

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esq.
Attorney for Intervening
Appellee John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify on this the 27th day of December, 2005, a true and correct copy of Intervening Appellee's Notice of Intervention was mailed, via United States First Class Mail, to:

Toni M. Cherry, Esq.
Attorney for DuBois Dutch
Gleason, Cherry & Cherry, PC
P.O. Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Attorney for Sandy Township Board of Supervisors
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

Sandy Township Board of Supervisors
Sandy Township Municipal Building
R.D. #3
DuBois, PA 15801

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esq.
Attorney for Intervening
Appellee John A. Guido

FILED

DEC 28 2005

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS DUTCH, LLC,
Appellant

vs.

SANDY TOWNSHIP BOARD OF SUPERVISORS,
Appellee

and

JOHN A. GUIDO,
Intervening Appellee

CIVIL ACTION - AT LAW

No. 05-1983 C.D.

Type of Pleading:

Praecipe to Amend Case Caption

Filed on behalf of:

Intervening Appellee
John A. Guido

Counsel of Record for This Party:

Anthony S. Guido, Esq.
Supreme Court No. 05877
Hanak, Guido and Taladay
498 Jeffers Street
P. O. Box 487
DuBois, PA 15801

814-371-7768

Date: December 27, 2005

FILED NO CC
m/10:34BK
DEC 28 2005
William A. Shaw
Prothonotary/Clerk of Courts

#4

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

PRAECIPE TO AMEND CASE CAPTION

TO THE PROTHONOTARY:

Kindly amend the case caption in the above referenced matter to read as follows:

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	No. 05-1983 C.D.
and	:	
JOHN A. GUIDO, Intervening Appellee	:	

Respectfully submitted,

HANAK, GUIDO and TALADAY

By

Anthony S. Guido, Esq.
Attorney for Intervening
Appellee John A. Guido

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - AT LAW

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05-1983 C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify on this the 27th day of December, 2005, a true and correct copy of Intervening Appellee's Praecipe to Amend Case Caption was mailed, via United States First Class Mail, to:

Toni M. Cherry, Esq.
Attorney for DuBois Dutch
Gleason, Cherry & Cherry, PC
P.O. Box 505
DuBois, PA 15801

Gregory M. Kruk, Esq.
Attorney for Sandy Township Board of Supervisors
Ferraro, Kruk & Ferraro, LLP
690 Main Street
Brockway, PA 15824

HANAK, GUIDO and TALADAY

By _____
Anthony S. Guido, Esq.
Attorney for Intervening
Appellee John A. Guido

05-1983-CD

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Sandy Township Board of Supervisors
PO Box 267
DuBois, PA 15801

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Barbara Hopkins ☐ Agent ☐ Addressee

B. Received by (Printed Name) Barbara Hopkins
C. Date of Delivery 12-27-05

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7002 2030 0004 5014 7968

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

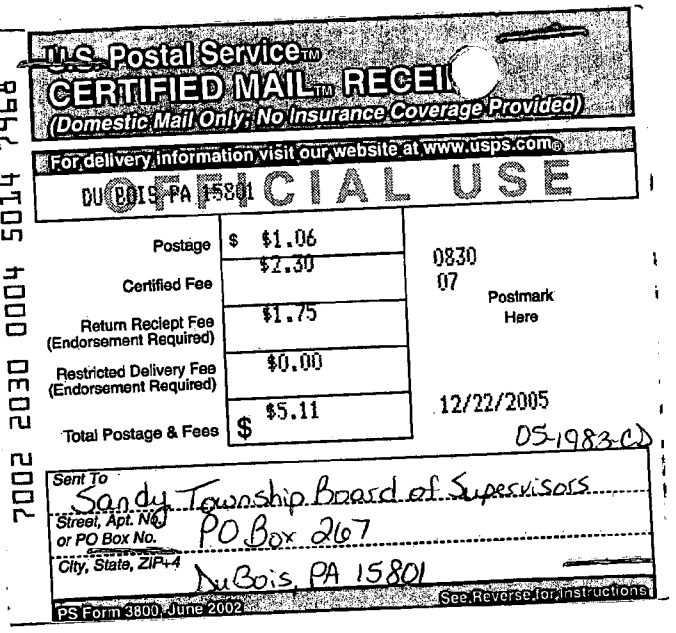
FILED
m/10:28/cc
DEC 28 2005
William A. Shaw
Prothonotary/Clerk of Courts

#3

FILED

DEC 28 2005

William A. Shaw
Prothonotary/Clerk of Courts



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0830
07
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12/22/2005
05-1983-CD

Sent To: Sandy Township Board of Supervisors
Street, Apt. No. or PO Box No.: PO Box 267
City, State, ZIP+4: DuBois, PA 15801

PS Form 3800, June 2002 See Reverse for Instructions

7002 2030 0004 5014 7968

05-1983-CD

Writ of Certiorari to Sandy Twp. Board of Supervisors

FILED
01 3:45 BCH
DEC 22 2005

William A. Shaw
Prothonotary/Clerk of Courts

#2

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC,
Appellant

vs.

SANDY TOWNSHIP BOARD OF SUPERVISORS,
Appellee

: No. 05 - 1983 C.D.
:
: Type of Case: LAND USE APPEAL
:
: Type of Pleading: NOTICE OF APPEAL FROM DECISIONS OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS
:
: Filed on Behalf of: DUBOIS DUTCH, LLC, Appellant
:
: Counsel of Record for Appellant:
:
: TONI M. CHERRY, ESQ.
: Supreme Court No.: 30205
:
: GLEASON, CHERRY AND CHERRY, L.L.P.
: Attorneys at Law
: P. O. Box 505
: One North Franklin Street
: DuBois, PA 15801
:
: (814) 371-5800

FILED 4 cc
01:55 BY Atty T. Cherry
DEC 21 2005
William A. Shaw
Prothonotary/Clerk of Courts
Atty pd. 85.00

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - _____ C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	

NOTICE OF APPEAL FROM LAND USE DECISIONS

AND NOW, comes the Appellant, DUBOIS DUTCH, LLC, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and files this appeal and, in support of which, avers the following:

1. Appellant, DuBois Dutch, LLC, is a limited liability company having its principal place of business at the intersection of I-80 and State Route 219 in Sandy Township, R. D. #3, Box 273C, DuBois, Pennsylvania 15801, and is the equitable owner of 2.605 acres, more or less, situate in the Township of Sandy, Clearfield County, Pennsylvania, upon which it conducts its business, together with the right of ingress and egress to Route 219 across an area which is .222 acres of land.

2. DuBois Dutch, LLC, owns and operates the restaurant business located on the foregoing property and known as Dutch Pantry, which business has been continuously operated on the foregoing site since 1971.

3. The Appellee is the Sandy Township Board of Supervisors, the governing body of Sandy Township, a Second Class Township organized and existing under the laws of the

Commonwealth of Pennsylvania, having its municipal office in the Sandy Township Municipal Building, R. D. #3, DuBois, with a mailing address of P. O. Box 267, DuBois, Pennsylvania 15801.

4. John A. Guido is an adult individual with a mailing address of P. O. Box 98, Flint Hill, Virginia 22627, and is the legal owner of 3.361 acres of land situate in Sandy Township, a portion of which is subject to the equitable interests of DuBois Dutch, LLC.

5. John A. Guido is the owner and former operator of the B.P. Station located at the intersection of I-80 and State Route 219 which business has been operated on said site either as a B.P. Oil Company Station, or a Boron Oil Company Station, or as a Standard Oil Company Station since approximately 1970 until the time that John A. Guido discontinued operating the same and said building is now vacant.

6. That DuBois Dutch, LLC is the beneficial owner of the parcel of ground upon which it conducts its restaurant business, having duly exercised its option to purchase the same from John A. Guido in accordance with the terms of an Option granted to it by Assignment in a Lease dated June 16, 1982, Memorandum of which has been recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, on July 12, 1982, in Deed Book Vol. 843, page 79.

7. That by letter dated November 16, 1998, DuBois Dutch did notify John A. Guido of its intent to exercise the option to purchase said 2.605 acres of land over which it held an option by reason of said lease.

8. That at the time that said Option was granted by Lease dated June 16, 1982, the portion of ground that was the subject of the Option Agreement and the land remaining to the

legal owner after the option was exercised were both in compliance with the Sandy Township Zoning Ordinance in effect at that time.

9. On December 19, 1986, Phillip J. Dieringer and Sherry S. Dieringer sold the gas station and land to John A. Guido and Roberta A. Guido. The deed was recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No. 1130, page 150 on December 22, 1986, and was under and subject to the Lease with Harley Hotels, Inc., a Memorandum of which was dated July 7, 1982, and recorded in Deed Book No. 843, page 79. That was the Lease that gave Harley Hotels, Inc., an option to purchase the land that was the subject of the Lease.

