

08-1460-CD
J. Marino vs Zoning Bd of Clkd Boro

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

JOSEPH A. MARINO, an adult individual,

Petitioner/Appellant,

: No. 08-1460-CD

v.

ZONING HEARING BOARD OF CLEARFIELD
BOROUGH; and HIRSCHMANN
CONSTRUCTION SERVICES, INC.,
a Pennsylvania Corporation,

Respondents/Appellees.

FILED

AUG 08 2008

0/11:50 AM

William A. Shaw

Prothonotary/Clerk of Courts

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Type of Pleading:

**APPEAL OF ZONING
HEARING BOARD DECISION**

Filed By:

Petitioner/Appellant

Counsel of Record:

: Theron G. Noble, Esquire

: Ferraraccio & Noble

: 301 East Pine Street

: Clearfield, PA 16830

: (814)-375-2221

: PA I.D.#: 55942

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

JOSEPH A. MARINO, an adult individual,)
Petitioner/Appellant,)) No. 08-_____ -CD
v.)
ZONING HEARING BOARD OF CLEARFIELD)
BOROUGH; CLEARFIELD BOROUGH; and)
HIRSCHMANN CONSTRUCTION SERVICES,)
INC., a Pennsylvania Corporation,)
Respondents/Appellees.)

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. IF YOU WISH TO DEFEND AGAINST THE CLAIM SET FORTH IN THE FOLLOWING PAGES, YOU MUST TAKE ACTION WITHIN TWENTY (20) DAYS AFTER THIS COMPLAINT AND NOTICE ARE SERVED, BY ENTERING A WRITTEN APPEARANCE PERSONALLY OR BY ATTORNEY AND FILING IN WRITING WITH THE COURT YOUR DEFENSES OR OBJECTIONS TO THE CLAIMS SET FORTH AGAINST YOU. YOU ARE WARNED THAT IF YOU FAIL TO DO SO THE CASE MAY PROCEED WITHOUT YOU AND A JUDGMENT MAY BE ENTERED AGAINST YOU BY THE COURT WITHOUT FURTHER NOTICE FOR ANY CLAIM IN THE COMPLAINT OR FOR ANY OTHER CLAIM OR RELIEF REQUESTED BY THE PLAINTIFF(S). YOU MAY LOSE MONEY OR PROPERTY OR OTHER RIGHTS IMPORTANT TO YOU.

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Clearfield, PA 16830
(814)-765-2641

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

JOSEPH A. MARINO, an adult individual,)
Petitioner/Appellant,)) No. 08-_____ -CD
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ZONING HEARING BOARD OF CLEARFIELD)
BOROUGH; and HIRSCHMANN)
CONSTRUCTION SERVICES, INC.,)
a Pennsylvania Corporation,)
Respondents/Appellees.)

APPEAL OF ZONING HEARING BOARD DECISION

**NOW, comes the Petitioner/Appellant, Joseph A. Marino, by and through his
counsel of record, Theron G. Noble, Esquire, of Ferraraccio & Noble, who avers as
follows in support of his appeal:**

Parties

1. That petitioner/appellant is Joseph A. Marino, hereinafter "Marino", an adult individual, who does, and at all material times did, reside at 413 Wrigley Street, Lawrence Township, Clearfield County, Pennsylvania.
2. That first respondent is the Zoning Hearing Board of Clearfield Borough, hereinafter "Zoning Hearing Board", which upon information and belief, is a governmental agency existing under the laws of the Commonwealth of Pennsylvania, duly organized and existing, with an office address of 6 South Front Street, Clearfield, Clearfield County, Pennsylvania 16830, charged with the responsibility to enforce the zoning ordinance as enacted by second respondent, Clearfield Borough.

3. That second respondent is Hirschmann Construction Services, Inc., hereinafter "Hirschmann", upon information and belief, a duly formed and existing Pennsylvania corporation, with principal address of 6222 Saddlebrook Drive, Hermitage, Mercer County, Pennsylvania 16148.

Background

4. That, upon information and belief, Hirschmann entered into a contract to purchase a certain property, located at 400 Arnold Avenue, Clearfield, Clearfield County, Pennsylvania, hereinafter "the premises", also identified by Clearfield County Tax Map No. 4-2-K08-230-08.

5. That, upon information and belief, said contract was contingent upon Hirschmann obtaining zoning approval for Hirschmann's intended use, which will be more fully detailed.

6. That the premises is zoned as a "Residential Suburban" classification under the Clearfield Borough Zoning Ordinance of 1994, hereinafter the "zoning ordinance".