10. On June 19, 1996, a new Zoning Ordinance took effect in Sandy Township, changing the designation of the zoning district in which the properties were located and requiring a minimum lot size that was larger than the size of the land that would remain to John A. Guido after the exercise of the Option by Dutch Pantry Restaurant and the sale of such land to DuBois Dutch, LLC.

11. John A. Guido and his wife were later divorced and pursuant to a Property Settlement Agreement, she did convey all of her right, title and interest in the subject property to him by deed dated June 13, 1997, and recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book Vol. 1852, page 85 on June 24, 1997. Again, that deed was made under and subject to the Lease between Phillip J. Dieringer and Harley Hotels, Inc., a Memorandum of which was recorded in the Offices of the Register and Recorder of Deeds of Clearfield County, Pennsylvania, in Deed Book No. 843, page 79.

12. On July 5, 1998, Harley Hotels, Inc., did sell the Dutch Pantry Restaurant located in Sandy Township to DuBois Dutch, LLC, and by assignment dated July 5, 1998, did assign all of its right, title and interest in the Lease with Phillip J. Dieringer, now his successor, John A. Guido, to DuBois Dutch, LLC.

13. By letter dated July 6, 1998, addressed to both Harley Hotels, Inc., and DuBois Dutch, LLC, John A. Guido did consent to the Assignment of the Lease to DuBois Dutch, LLC, and specifically acknowledged that DuBois Dutch, LLC would have all of the rights and privileges under the Lease including, but not limited to, the right to exercise the Purchase Option for the property upon which the DuBois Dutch Pantry was located.

14. That on November 16, 1998, DuBois Dutch, LLC, gave notice, through its attorney, to John A. Guido, that it was exercising its option to purchase the subject premises pursuant to the terms of Paragraph 9 of the June 16, 1982, Lease.

15. By letter dated November 17, 1998, John A. Guido, by his attorney, advised that he would not convey the subject premises to DuBois Dutch, LLC, nor would he cooperate in securing subdivision approval from Sandy Township unless the Township granted relief from the mandates of the amended ordinance insofar as setbacks, lot size and coverage were concerned.

16. John A. Guido did not proceed before the Planning Commission and the Board of Supervisors of Sandy Township to request a subdivision as is the normal procedure for a landowner who is a party to a contract for sale and, as a result, DuBois Dutch, LLC filed a Complaint for Specific Performance in the Court of Common Pleas of Clearfield County, Pennsylvania, to No. 99 - 160 C.D. on February 12, 1999.

17. On May 17, 1999, the Court of Common Pleas issued an Order to the above-captioned term and number holding all matters between the parties in abeyance until a decision by the Sandy Township Supervisors was made on the application to declare the premises a nonconforming lot and grant the subdivision request.

18. On July 7, 1999, the Board of Supervisors of Sandy Township unanimously approved the subdivision request of DuBois Dutch, LLC, on the basis that the Township and the parties had always treated the property as two separate parcels and the Board agreed that the exercise of the option reverted back to the time when the option was granted and at that time both lots were in conformance with the ordinance existing in 1982.

19. John A. Guido appealed the Township's grant of subjection approval to the Court of Common Pleas of Clearfield County, Pennsylvania, at No. 99 - 867 C.D. and a hearing de novo was held before the Honorable John K. Reilly, Jr., then President Judge of Clearfield County, on June 13, 2000.

20. That by Order dated June 5, 2001, Judge Reilly affirmed the decision of the Township of Sandy granting subdivision approval to DuBois Dutch, LLC, on the basis that the properties had actually been divided as of June 16, 1982, the date of the grant of the option and that when such lots were divided, both lots were in full compliance with the then-existing zoning ordinance of Sandy Township.

21. That John A. Guido again appealed the decision granting subdivision approval and was successful in having the Commonwealth Court, on a two to one decision, overturn the holding of the Clearfield County Court.

22. Thereafter, the Supreme Court of Pennsylvania granted *allocatur* to decide the question of whether a leasehold interest with an option to purchase creates a property interest in the lessee sufficient to support a subdivision under the terms of the Pennsylvania Municipalities Planning Code.

23. By Order issued August 23, 2005, and published at 880 A.2d 1220 (Pa. 2005), the Supreme Court of Pennsylvania declared that the parties had divided the property in fact as of June 16, 1982, because the exercise of the option by DuBois Dutch on November 16, 1998, passed equitable title to the land described in the option to DuBois Dutch, LLC, as of the date the option was granted, to wit, June 16, 1982. However, the Supreme Court determined that there was no legal subdivision as of that date because no request for legal subdivision had been made at that time by any of the parties.

24. That the Supreme Court of Pennsylvania left the parties with the opportunity to seek further relief pursuant to the modification procedure established by the Municipalities Planning Code and Sandy Township and/or to complete the underlying litigation seeking specific performance without a grant of subdivision.

25. That the Sandy Township Zoning Ordinance enacted in June of 1996 establishes the minimum lot size for lots in commercial highway districts at 45,000 square feet, with minimum lot width being 250 feet; minimum front yard setback at 50 feet; minimum side yard setback at 20 feet and minimum rear yard setback at 30 feet with a maximum height structure at 35 feet and a maximum lot coverage at 40%.

26. That the parcel of ground of which DuBois Dutch, LLC, is equitable owner meets all of the above lot yard and height requirements.

27. That the lot that will remain to John A. Guido after the conveyance of the said land to DuBois Dutch, LLC, does not meet the minimum lot size nor the minimum lot width although the lot is fully developed and has an existing structure located thereon.

28. That §512.1(a) of the Pennsylvania Municipalities Planning Code allows the governing body to grant a modification of the requirements of one or more provisions of the subdivision and land development ordinance if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed. See 53 P.S. §10512.1(a).

29. That Article 10, Section 1004 of the Sandy Township Subdivision and Land Development Ordinance adopts the foregoing provisions of the Pennsylvania Municipalities Planning Code.

30. That the Supreme Court of Pennsylvania has reaffirmed that "an option to purchase land is a substantial interest in the land; and, when the option is exercised, the optionee's ownership reverts to the granting of the option." (citations omitted), Guido v. Township of Sandy and DuBois Dutch, LLC, 880 A.2d 1220, 1225 (Pa. 2005).

31. That the Supreme Court affirmed that when DuBois Dutch exercised the option to purchase, the landlord-tenant relationship with John A. Guido ceased to exist and the lease was converted into a contract of sale. (citations omitted) 880 A.2d at 1225.

32. The Supreme Court has declared that "DuBois Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon DuBois Dutch effective June 16, 1982." 880 A.2d at 1225.

33. The Pennsylvania Supreme Court held "that the law views DuBois Dutch's exercise of the Option as effectuating transfer of the Restaurant Parcel to DuBois Dutch as of the date of the 1982 Lease and Option, and that ... such conveyance resulted in the division-in-fact of the Property into the Restaurant Parcel and the Gas Station Parcel ...". 880 A.2d at 1227.

34. That the Supreme Court noted that the MPC and Sandy Township's Subdivision Ordinance provides a procedure by which Sandy Township could excuse failures to conform to its current ordinance and did direct the parties to request a modification of that portion of the ordinance to which the transaction could not conform.

35. That in accordance with the directive from the Supreme Court, DuBois Dutch, LLC, did request a modification of that portion of the ordinance to which the transaction between DuBois Dutch, LLC, and John A. Guido could not conform so that a subdivision could be granted and John A. Guido could not continue to refuse to perform his obligation under the contract between the parties and convey legal title to DuBois Dutch of the portion of land over which it currently holds equitable title as found by the Supreme Court of Pennsylvania.

36. That in complete violation of his duties as a vendor under a contract for sale and in violation of the case law of the Commonwealth of Pennsylvania that has declared that an owner will not be permitted to avoid his contractual obligation under an option allowing a lessee to buy the leased portion of a property by refusing to obtain subdivision if such subdivision was possible, John A. Guido did vehemently oppose the grant of any modification and the approval of the subdivision request of DuBois Dutch, LLC. See Holden v. Kay, 601 A.2d 453 (Pa.Cmwlth. 1991).

37. That the Sandy Township Board of Supervisors did refuse such modification request and did refuse to grant the subdivision request of DuBois Dutch, LLC, at a public hearing held on November 21, 2005, and did issue a formal decision giving its reasons for such refusal by letter dated December 6, 2005.

38. That the Board of Supervisors' performance of its fact-finding function deprived Appellant of a fundamentally fair proceeding and the findings of the Sandy Township Board of Supervisors capriciously and without reasonable explanation disregarded the overwhelming evidence supporting the grant of Appellant's request.