7. That the premises contains a church building, formerly used as a church, upon information and belief, operated by the Jehovah's Witness religious organization.

8. That upon information and belief, Hirschmann intends to convert said church into an office for use and operation by the Commonwealth of Pennsylvania's Department of Labor and Industry, Bureau of Workmens' Compensation.

9. That Marino owns and/or operates over thirty (30) rental units within the jurisdiction of Clearfield Borough, subject to its laws and ordinances, most of which are located in the "downtown", commercial area of the borough.

10. That amongst Petitioner Marino's rental units is a structure located at 306 E. Locust

Street, which currently houses the Commonwealth of Pennsylvania's Department of Labor and Industry, Bureau of Workmens' Compensation office, which is in an area zoned as "Commercial" pursuant to Clearfield Borough's zoning ordinance, and best described as located in the downtown area of Clearfield Borough.

11. That upon information and belief, the Commonwealth of Pennsylvania's Department of Labor and Industry, Bureau of Workmens' Compensation's office located in Clearfield Borough serves the entire Clearfield County area and parts of Clinton, Centre, Jefferson, Elk, McKean, Cameron, Potter, Mifflin and Huntingdon counties.
12. That upon information and belief, Hirschmann was initially denied its request to convert the church located on the premises into an office by the Clearfield Borough Zoning Officer on May 1, 2008.
13. That on May 26, 2008 Respondent Hirschmann filed a request to the Zoning Hearing Board for a "special exception" under the zoning ordinance. A true and correct copy of the same is attached hereto as Exhibit "A".
14. That Respondent Zoning Hearing Board scheduled an initial hearing on Respondent Hirschmann's appeal on, or about June 18, 2008.
15. However, Respondent Zoning Hearing Board, following a meeting of the Clearfield Borough Planning Commission, which lacked quorum, did not take rule on the appeal as it wanted to consult with its solicitor after it did take testimony from numerous citizens who attended to protest Respondent Hirschmann's appeal.
16. Another meeting of the Respondent Zoning Hearing Board was scheduled and was held on, or about July 16, 2008, in which Respondent Zoning Hearing Board verbally announced that it approved Respondent Hirschmann's appeal, citing input from its

solicitor. Attached hereto as Exhibit "D" is a true and correct copy of Respondent Zoning Hearing Board's approval of Respondent Hirschmann's appeal.

17. That Petitioner Marino attended each of the aforementioned hearings before the Zoning Hearing Board, gave testimony and objected to Respondent Hirschmann's appeal.

Count I: Violation of Clearfield Borough's Zoning Ordinance

18. That the averments of paragraphs 1 - 17, inclusive, are hereby included as if again fully set forth at length.

19. That Clearfield Borough's Zoning Ordinance addresses its "Residential Suburban District, sometimes hereinafter "R-S", in §401 of the code.

20. That §401(b) of the code details the permitted uses, without stating as such the types of *residential housing* permitted in a "R-S" district; while §401(c) of the code delineates the permitted types of non-residential uses and structures in a district zoned as "R-S". A true and correct copy of §401(b) and (c) of the code is attached hereto as Exhibit "B".

21. That Respondent Hirschmann's intended use for the premises as an office is non-residential such that §401(b) of the code is not at issue. See Exhibit "B".

22. That §401(c) of the code expressly permits certain types of non-residential structures and uses in a "R-S" district, namely: (1) churches and similar places of worship, parish house, convent; (2) public parks, public playgrounds, municipal recreation area; and (3) essential services. See Exhibit "B".

23. §101 of the code contains "Definition of Terms" as used in the code and defines Essential Services as: "*Services and utilities needed for the health, safety and general*

welfare of the community, such as underground, surface, or overhead electrical, gas, telephone, steam, water, sewerage, and other utilities and the equipment and appurtenances necessary for such systems to furnish an adequate level of service for the area in which it is located". A true and correct copy of §101 of the code, containing the definition of "Essential Services" is attached hereto as Exhibit "C".

24. That neither the code, nor particularly §101 of the code, defines "community" nor "area", however, upon information and belief, as used in the definition of "Essential Services" "community" refers to Clearfield Borough while "area" would be that section of Clearfield Borough in proximity to the subject premises and especially similarly zoned as "R-S".

25. That by seeking a "special exception" Respondent Hirschmann already has acknowledged that its intended use of the premises is not of the type or character which can be classified as an "Essential Service", since no special exception would be needed for an "Essential Service".

26. That by granting a "special exception" Respondents Clearfield Borough and its Zoning Hearing Board also already have acknowledged that Respondent Hirschmann's intended use of the premises is not of the type or character which can be classified as an "Essential Service".

27. That the Respondent Hirschmann's intended use as an office for the Workmen's Compensation Bureau, is not of the type or character typically accepted as an "essential service", which is more aptly described as infrastructure which supports the buildings and their uses in the zoned area.

28. That §401(E) of the Code details special exceptions which are permitted in the "R-S"

zoning classification. Exhibit "E" is a true and correct copy of §401(E) of the Code.

29. That the intended use of the subject premises, i.e. an office, is not contained in §401(E) of the Code, thus by approving Respondent Hirschmann's appeal, Respondent Zoning Hearing Board has violated its own ordinance.

30. That §407 of the Code discusses "Conditional Uses and Special Exceptions".

31. That §407.3 provides for "municipality structures" while §407.17 discusses amongst other uses, "limited offices".

32. That upon information and belief Respondent Hirschmann's intended use for the premises most likely would qualify as a limited office pursuant to §407.17 of the code, and possibly could qualify under §407.3 as a municipal structure.

33. However, §401(E) does not incorporate either §407.17 nor §407.3 as special exceptions in the "R-S" zoning classification.

34. That Respondent Hirschmann's appeal to the Zoning Hearing Board should have been denied, and in granting the same, Respondent Zoning Hearing Board erred as follows, such that its decision is arbitrary, capricious and an abuse of its discretion:

(a) they have not applied, or alternatively have misapplied the Zoning Ordinance of 1994 as adopted and in force by Respondent Clearfield Borough, as follows:

(i) by considering Respondent Hirschmann's intended use of the subject premises as an "Essential Service" when it is not;

(ii) by not understanding that Respondent Hirschmann's intended use is covered by the Code as a special exception under §407.17 and/or §407.3, which in turn are not permitted by §401(E) in the applicable "R-S" zoning classification;

(iii) by expanding the definitions of "community" and "area" to include a

geographical area far beyond the subject premises and Clearfield Borough as detailed in Averment 11 hereof; and

(iv) in effect to render the entire Zoning Ordinance of 1994 as adopted and in force as meaningless as without properly enforced borders on zoning districts the entire borough becomes one zoning district albeit encompassing all permitted uses further rendering the plans and uses by those attempting to follow the Code, such as Petitioner, useless.

WHEREFORE, Petitioner respectfully requests this Honorable Court to enforce the Zoning Ordinance of 1994, as adopted and in force in Clearfield Borough, by DENYING the appeal sought by Respondent Hirschmann and granted by the Zoning Hearing Board, further awarding costs of this action to Petitioner.

Respectfully Submitted,



Theron G. Noble, Esquire
Attorney for Petitioner/Appellant
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D. #: 55942



BOROUGH OF CLEARFIELD

6 SOUTH FRONT STREET
CLEARFIELD, PA 16830
clearfieldboro@penn.com

PHONE (814) 765-7817

FAX (814) 765-2374



Exhibit "A"

ZONING HEARING BOARD HEARING REQUEST

ZHB # 2 / 08DATE May 26, 2008APPELLANT: Hirschmann Construction Services Inc.ADDRESS 6222 Saddlebrook Drive TELEPHONE 724-346-9119
Hermitage, PA 16148ZONING DISTRICT Residential Suburban WARD 2nd Ward
MAP NUMBER 4-2-HOB-230-08LOT SIZE 18,000 Sq. Ft.PRESENT LAND USAGE Hol. C-1. Non Residential Use. House of Worship

Under the provisions of the Clearfield Borough Ordinance, I/We are requesting that a hearing be held on the following appeal:

An application to convert residential property to office space, was denied by the Clearfield Borough Zoning Officer on 5/1/08Special ExceptionThe request is for a variance to Regulated by the Clearfield Borough Zoning Ordinance. It is the desire of the
appellant to convert residential property to office space.Appellant (s) is/are are not X the owner (s) of said property in question:We have an agreement to purchase, contingent upon zoning approval.

Provisions of the Ordinance Number:

Article 1C Section 401 Sub-Section 6.Fee (\$175.00 plus all costs) amount paid \$ 250.00, Received by Chris E. Kleg
250.00 Paid in AdvanceAppellant Signature Christopher KlegHearing Scheduled Date JUNE 18, 2008Date 5-28-08Time 2:45 PM

Per J Check NO 4914
JKleg

Multiple-family structures - seven (7) stories. See Article V, Section 507.