39. That the Sandy Township Board of Supervisors adopted the position taken by John A. Guido throughout the length of these proceedings to deny Appellant its constitutionally-protected right to own and use its land in a way that does not interfere with the health, safety or welfare of the community.

40. That the Sandy Township Board of Supervisors abused its discretion and committed an error in law in finding that the circumstances of the instant case did not support a modification of the requirements of the lot size requirements of the current ordinance when

(a) Sandy Township has recognized the properties as two separate parcels for decades;

(b) both parcels are completely developed and have been in use as separate, completely-developed businesses for over 30 years;

(c) all gas, electric, water and sewer lines are already in place to both properties and have been separately serving such properties separately for decades;

(d) no additional use of any of the infrastructure of Sandy Township is required since both properties are fully developed;

(e) no further building or development permits are required for either parcel;

(f) there was no need for any traffic studies and no change to the traffic patterns currently existing because both properties are fully developed in their intended uses;

(g) the development requested is already in existence and was made in accordance with the comprehensive plan of the Township of Sandy; and

(h) Appellant's request promotes public health, safety, morals, convenience, comfort, amenities, prosperity and general welfare of the community and of a wholesome, serviceable and attractive township and has adequate parking and green space as the same have been required by the Township for decades.

41. That the Board of Supervisors erred and abused its discretion in finding that Appellant had not fulfilled the requirements for the granting of a request for modification when

(a) the physical circumstances of the land in question prevents strict conformity with the provisions of the ordinance because the property has already been divided in fact by the parties and such division-in-fact has long been recognized by Sandy Township;

(b) undue hardship will be exacted upon Appellant because John A. Guido will refuse to perform his contractual responsibilities and avoid his obligations and be rewarded for actively opposing a subdivision when such subdivision is possible under the rules of the Municipalities Planning Code and the ordinances of Sandy Township;

(c) no objection to such modification was made by any member of the public and such grant could not be shown to be contrary to the public interest but, instead, was in complete observance of the purpose and intent of the ordinances of Sandy Township.

(d) the request made by Appellant imposed the conditions that would have been applicable to the property at the time that Appellant acquired his interest in such property in accordance with Section 515.1 of the Municipalities Planning Code and was in accordance with law.

42. That in refusing to sanction a development that it has allowed to exist for 30 years when it knew that Sandy Township had always treated the parcels as separate properties, the Board of Supervisors of Sandy Township abused its discretion and acted capriciously.

43. That it was error for the Board of Supervisors of Sandy Township to refuse to grant Appellant's request for modification and subdivision approval when there was no evidence that the health and safety of the public would be compromised by the granting of such request and when there was absolutely no evidence that this subdivision could affect the community negatively.

44. That the decision of the Board of Supervisors of Sandy Township ignores the determination of the Supreme Court of Pennsylvania that there are arguments supporting a grant of modification in this case.

45. That after refusing to grant Appellant's request for modification and after refusing to grant approval of Appellant's subdivision plan, the Board of Supervisors of Sandy Township did approve a subdivision plan presented by the legal landowner, John A. Guido, which subdivision plan encompassed the taking of land that belongs to Appellant for the use and

ownership of John A. Guido and it did authorize John A. Guido to divide the parcel of land in accordance with his subdivision plan without the authorization and agreement of Appellant.

46. That in granting the subdivision request of John A. Guido, the Board of Supervisors of Sandy Township did abuse its discretion and act capriciously in the following manner:

(a) That it approved the taking of land that the Supreme Court of Pennsylvania has decreed belongs to Appellant;

(b) That it approved a plan that gave land to John A. Guido upon which is located and constructed the parking lot of the Appellant and the grease trap of Appellant;

(c) By approving a plan that confiscates land under which is located the utilities that serve Appellant's business; and

(d) By approving a plan of subdivision which ignores the vested rights that Appellant has in the land in question and by giving that land to John A. Guido without the approval of and adequate compensation to Appellant.

47. That government can only take the land of a private citizen for a public purpose under the strict guidelines of the eminent domain procedures enacted by the legislature and for no other purpose and in no other manner and the action of the Board of Supervisors of Sandy Township in approving the subdivision request of John A. Guido violated the laws of the Commonwealth of Pennsylvania and took private land from one individual and gave it to another without following the strict procedures of the statutes of Pennsylvania constituting a confiscatory taking.

48. That the grant of John A. Guido's subdivision request by the Board of Supervisors of Sandy Township and allowing him to take land that he holds in trust for Appellant violates

the law of the Commonwealth of Pennsylvania and ignores the clear decision by the Supreme Court of Pennsylvania that the land that John A. Guido claims for himself is already owned by Appellant having been divided and given to Appellant with the full agreement of John A. Guido.

WHEREFORE, Appellant respectfully requests that:

(a) the decision of the Board of Supervisors of Sandy Township denying Appellant's modification request and request for approval of subdivision be overturned;

(b) the Board of Supervisors' approval of the subdivision plan of John A. Guido be declared invalid and dismissed;

(c) Your Honorable Court take testimony in this case and approve the request for modification of Appellant, DuBois Dutch, LLC, and approve the subdivision request of DuBois Dutch, LLC, in accordance with the division-in-fact effected by the parties;

(d) such other relief as is necessary to allow Appellant to secure the transfer of legal title to the property over which it has an equitable interest to the Appellant.

Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorneys for Appellant

VERIFICATION

I, TONI M. CHERRY, ESQ., attorney for DUBOIS DUTCH, LLC, Appellant, verify that the information provided in the foregoing Notice of Appeal From Land Use Decisions is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.

Toni M. Cherry

DATED: December 21, 2005

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS DUTCH, LLC, Appellant	:	
vs.	:	No. 05 - _____ C.D.
SANDY TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2005, a certified copy of the Notice of Appeal From Land Use Decisions was served upon the following person by mailing the same to him by United States First Class Mail, postage prepaid, by depositing the same in the United States Post Office at DuBois, Pennsylvania, addressed as follows:

ANTHONY S. GUIDO, ESQ.
Hanak, Guido and Taladay
Attorneys at Law
P. O. Box 487
DuBois, PA 15801
Attorney for Landowner, John A. Guido

GLEASON, CHERRY AND CHERRY, L.L.P.

By _____
Attorney for Appellant

Dated: December 21, 2005

FILED

DEC 2 1 2005

William A. Shaw
Prothonotary/Clerk of Courts

COPY

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION
WRIT OF CERTIORARI

DuBois Dutch, LLC Plaintiff(s)	*	
Vs.	*	No. 2005-01983-CD
Sandy Township Board of Supervisors	*	

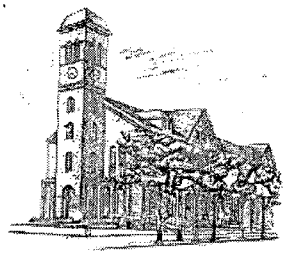
TO: Sandy Township Board of Supervisors

On December 21, 2005, the Appellants in the above action have duly filed a Land Use Appeal Notice on the decisions of The Sandy Township Board of Supervisors to deny Appellant's modification request and request for approval of subdivision. A copy of said Notice is hereby attached.

Therefore, you are hereby COMMANDED, within twenty (20) days after the receipt of this Writ, to certify to the Court your entire record in this matter from which the Land Use Appeal has been taken, or a true and correct copy thereof: including any transcripts of testimony in existence and available to Sandy Township Board of Supervisors at the time this Writ is received by you.

WITNESS THE HAND AND SEAL OF
WILLIAM A. SHAW, PROTHONOTARY,

Date: December 22, 2005



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts
Jacki Kendrick Deputy Prothonotary/Clerk of Courts
Bonnie Hudson Administrative Assistant
David S. Ammerman Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

May 8, 2007

Commonwealth Court of Pennsylvania
Irvis Office Building
6th Floor, Room 624
Commonwealth Ave. & Walnut St.
Harrisburg, PA 17120

Re: DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido
No. 05-1983-CD
Commonwealth Court No. 403 CD 2007

Dear Prothonotary:

Enclosed you will find a supplement to the record previously appealed to your office. Please attach to the original record.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

Docket Supp.

Paid.