2. Conversion apartments - not to exceed height prior to conversion.

K. Off-Street Parking and Loading.

1. For off-street parking and off-street loading, see Supplementary Regulations, Article V, Sections 508, 513 and 524.

L. Signs.

1. See Supplementary Regulations, Article V, Section 515.

M. Access.

1. See Article V, Section 502.

Section 401. R-S Residential Suburban District.

A. Purpose. To modify the controls of the R-U District to reflect a lower density of population, a greater percentage of open land and an improved residential environment. The goals are: to preserve the investments of the past that are in keeping with the planned environment; to provide for a gradual relocation of conflicting uses; and to encourage investment in innovative programs designed to improve the social and cultural aspects of the Borough.

B. Permitted Uses and Structures.

1. One-family detached dwellings.
2. Two-family dwellings.
3. Conversion apartments not to exceed three (3) families per structure.
4. Planned residential development (see Section 514).

C. Permitted Non-Residential Uses and Structures.

1. Churches and similar places of worship, parish house, convent.
2. Public parks, public playgrounds, municipal recreation areas.
3. Essential services. —

Exhibit "B"

DWELLING, ONE-FAMILY: A building designed for or occupied exclusively by one (1) family.

DWELLING, ONE-FAMILY DETACHED: A building accommodating but a single-family and having two (2) side yards.

DWELLING, TWO-FAMILY: A building designed specifically for or occupied exclusively by two (2) families living independently of each other and of one-story or two-story design.

DWELLING, MULTIPLE: A building used or designed as a residence for three (3) or more families living independently of each other and doing their own cooking therein, including apartment houses, apartment hotels, condominium and group houses.

DWELLING, TOWNHOUSE: A dwelling having at least one (1) wall in common with an adjacent section, each section is designed for occupancy by one (1) family, shall not exceed two (2) stories in height, but may include a cellar and a storage space below the first floor and storage space in areas under "hip" and "gable" roofs and shall not exceed eight (8) contiguous sections.

DWELLING UNIT: A building or portion thereof providing complete housekeeping facilities for one (1) family.

ELECTRIC SUB-STATION: An assemblage of equipment for purpose other than generation or utilization, through which electric energy in bulk is passed for the purpose of switching or modifying its characteristics to meet the needs of the general public.

ESSENTIALLY DRY SPACE: A space which will remain dry during flooding, except for the passage of some water vapor or minor seepage; the structure is substantially impermeable to the passage of water.

ESSENTIAL SERVICES: Services and utilities needed for the health, safety and general welfare of the community, such as underground, surface, or overhead electrical, gas, telephone, steam, water, sewerage, and other utilities and the equipment and appurtenances necessary for such systems to furnish an adequate level of service for the area in which it is located.

FAMILY: One (1) or more persons who live together in one (1) dwelling unit and maintain a common household. May consist of a single person or of two (2) or more persons, whether or not related by blood, marriage, or adoption. May also include domestic servants and gratuitous guests.

FENCE: An artificially constructed barrier of any material, or combination of materials, erected to enclose, screen or separate areas. (See also Section 522.)

FINDINGS OF FACT

1. The Zoning Hearing Board of the Borough of Clearfield held a public hearing on June 18, 2008, for the purpose of hearing an appeal from the application of Hirschmann Construction Services, Inc. ("Applicant") requesting a change of use as a special exception as provided by the Zoning Ordinance of Clearfield Borough, ("the Ordinance.")
2. The property which is the subject of this appeal is situated at 400 Arnold Avenue in the Second Ward of Clearfield Borough. Specifically, the property is situated at the corner of Arnold Avenue and South Fourth Street.
3. The property is currently owned by the Philipsburg Congregation of Jehovah's Witnesses and most recently was utilized as a place of worship. Applicant has contracted to purchase the property subject to the approval by the Board of the requested change of use.
4. The property is situated in a district zoned as "Residential Suburban".
5. The property is situated across South Fourth Street from a district zoned as "Industrial". Clearfield Machine Company and Reed Brothers Equipment, both industrial/commercial uses, are situated directly across South Fourth Street from the property.
6. Pennsylvania Electric Company operates an office building with garages and other accessory non-residential uses directly across Arnold Avenue from the property.
7. The Appellants have requested that the use of the property be changed from a house of worship to office use.
8. Specifically, the proposed use would be made by the Pennsylvania Department of Labor and Industry as a Workers Compensation Office of Adjudication, with four (4) full time employees and hours of operation Monday through Friday from 8:00 a.m. to 5:00 p.m.

9. The property consists of a one-story brick structure and 0.59 acres, which includes a paved parking area with 40 regular and 2 handicapped spaces.