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
10 MAY 2007 13 16

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
		****APPEAL MAILED TO COMMONWEALTH COURT APRIL 12, 2007****	
51	04/12/07	Letter to Commonwealth Court transferring appeal	01
52	04/12/07	Certified Mail Receipt	01
53	04/16/07	Domestic Return Receipt	01
54	04/19/07	Appellant's Answer to Application for Supersedeas filed by Intervening Appellee	08
55	04/25/07	Praecipe to Withdraw Application for Supersedeas	03
56	05/07/07	Amended Certificate of Service of Concise Statement of Matters	05
57	05/08/07	Letter, Re: Notification of mailing supplement to appeal to Commonwealth Court mailed to Toni M. Cherry, Esq.; Gregory M. Kruk, Esq.; and Anthony S. Guido, Esq. with certified copies of the docket sheet and the document listing required by Pa.R.A.P. 1931(c)	09

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
01	12/21/05	Notice of Appeal from Land Use Decisions	17
02	12/22/05	Certified Mail Receipt, Writ of Certiorari mailed by certified mail to Sandy Township Board of Supervisors	01
03	12/28/05	Domestic Return Receipt	01
04	12/28/05	Praecipe to Amend Case Caption	04
05	12/28/05	Notice of Intervention	03
06	01/13/06	Response to Writ of Certiorari (entire record from Sandy Township in this matter)	137
07	01/27/06	Motion to Dismiss Appeal of DuBois Dutch, LLC with Order of Court regarding scheduling, filed February 1, 2006	05
08	02/01/06	Certificate of Service, Motion to Dismiss Appeal of DuBois Dutch, LLC and Brief in Support of Motion	03
09	02/07/06	Certificate of Service, Re: Order of Court for Argument	02
10	03/17/06	Motion and Order scheduling argument	06
11	03/17/06	Certificate of Service, Motion	02
12	03/22/06	Certificate of Service, Re: Order of Court for argument	02
13	04/07/06	Motion to Present Additional Evidence	10
14	04/13/06	Order, Re: Motion to Dismiss Appeal withdrawn	02
15	04/13/06	Order, Re: argument on Motion to Present Additional Evidence scheduled	02
16	04/20/06	Motion to Dismiss Appeal of DuBois Dutch, LLC and Order scheduling argument	09
17	04/20/06	Certificate of Service, Motion	01
18	04/26/06	Certificate of Service, Order of Court for Argument on Motion to Dismiss Appeal	02
19	04/27/06	Answer to Motion to Present Additional Evidence	08
20	05/03/06	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC	09
21	05/04/06	Order, Re: Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal	02
22	06/07/06	Notice, Re: objections to transcripts	01
23	06/07/06	Transcript of Proceedings, Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal held May 3, 2006	Separate Cover
24	06/21/06	Opinion	04
25	07/03/06	Petition to Reconsider Order, or, In the Alternative, to Amend Order	18
26	07/14/06	Order, Re: Petition to Reconsider Order filed July 3, 2006, Dismissed	01
27	08/17/06	Order, Re: evidentiary hearing scheduled	01
28	10/03/06	Motion to Dismiss Notice of Appeal (copy—original missing from record)	12
29	10/05/06	Order, Re: briefs to be filed	01
30	11/06/06	Certificate of Service, brief on behalf of Intervening Appellee	02
31	12/05/06	Motion for Oral Argument	04
32	12/05/06	Order, Re: Motion for Oral Argument Denied	01
33	01/23/07	Notice, Re: objections to transcripts	01
34	01/23/07	Transcript of Proceedings, Evidentiary Hearing held October 3, 2006	Separate Cover
35	01/23/07	Transcript Exhibits Part One: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 1	Separate Cover
36	01/23/07	Transcript Exhibits Part Two: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 2	Separate Cover
37	01/23/07	Transcript Exhibits Part Three: Sandy Township Subdivision and Land Development Ordinance	Separate Cover

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
38	01/23/07	Transcript Exhibits Part Four: Zoning Ordinance for the Township of Sandy, June 1996	Separate Cover
39	02/13/07	Notice, Re: objections to transcript	01
40	02/13/07	Transcript of Proceedings, Argument on Appellant's Land Use Appeal held April 10, 2006	Separate Cover
41	02/26/07	Opinion and Order	40
42	03/02/07	Notice of Appeal to Commonwealth Court, Proof of Service, and Request for Transcript (no request for transcript has been made due to the fact that the complete transcript has been lodged of record)	08
43	03/05/07	Supplemental Proof of Service, Notice of Appeal	02
44	03/07/07	Commonwealth Court of Pennsylvania, Notice of Docketing Appeal and Notice to Counsel 403 CD 2007	02
45	03/16/07	Order, Re: John Guido to file concise statement	01
46	03/19/07	Order (Amended), Re: John Guido to file concise statement	01
47	03/22/07	Concise Statement of Matters	07
48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01
50	04/12/07	Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	07

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
04/12/2007	Letter to Commonwealth Court, Re: appeal mailed April 12, 2007.	Fredric Joseph Ammerman
	Certified Mail Receipt, addressed to Commonwealth Court of PA, filed.	Fredric Joseph Ammerman
04/16/2007	Domestic Return Receipt. Received on April 13, 2007. No CC	Fredric Joseph Ammerman
04/19/2007	Appellant's Answer to Application For Supersedeas Filed by Intervening Appellee, filed by s/ Toni M. Cherry, Esquire. 2CC Atty. T. Cherry	Fredric Joseph Ammerman
04/25/2007	Praecipe To Withdraw Application for Supersedeas, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
05/07/2007	Amended Certificate of Service of Concise Statement of Matters: copies of the Concise Statement of Matters were served upon Hon. Fredric J. Ammerman, Pres. Judge, Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire on March 21, 2007 by First Class Mail. Filed by s/ Anthony S. Guido, Esquire. 1CC to Atty.	Fredric Joseph Ammerman
05/08/2007	May 8, 2007, Supplement to Appeal Mailed to Commonwealth Court. May 8, 2007, Letters, Re: Notification of mailing supplement to appeal mailed to Toni M. Cherry, Esq.; Gregory M. Kruk, Esq.; and Anthony S. Guido, Esq. with certified copies of the docket sheet and document listing required by Pa.R.A.P. 1931 (c).	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAY 08 2007

Attest.

Prothonotary/
Clerk of Courts

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Civil Other

Date	Selected Items	Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Civil Other

Date	Selected Items	Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Civil Other

Date	Selected Items	Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman
04/12/2007	April 12, 2007, Appeal mailed to Commonwealth Court. April 12, 2007, Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	Fredric Joseph Ammerman

File Copy

Commonwealth Court of Pennsylvania

Kristen W. Brown
Prothonotary
Michael Krimmel, Esq.
Chief Clerk of Commonwealth Court

Irvis Office Building, Room 624
Harrisburg, PA 17120
717-255-1652

August 11, 2008

TO:

RE: Dubois Dutch LLC v. Sandy Twp Bd. of Spvrs (Guido)
No.403 CD 2007

Trial Court/Agency Dkt. Number: No. 05-1983 C.D.
Trial Court/Agency Name: Clearfield County Court of Common Pleas

Annexed hereto pursuant to Pennsylvania Rules of Appellate Procedure 2571 and 2572 is the entire record for the above matter.

Contents of Original Record:

Original Record Item	Filed Date	Description
trial court record	April 16, 2007	1 box

Date of Remand of Record: 8/11/2008
10:22:25AM

Enclosed is an additional copy of the certificate. Please acknowledge receipt by signing, dating, and returning the enclosed copy to the Prothonotary Office or the Chief Clerk's office.

Commonwealth Court Filing Office

Signature

Printed Name

WILLIAM A. SHAW
Prothonotary
My Commission Expires
1st Monday in Jan. 2010
Clearfield Co., Clearfield, PA

August 12, 2008
Date

FILED
m/11:13/8M
AUG 12 2008

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

05-1983-CD

Dubois Dutch, LLC	:	
	:	
v.	:	
	:	
Sandy Township Board of Supervisors and John A. Guido	:	
	:	No. 403 C.D. 2007
Appeal of: John A. Guido	:	Argued: October 9, 2007

FILED
AUG 12 2008
William A. Shaw
Prothonotary/Clerk of Courts

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION BY JUDGE COLINS **FILED: December 28, 2007**

John A. Guido appeals an order of the Court of Common Pleas of Clearfield County that reversed an order of the Sandy Township Board of Supervisors and granted a request filed by Dubois Dutch seeking (1) a modification of a requirement of the Township's subdivision ordinance (SALDO) and (2) subdivision approval for a tract of land in the township.[1]

This case presents a long and tortured history, which we will recite below. In 1982 Philip and Sherry Dieringer owned a 3.379-acre tract of land in the Township, hereinafter referred to as the Property. In that year, the Dieringers informally separated the tract into two parcels by virtue of a lease between the Dieringers and Harley Hotels. The lease granted to Harley Hotels the use of a

[1] Because the Board of Supervisors made no record of the proceedings before it, the trial court conducted a de novo review and accepted evidence offered only by Dubois Dutch.

2.605-acre portion of the Property upon which Harley Hotels operated a Dutch Pantry restaurant. The lease also contained a purchase option entitling the lessee to purchase the Dutch Pantry tract. On the remaining .772-acre parcel, the Dieringers operated a gas station and convenience store. Guido purchased the Property in 1986 for $110,000. The agreement of sale included a provision entitling Guido to receive payment of $30,000 upon the exercise of the lease option by the lessee of the restaurant parcel. At the time the Dieringers entered the lease with Harley Hotels, and continuing after their sale of the Property to Guido, the Township's 1964 zoning ordinance remained applicable to the approved uses in the C-H Commercial-Highway District in which the Property is located. During this period, both parcels comprising the Property satisfied the minimum lot size requirements of the ordinance. However, in 1996, the Township adopted a new zoning ordinance that changed the minimum lot sizes for this district to 45,000 square feet. Consequently, the smaller of the informally separated lots, being only 33,259 square feet in size, did not conform to the 1996 zoning ordinance.

In 1998 Dubois Dutch purchased the Dutch Pantry restaurant from Harley Hotels, and succeeded the latter as lessee in the lease agreement with Guido. Dubois Dutch attempted to exercise its purchase option in November 1998, before the expiration of the lease. Guido refused to convey the parcel for the espoused reason that he would not be able to continue his commercial use of the smaller remaining parcel under the new minimum size requirements of the ordinance. Dubois Dutch approached the Township's Planning Commission seeking formal subdivision of the Property in accordance with the lease terms. The Commission rejected the request.

Dubois Dutch then filed a specific performance action in the Court of Common Pleas of Clearfield County, seeking an order compelling Guido to complete the transfer of the property. In response, Guido contended that he could not comply with such a request because that action would violate the zoning ordinance. Guido contemporaneously filed an ejectment action against Dubois Dutch. In response to these pending matters, the trial court (1) directed Dubois Dutch to file a second request for subdivision approval with the Township, and (2) stayed all matters until the Township Planning Commission resolved the request for subdivision approval.

When Dubois Dutch submitted its renewed application with the Commission for subdivision approval, it asserted that formal sanction of the division was proper either because the 1982 lease option effectuated a subdivision of the property at the time the lease was signed, or that the exercise of the option resulted in an ownership of the land relating back to the 1982 lease execution. With the latter reasoning, Dubois Dutch suggested that the former zoning ordinance would apply, based on the relation-back theory such as would render the smaller residue lot a lawful nonconforming lot and use.

The Planning Commission approved Dubois Dutch's request, and Guido appealed to the Common Pleas Court. That Court, following a de novo hearing, affirmed the Commission's grant of subdivision approval, concluding (1) that the execution of the lease and Dubois Dutch's attempt to exercise the option effectuated a subdivision under the Pennsylvania Municipalities Planning Code (MPC)[2] and the previous zoning ordinance, and (2) that the smaller lot and its use as a gas station, constituted a permissible pre-existing non-conforming lot under

[2] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202.

the 1996 zoning ordinance. Guido appealed that decision to this Court, which reversed the trial court based upon its conclusion that the leasehold and option to purchase did not effect a subdivision of the property under the MPC or the previous ordinance and hence, the smaller lot could not constitute a pre-existing non-conforming lot upon Dubois Dutch's exercise of the option.

Dubois Dutch appealed this Court's decision to the Supreme Court, which limited the focus of the appeal to the question of "whether a leasehold interest in a parcel of land coupled with an option to purchase such land creates a property interest in the lessee-optionee sufficient to support a legally recognized subdivision of the property either at the time the lease and option were simultaneously executed or when the purchase option was exercised." *Guido v. Township of Sandy*, 584 Pa. 93, 95, 880 A.2d 1220, 1221 (2005).

In resolving this issue, the Supreme Court first quoted its decision in *Detwiler v. Capone*, 357 Pa. 495, 55 A.2d 380, 383 (1947), wherein that Court equated purchase options in leases to contracts for the sale of land, both of which constitute encumbrances on the land. When two parties enter a lease with an option to purchase, upon execution of the option, the courts regard the title (and ownership) as relating back to the date the lessor/optionor granted the option. In reliance upon *Detwiler*, our Supreme Court also noted that when a lessee/optionee verbally communicates to the lessor/optionor his or her intent to exercise the option, the lessor/lessee relationship terminates and that communication transforms the lease into a contract for sale. In summary, the Court concluded that "Dubois Dutch's equitable title reverted, upon exercise of the Option, back to the date of formation of the 1982 Lease and Option conferring title upon Dubois Dutch effective June 16, 1982." *Guido*, 584 Pa. at 102, 880 A.2d at 1225.

After setting forth this well-accepted tenet, the Supreme Court, while agreeing that the potential right to exercise an option does not create a division in fact of a parcel, stated that the exercise of such an option does create a division-in-fact that relates back to the date of the agreement. However, as the Supreme Court noted, division-in-fact is a concept distinct from legal subdivision, i.e., one that is accomplished under a subdivision ordinance, and the exercise of the option could not, the Supreme Court opined, result in a legal subdivision.

The Supreme Court, citing the MPC, noted the manner in which compliance with a formal subdivision process furthers the goals of "protecting and promoting the safety and health of the public, accomplishing coordinated development, guiding the uses of land and structure, and preserving the Commonwealth natural resources. 53 P.S. §10105." 584 Pa. at 106, 880 A.2d at 1227. The Court reflected upon the observation that, had Dubois Dutch's predecessor in interest acted in a timely manner to exercise its option, the earlier subdivision ordinance would have applied, resulting in a division of the property that created two lots of sufficient size to satisfy the minimum lot size requirements of the earlier ordinance.

The Supreme Court then noted that the MPC and the Township's 1997 subdivision ordinance both contain "modification" provisions permitting property owners to seek relief from the application of a subdivision ordinance. Under Section 512.1 of the MPC, 53 P.S. §10512.1, the governing body or planning commission (as the case may be)

> may grant a modification of the requirements of one or more provisions [of the subdivision ordinance] if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be

contrary to the public interest and that the purpose and intent of the ordinance is observed.

Finally, the Supreme Court agreed with this Court's conclusion that Dubois Dutch's request of the Planning Commission to designate the property as a pre-existing non-conforming use did not constitute a tacit request for modification, but noted that the parties could seek subdivision approval under the modification provision and also proceed to complete litigation of Dubois Dutch's specific performance claim.

Following this opinion, Dubois Dutch filed a written request with the Township's Planning Commission for subdivision approval under the ordinance modification provision of the minimum lot size requirements based upon the division of the property that occurred, and related back to, the 1982 purchase-option agreement. Guido objected to Dubois Dutch's request, and also submitted his own request for subdivision approval --- one that he based upon a reconfiguration of the property lines. Guido's proposed subdivision required the taking of some of the property to which Dubois Dutch was entitled under the lease-option, thereby enlarging Guido's remaining tract. On November 21, 2005, the Planning Commission denied Dubois Dutch's request and granted Guido's. Dubois Dutch appealed those decisions to the trial court, and Guido intervened in Dubois Dutch's appeal.

The trial court conducted a de novo review of the Planning Commission's decision. At that hearing, Guido presented no evidence. The trial court reversed the Planning Commission's decisions by: (1) granting Dubois Dutch's request for modification and subdivision request, and waiving the minimum lot size requirements; (2) denying Guido's subdivision request; and (3)

directing that Dubois Dutch's subdivision plan be filed of record and that Guido's recorded subdivision plan be voided and stricken from the Clearfield County records. Guido filed an appeal of the trial court's decision that the Court now considers.

With regard to the trial court's grant of the modification request by Dubois Dutch, Guido raises three issues: (1) whether the trial court had subject matter jurisdiction to modify the minimum lot size requirements through the subdivision modification request; (2) whether the trial court erred in granting the request by failing to address the specific requirements of the modification provision; and (3) whether the trial court erred in not applying the doctrine of res judicata to preclude Dubois Dutch from initiating the modification request. Because the trial court did not address the res judicata issue, and because it could be dispositive, we will first address this issue.

Res judicata will preclude a court from considering a second identical application for relief, i.e. a variance. In order to apply, a litigant must establish the identity of four elements in the matter for which the relief is sought:

> (1) Identity of the thing sued for;
> (2) Identity of the cause of action;
> (3) Identity of persons and parties to the action; and
> (4) Identity of the quality in the persons for or against whom the claim is made.

City of Pittsburgh v. Zoning Board of Adjustment of the City of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989). However, in zoning matters, courts apply the rule

sparingly, perceiving the need for flexibility in land use matters to outweigh the burdens of repetitive litigation. *Price v. Bensalem Township Zoning Hearing Board*, 569 A.2d 1030, 1032 (1990). In *Price*, the Court also noted that res judicata will not bar a subsequent application when changes associated with the land itself are evident. The Court in *Price* concluded that, although an earlier application for a variance was res judicata as to a subsequent variance request, the doctrine did not bar a subsequent claim that the property was validly nonconforming as to the ordinance, even though the relief sought was the same.

Essentially, Guido argues that Dubois Dutch had the opportunity in the initial application for subdivision to include an alternative request for modification with that first request. Guido is correct in pointing out that Dubois Dutch initially filed for subdivision approval under the relation-back theory, which occurred in 1982 and Dubois Dutch argued only that this meant that the ordinance provisions applicable at that time were also binding. Dubois Dutch elected to submit a formal written application under the modification provision only after the Supreme Court confirmed that the 1997 ordinance applied. However, as in *Price*, although Dubois Dutch sought essentially the same relief, the manner of obtaining the relief, i.e., formal subdivision, arose under different forms of application. Although this is an admittedly close case, given the fact that there have been no material alterations to the land itself, we are inclined to conclude that the doctrine of res judicata does not apply under the present circumstances.

As to the remaining issues, which the trial court did address, we believe that the Honorable Fredric J. Ammerman of the Court of Common Pleas of Clearfield County ably and correctly resolved those questions. Accordingly, we

will affirm the trial court on the basis of his well-reasoned decision, which we hereto attach.

JAMES GARDNER COLINS, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

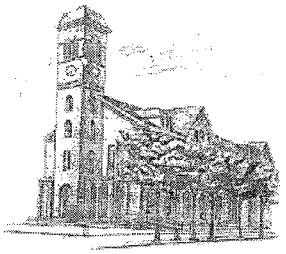
Dubois Dutch, LLC	:	
	:	
v.	:	
	:	
Sandy Township Board of Supervisors and John A. Guido	:	
	:	
	:	No. 403 C.D. 2007
Appeal of: John A. Guido	:	

ORDER

AND NOW, this 28th day of December 2007, the order of the Court of Common Pleas of Clearfield County is affirmed on the basis of the opinion of Judge Fredric J. Ammerman at No. 05-1983-CD, ___ Pa. D. & C.4th ___, filed February 23, 2007.

James G. Colins

JAMES GARDNER COLINS, Judge



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

COPY

Fredric J. Ammerman, President Judge
Court of Common Pleas
230 E. Market Street
Clearfield, PA 16830

Toni M. Cherry, Esq.
PO Box 505
1 North Franklin Street
DuBois, PA 15801

Gregory M. Kruk, Esq.
690 Main Street
Brockway, PA 15824

Anthony S. Guido, Esq.
PO Box 487
DuBois, PA 15801

DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido

Court No. 05-1983-CD; Commonwealth Court No. 403 CD 2007

Dear Counsel:

Please be advised that a supplement to the above referenced record was forwarded to the Commonwealth Court of Pennsylvania on May 8, 2007. For a listing of what documents were included in this supplement, please see attached docket and document listing.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
		****APPEAL MAILED TO COMMONWEALTH COURT APRIL 12, 2007****	
51	04/12/07	Letter to Commonwealth Court transferring appeal	01
52	04/12/07	Certified Mail Receipt	01
53	04/16/07	Domestic Return Receipt	01
54	04/19/07	Appellant's Answer to Application for Supersedeas filed by Intervening Appellee	08
55	04/25/07	Praecipe to Withdraw Application for Supersedeas	03
56	05/07/07	Amended Certificate of Service of Concise Statement of Matters	05

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
01	12/21/05	Notice of Appeal from Land Use Decisions	17
02	12/22/05	Certified Mail Receipt, Writ of Certiorari mailed by certified mail to Sandy Township Board of Supervisors	01
03	12/28/05	Domestic Return Receipt	01
04	12/28/05	Praecipe to Amend Case Caption	04
05	12/28/05	Notice of Intervention	03
06	01/13/06	Response to Writ of Certiorari (entire record from Sandy Township in this matter)	137
07	01/27/06	Motion to Dismiss Appeal of DuBois Dutch, LLC with Order of Court regarding scheduling, filed February 1, 2006	05
08	02/01/06	Certificate of Service, Motion to Dismiss Appeal of DuBois Dutch, LLC and Brief in Support of Motion	03
09	02/07/06	Certificate of Service, Re: Order of Court for Argument	02
10	03/17/06	Motion and Order scheduling argument	06
11	03/17/06	Certificate of Service, Motion	02
12	03/22/06	Certificate of Service, Re: Order of Court for argument	02
13	04/07/06	Motion to Present Additional Evidence	10
14	04/13/06	Order, Re: Motion to Dismiss Appeal withdrawn	02
15	04/13/06	Order, Re: argument on Motion to Present Additional Evidence scheduled	02
16	04/20/06	Motion to Dismiss Appeal of DuBois Dutch, LLC and Order scheduling argument	09
17	04/20/06	Certificate of Service, Motion	01
18	04/26/06	Certificate of Service, Order of Court for Argument on Motion to Dismiss Appeal	02
19	04/27/06	Answer to Motion to Present Additional Evidence	08
20	05/03/06	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC	09
21	05/04/06	Order, Re: Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal	02
22	06/07/06	Notice, Re: objections to transcripts	01
23	06/07/06	Transcript of Proceedings, Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal held May 3, 2006	Separate Cover
24	06/21/06	Opinion	04
25	07/03/06	Petition to Reconsider Order, or, In the Alternative, to Amend Order	18
26	07/14/06	Order, Re: Petition to Reconsider Order filed July 3, 2006, Dismissed	01
27	08/17/06	Order, Re: evidentiary hearing scheduled	01
28	10/03/06	Motion to Dismiss Notice of Appeal (copy—original missing from record)	12
29	10/05/06	Order, Re: briefs to be filed	01
30	11/06/06	Certificate of Service, brief on behalf of Intervening Appellee	02
31	12/05/06	Motion for Oral Argument	04
32	12/05/06	Order, Re: Motion for Oral Argument Denied	01
33	01/23/07	Notice, Re: objections to transcripts	01
34	01/23/07	Transcript of Proceedings, Evidentiary Hearing held October 3, 2006	Separate Cover
35	01/23/07	Transcript Exhibits Part One: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 1	Separate Cover
36	01/23/07	Transcript Exhibits Part Two: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 2	Separate Cover
37	01/23/07	Transcript Exhibits Part Three: Sandy Township Subdivision and Land Development Ordinance	Separate Cover

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
38	01/23/07	Transcript Exhibits Part Four: Zoning Ordinance for the Township of Sandy, June 1996	Separate Cover
39	02/13/07	Notice, Re: objections to transcript	01
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41	02/26/07	Opinion and Order	40
42	03/02/07	Notice of Appeal to Commonwealth Court, Proof of Service, and Request for Transcript (no request for transcript has been made due to the fact that the complete transcript has been lodged of record)	08
43	03/05/07	Supplemental Proof of Service, Notice of Appeal	02
44	03/07/07	Commonwealth Court of Pennsylvania, Notice of Docketing Appeal and Notice to Counsel 403 CD 2007	02
45	03/16/07	Order, Re: John Guido to file concise statement	01
46	03/19/07	Order (Amended), Re: John Guido to file concise statement	01
47	03/22/07	Concise Statement of Matters	07
48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01
50	04/12/07	Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	07

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
04/12/2007	Letter to Commonwealth Court, Re: appeal mailed April 12, 2007.	Fredric Joseph Ammerman
	Certified Mail Receipt, addressed to Commonwealth Court of PA, filed.	Fredric Joseph Ammerman
04/16/2007	Domestic Return Receipt. Received on April 13, 2007. No CC	Fredric Joseph Ammerman
04/19/2007	Appellant's Answer to Application For Supersedeas Filed by Intervening Appellee, filed by s/ Toni M. Cherry, Esquire. 2CC Atty. T. Cherry	Fredric Joseph Ammerman
04/25/2007	Praecipe To Withdraw Application for Supersedeas, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
05/07/2007	Amended Certificate of Service of Concise Statement of Matters: copies of the Concise Statement of Matters were served upon Hon. Fredric J. Ammerman, Pres. Judge, Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire on March 21, 2007 by First Class Mail. Filed by s/ Anthony S. Guido, Esquire. 1CC to Atty.	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

MAY 08 2007

Attest.

William A. Shaw
Prothonotary/
Clerk of Courts

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

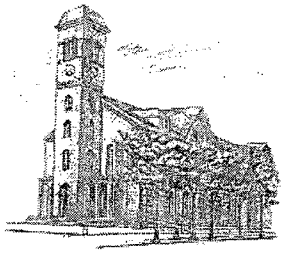
Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman
04/12/2007	April 12, 2007, Appeal mailed to Commonwealth Court. April 12, 2007, Letters, Re: Notification of mailing appeal mailed to Toni M. Cherry, Esq., Gregory M. Kruk, Esq., and Anthony S. Guido, Esq., with certified copies of docket sheet and Document Listing required by Pa.R.A.P. 1931(c).	Fredric Joseph Ammerman



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

COPY

Fredric J. Ammerman, President Judge
Court of Common Pleas
230 E. Market Street
Clearfield, PA 16830

Toni M. Cherry, Esq.
PO Box 505
1 North Franklin Street
DuBois, PA 15801

Gregory M. Kruk, Esq.
690 Main Street
Brockway, PA 15824

Anthony S. Guido, Esq.
PO Box 487
DuBois, PA 15801

DuBois Dutch, LLC
Vs.
Sandy Township Board of Supervisors and John Guido

Court No. 05-1983-CD; Commonwealth Court No. 403 CD 2007

Dear Counsel:

Please be advised that the above referenced record was forwarded to the Commonwealth Court of Pennsylvania on April 12, 2007.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

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02	12/22/05	Certified Mail Receipt, Writ of Certiorari mailed by certified mail to Sandy Township Board of Supervisors	01
03	12/28/05	Domestic Return Receipt	01
04	12/28/05	Praecipe to Amend Case Caption	04
05	12/28/05	Notice of Intervention	03
06	01/13/06	Response to Writ of Certiorari (entire record from Sandy Township in this matter)	137
07	01/27/06	Motion to Dismiss Appeal of DuBois Dutch, LLC with Order of Court regarding scheduling, filed February 1, 2006	05
08	02/01/06	Certificate of Service, Motion to Dismiss Appeal of DuBois Dutch, LLC and Brief in Support of Motion	03
09	02/07/06	Certificate of Service, Re: Order of Court for Argument	02
10	03/17/06	Motion and Order scheduling argument	06
11	03/17/06	Certificate of Service, Motion	02
12	03/22/06	Certificate of Service, Re: Order of Court for argument	02
13	04/07/06	Motion to Present Additional Evidence	10
14	04/13/06	Order, Re: Motion to Dismiss Appeal withdrawn	02
15	04/13/06	Order, Re: argument on Motion to Present Additional Evidence scheduled	02
16	04/20/06	Motion to Dismiss Appeal of DuBois Dutch, LLC and Order scheduling argument	09
17	04/20/06	Certificate of Service, Motion	01
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20	05/03/06	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC	09
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25	07/03/06	Petition to Reconsider Order, or, In the Alternative, to Amend Order	18
26	07/14/06	Order, Re: Petition to Reconsider Order filed July 3, 2006, Dismissed	01
27	08/17/06	Order, Re: evidentiary hearing scheduled	01
28	10/03/06	Motion to Dismiss Notice of Appeal (copy—original missing from record)	12
29	10/05/06	Order, Re: briefs to be filed	01
30	11/06/06	Certificate of Service, brief on behalf of Intervening Appellee	02
31	12/05/06	Motion for Oral Argument	04
32	12/05/06	Order, Re: Motion for Oral Argument Denied	01
33	01/23/07	Notice, Re: objections to transcripts	01
34	01/23/07	Transcript of Proceedings, Evidentiary Hearing held October 3, 2006	Separate Cover
35	01/23/07	Transcript Exhibits Part One: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 1	Separate Cover
36	01/23/07	Transcript Exhibits Part Two: Appeal of DuBois Dutch, LLC, from the December 2, 2002, Order of the Commonwealth Court of PA, Vol. 2	Separate Cover
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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 05-1983-CD
DuBois Dutch, LLC
VS.
Sandy Township Board of Supervisors and John A. Guido

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41	02/26/07	Opinion and Order	40
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44	03/07/07	Commonwealth Court of Pennsylvania, Notice of Docketing Appeal and Notice to Counsel 403 CD 2007	02
45	03/16/07	Order, Re: John Guido to file concise statement	01
46	03/19/07	Order (Amended), Re: John Guido to file concise statement	01
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48	03/26/07	Application for Supersedeas	06
49	03/29/07	Order, Re: Application for Supersedeas, Rule issued to Show Cause; Rule Returnable for written response April 19, 2007	01

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
12/21/2005	New Case Filed.	No Judge
	Filing: Notice of Appeal From Land Use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	Domestic Return Receipt, Re: Writ of Certiorari, filed.	No Judge
	Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	Motion to Dismiss Appeal of DuBois Dutch, LLC from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion, and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to Dismiss Appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition to Reconsider Order, or, In the Alternative, to Amend Order, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider Order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appelle, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1 Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA, Vol. 2 Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997 Part Four: Zoning Ordinance For The Township of Sandy, June 1996	Fredric Joseph Ammerman
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
03/02/2007	Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check)	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07.	Fredric Joseph Ammerman
03/07/2007	Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007	Fredric Joseph Ammerman
03/16/2007	Order NOW, this 15th day of March 2007, the Court having been notified of Appeal to the Superior Court of Pennsylvania in the above-captioned matter, it is the ORDER of this Court that John Guido, Appellant, file a concise statement of the matters complained of on said Appeal no later than fourteen (14) days herefrom, as set forth in Rule 1925 (b) of the Rule of Appellate Procedure. BY THE COURT: /s/ Fredric J. Ammerman, P. Judge. 1CC Atty T. Cherry, G. Kruk and A. Guido.	Fredric Joseph Ammerman
03/19/2007	Order, filed · Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC	Fredric Joseph Ammerman
03/26/2007	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido	Fredric Joseph Ammerman
03/29/2007	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

APR 12 2007

Attest. William L. Shaw
Prothonotary/
Clerk of Courts

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
12/21/2005	New Case Filed.	No Judge
	(1) Filing: Notice of Appeal From Land use Decisions. Paid by: Cherry, Toni M. (attorney for DuBois Dutch, LLC) Receipt number: 1911762 Dated: 12/21/2005 Amount: $85.00 (Check) 4CC T. Cherry.	No Judge
12/22/2005	(2) Writ of Certiorari sent by certified mail to Sandy Township Board of Supervisors.	No Judge
	Certified Mail Receipt, Writ of Certiorari to Sandy Twp. Board of Supervisors	No Judge
12/28/2005	(3) Domestic Return Certified Mail Receipt, Re: Writ of Certiorari, filed.	No Judge
	(4) Praecipe to Amend Case Caption filed by s/ Anthony S. Guido Esq. No CC. (adding John A. Guido as Intervening Appellee)	No Judge
	(5) Notice of Intervention, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
01/13/2006	(6) Response to Writ of Certiorari, filed by Atty. Kruk no cert. copies. Entire record from Sandy Township in this matter attached.	No Judge
01/27/2006	(7) Motion to Dismiss Appeal of DuBois Dutch, LLC. from Decision of the Sandy Township Borad of Supervisors, Cert. to Atty.	No Judge
02/01/2006	(8) Certificate of Service, filed. That a true and correct copies of the MOTION TO DISMISS APPEAL OF DUBOIS DUTCH, LLC., FROM DECISION OF THE SANDY TOWNSHIP BOARD OF SUPERVISORS and BRIEF IN SUPPORT OF MOTION filed on behalf of Intervening Appellee, JOHN A. GUIDO, in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by Anthony S. Guido Esq. No CC.	No Judge
	Order Of Court For Argument, NOW, this 31st day of Jan., 2006, upon consideration of the Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by Appellant, DuBois Dutch, LLC, It is ordered: argument is scheduled for the 10th of April, 2006, at 9:00 a.m. Courtroom No. 1. Appellant DuBois Dutch, LLC, shall file its brief on or before the 10th day of March, 2006, and Appellee, Sandy Township Supervisors, shall file its brief 20 days therafter. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty. Guido	Fredric Joseph Ammerman
02/07/2006	(9) Certificate of Service, filed. That a true and correct copy of the ORDER OF COURT FOR ARGUMENT in the above captioned action, were served upon Toni M. Cherry Esq., and Gregory M. Kruk Esq., on the 6th day of February 2006, filed by s/ Anthony S. Guido Esq. No CC.	No Judge
03/17/2006	(10) Motion, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 16th day of March, 2006, upon consideration of the foregoing Motion, argument on the land use appeals filed by DuBois Dutch is scheduled for the 10th day of April, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	(11) Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire, on March 15, 2006. Filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
03/22/2006	(12) Certificate of Service, filed. That a true and correct copies of the Order of Court for argument on the land use appeal filed in the above captioned action were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
04/07/2006	(13) Motion To Present Additional Evidence, filed by s/ Toni M. Cherry, Esquire. 4CC Atty. Cherry	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
04/13/2006	Order, NOW, this 10th day of April, 2006, this being the date set for argument on the Motion to Dismiss Appeal filed on behalf of John A. Guido, following argument on the Motion; and at the request of counsel for John A. Guido to withdraw the said Motion, it is Ordered that said request is hereby granted and the Motion be considered withdrawn. By The Court, /s/ Fredric J. Ammerman, President Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
	Order, NOW, this 11th day of April, 2006, upon consideration of the Motion to Present Additional Evidence and the reasons set forth therein, argument on said Motion is scheduled for the 3rd day of May, 2006, at 9:00 a.m. in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 7CC Atty T. Cherry	Fredric Joseph Ammerman
04/20/2006	Motion To Dismiss Appeal of DuBois Dutch, LLC. From Decision of The Sandy Township Board of Supervisors, filed by s/ Anthony S. Guido, Esquire. 2CC Atty. Guido	Fredric Joseph Ammerman
	Order, NOW, this 19th day of April, 2006, upon consideration of the foregoing Motion of Intervening Appellee, John A. Guido, to dismiss appeal filed by DuBois Dutch, LLC, from the decision of the Sandy Township Board of Supervisors refusing to modify the size requirements of one of the lots of a two-lot subdivision, it is Ordered that argument is scheduled for the 3rd day of May, 2006, at 9:00 a.m. Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Atty. Guido	Fredric Joseph Ammerman
	Certificate of Service, copies of the Motion were served upon Toni M. Cherry, Esquire, and Gregory M. Kruk, Esquire by First Class Mail, on the 13th day of April, 2006. 2CC Atty. Guido	Fredric Joseph Ammerman
04/26/2006	Certificate of Service, filed. That true and correct copies of the Order of Court for Argument on Motion to dismiss appeal in the above captioned action, were served upon Toni M. Cherry Esq and Gregory M. Kruk Esq on the 25th day of April 2006, filed by s/ Anthony S. Guido Esq. No CC.	Fredric Joseph Ammerman
04/27/2006	Answer to Motion to Present Additional Evidence, filed by s/ Anthony S. Guido Esq No CC.	Fredric Joseph Ammerman
05/03/2006	Appellant's Answer to Intervening Appellee's Motion to Dismiss Appeal of DuBois Dutch, LLC from decision of the Sandy Township Board of Supervisors, filed by s/ Toni M. Cherry Esq. 3CC Atty T. Cherry.	Fredric Joseph Ammerman
05/04/2006	Order, NOW, this 3rd day of May, 2006, following argument on the Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, Ordered: (see original). By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 2CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
06/07/2006	Notice is hereby given that if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Clerk of Courts' office. s/ Thomas D. Snyder, RPR, Official Court Reporter, No CC	Fredric Joseph Ammerman
	Original Transcript of Proceedings, filed. Argument on Appellant's Motion to Present Additional Evidence and Intervening Appellee's Motion to Dismiss Appeal, held before the Honorable Fredric J. Ammerman, Pres. Judge, on Wed., May 3, 2006.	Fredric Joseph Ammerman
06/21/2006	Opinion, By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido; aCC without memo: D. Mikesell, Law Library	Fredric Joseph Ammerman
07/03/2006	Petition, filed by s/ Anthony S. Guido, Esquire. 2CC Atty	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
07/14/2006	Order, NOW, this 12th day of July, 2006, the Court noting receipt and review of the Petition to Reconsider order filed July 3, 2006 on behalf of John A. Guido, Intervening Appellee, it is the Order of the Court that said Petition is Dismissed. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
08/17/2006	Order, NOW, this 16th day of August, 2006, it is the Order of the Court that an evidentiary hearing is scheduled on Oct. 3 and 4, 2006, beginning at 9:00 a.m. each day in Courtroom No. 1. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, G. Kruk, A. Guido	Fredric Joseph Ammerman
10/03/2006	Motion to Dismiss Notice of Appeal filed by Appellant, DuBois Dutch, LLC from Decision of the Sandy Township Board of Supervisors, filed by s/ Anthonty S. Guido Esq. 3 CC Atty Guido.	Fredric Joseph Ammerman
10/05/2006	Order, NOW, this 3rd day of Oct., 2006, Ordered that both parties supply the Court with brief by no later than Nov. 6, 2006. Either or both parties may thereafter supply a reply brief by no later than Nov. 20, 2006. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. CC to Attys: Guido, T. Cherry, G. Kruk	Fredric Joseph Ammerman
11/06/2006	Certificate of Service, filed. That on the 6th day of November 2006, true and correct copies of the Brief on behalf of Intervening Appellee, John A. Guido, were served on Toni M. Cherry Esq., and Gregory M. Kruk Esq., filed by s/ Anthony S. Guido Esq. NO CC.	Fredric Joseph Ammerman
12/05/2006	Motion For Oral Argument, filed by s/ Anthony S. Guido, Esquire. No CC	Fredric Joseph Ammerman
	Order, NOW, this 4th day of Dec., 2006, Motion for Oral Argument is Denied. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: T. Cherry, Kruk, Guido	Fredric Joseph Ammerman
01/23/2007	Notice, In accordance with the Rules of Appellate Procedure Rule 1922, Notice is given that if no objections are made to the text of the transcript within five days after such notice, the transcript in the above-captioned matter will become part of the record upon being filed in the Prothonotary's Office. Filed by s/ Cathy J. Provost, RMR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Evidentiary Hearing, held before Fredric J. Ammerman, Pres. Judge, on Tuesday, Oct. 3, 2006. Exhibits- Parts One Through Four	Fredric Joseph Ammerman
	Part One: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002 Order of the Commonwealth Court of PA, Vol. 1	
	Part Two: Appeal of DuBois Dutch, LLC, from the Dec. 2, 2002, Order of the Commonwealth Court of PA., Vol. 2	
	Part Three: Sandy Township Subdivision And Land Development Ordinance, May 1997	
	Part Four: Zoning Ordinance For The Township of Sandy, June 1996	
02/13/2007	Notice, if no objections are made to the text of the transcript within 5 days after such notice, the transcript in the matter will become part of the record upon being filed in the Prothonotary's Office. filed by s/ Thomas D. Snyder, RPR, Official Court Reporter	Fredric Joseph Ammerman
	Transcript of Proceedings, filed. Argument on Appellant's Land Use Appeal, held before Fredric J. Ammerman, Pres. Judge, on Monday April 10, 2006	Fredric Joseph Ammerman
02/26/2007	Opinion And Order, NOW, this 23rd day of Feb., 2007, Ordered: (see original). By the Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Atty T. Cherry, Kruk, Guido, 1CC Law Library	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas
ROA Report
Case: 2005-01983-CD
Current Judge: Fredric Joseph Ammerman
DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date		Judge
03/02/2007	42 Filing: Appeal to High Court Paid by: Guido, Anthony S. (attorney for Guido, John A.) Receipt number: 1917866 Dated: 3/2/2007 Amount: $45.00 (Check) 8	Fredric Joseph Ammerman
	Notice of Appeal, Proof of Service and Request for Transcript. filed by s/ Anthony S. Guido Esq. (check and copy to Commonwealth Court on 3/2/2007) 4CC atty.	Fredric Joseph Ammerman
03/05/2007	43 Supplemental Proof of Service, Notice of Appeal, filed. Served copies of the foregoing Notice of Appeal to which is attached Docket Entries and Schedule; Order for Transcript; and this Supplemental Proof of Service upon Daniel J. Nelson, Court Administrator, filed by s/ Matthew B. Taladay Esq. 1CC Atty Guido and 1CC Comm. Court on 3/5/07. 2	Fredric Joseph Ammerman
03/07/2007	44 Commonwealth Court of Pennsylvania: Notice of Docketing Appeal, and Notice to Counsel, filed. 403 CD 2007 2	Fredric Joseph Ammerman

Clearfield County Court of Common Pleas

ROA Report

Case: 2005-01983-CD

Current Judge: Fredric Joseph Ammerman

DuBois Dutch, LLC vs. Sandy Township Board of Supervisors, John A. Guido

Civil Other

Date	Selected Items	Judge
03/19/2007	Order, filed Cert. to Atty's A. Guido, T. Cherry & G. Kruk Now, this 19th day of March, 2007, the Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter, ORDER of Court that Appelant, file a concise statement of the matters no later than fourteen (14) days herefrom, per rule 1925(b) of the RAP.	Fredric Joseph Ammerman
03/22/2007 (47)	Concise Statement of Matters, filed by s/Anthony S. Guido, Esq. No CC 7	Fredric Joseph Ammerman
03/26/2007 (48)	Application for Supersedeas, filed by s/Matthew B. Taladay, Esq. One CC Attorney Guido 6	Fredric Joseph Ammerman
03/29/2007 (49)	Order, NOW, this 29th day of March, 2007, upon consideration of the attached Application for Supersedeas, a Rule is hereby issued upon Appellant, DuBois Dutch, LLC, and Appellee, Sandy Township Board of Supervisors, to Show Cause why the Application for Supersedeas should not be granted. Rule Returnable the 19th day of April, 2007, for filing written response. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: T. Cherry, Guido, Kruk 1	Fredric Joseph Ammerman