10. A special exception has been defined by the appellate courts of this Commonwealth as a use which is expressly permitted by the ordinance in question, provided there is no showing of a detrimental effect on the community. The applicant for the proposed use has the burden of demonstrating that the proposed use meets the requirements of the ordinance. In Re Dippolito, 833 A.2d 336 (Pa. Cmnwlth. 2003).

11. The Ordinance does not list "office use" as a special exception in the R-S District.

12. The Ordinance does, however, specifically list several "Permitted Non-Residential Uses and Structures at Section 401.C, which includes a use for "essential services."

13. "Essential Services" is defined by the Ordinance as "Services and utilities needed for the health, safety and general welfare of the community".

14. The proposed use of the property in question as an Office of Adjudication for the Commonwealth Workers Compensation Bureau would fall within the definition of essential services, as the administration and hearing of Workers Compensation claims is a service which clearly benefits the general welfare of the community.

15. Once the burden of establishing a permitted use is met, anyone objecting to the application must show that a high probability that the use will generate adverse impacts not normally generated by this type of use, and that these impacts will pose a substantial threat to the health and safety of the community. In Re Dippolito, 833 A.2d 336 (Pa. Cmnwlth. 2003).

16. Several persons appeared at the Hearing before the Board to oppose the request of the Appellant. No person voicing opposition made any reference to a provision of the Ordinance in support of their argument.

17. The objections made at hearing were focused on the desirability of keeping the Workers Compensation Office of Adjudication at its present location at 306 East Locust Street, which is situated in the downtown business area of the Borough.

18. The Zoning Hearing Board is mandated by statute to consider certain matters and adjudicate the same in accordance with applicable state and local law, including the Ordinance.

19. The Ordinance contains no language which would compel the Board to favor a use or disapprove a use on the basis of whether it is located in the downtown business area of the Borough.

20. The Board is sympathetic to the arguments made in favor of promoting the retention or location of business in the downtown district; however, these arguments are not relevant to the application before the Board, as nothing in the Ordinance or applicable law would permit the Board to consider these arguments in the pending appeal.

21. There was absolutely no testimony or evidence presented at hearing which would permit the Board to find any detrimental impact upon the immediate neighborhood.

22. The available off street parking is sufficient to meet the criteria set forth in the Ordinance.

CONCLUSIONS OF LAW

1. The Zoning Hearing Board of the Borough of Clearfield has exclusive jurisdiction over the subject matter of this application pursuant to the Zoning Ordinance, the Municipalities Planning Code, and applicable law.
2. The proposed use of the property at 400 Arnold Avenue as a Workers Compensation Office of Adjudication is a permitted non-residential use as set forth in the Zoning Ordinance at Article IV, Section 401, Subsection C, and Paragraph 3, "Essential Services".
3. There has been no showing of a detrimental impact which would impose a substantial threat to the health and safety of the community.

ZONING HEARING BOARD

By: Michael A. Gill
Michael A. Gill, Chairman

MOTION

I move to approve the application of Hirschmann Construction Services, Inc. for the change in use of the property at 400 Arnold Avenue in the Borough of Clearfield, and further move to adopt the Findings of Fact and Conclusions of Law in their entirety and to authorize the Chairman to sign those Findings and Conclusions as evidence of their adoption by this Board.

D. Permitted Accessory Uses and Services.

1. Private garages and carports when supplementary and incidental to a permitted use.
2. Private swimming pool.
3. Accessory uses and structures.

E. The following uses are Special Exceptions. Specific criteria to be used by the Zoning Hearing Board considering Special Exceptions are found in Section 407:

1. Townhouses (407.8).
2. Public and private schools, colleges and universities (407.10).
3. Fraternities, sororities and dormitories (407.13).
4. Hospitals and medical centers (407.14).
5. Home occupations (407.11).
6. Bed and breakfast (407.12).
7. Public utility substations (407.2).

F. Reserved.

G. Lot Requirements.

— Exhibit "E" —

1. Area.

- a. One-family detached dwellings - six thousand (6,000) square feet.
- b. Two-family dwellings - three thousand five hundred (3,500) square feet per family.
- c. Townhouses - two thousand four hundred (2,400) square feet per family.
- d. Conversion apartments - not less than four thousand (4,000) square feet plus one thousand five hundred (1,500) square feet per family. Should the existing lot be of an insufficient size to provide required area, a building and/or zoning permit shall be denied.

2. Width.

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY,
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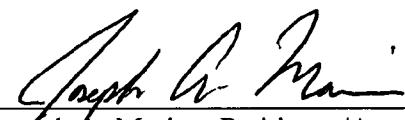
JOSEPH A. MARINO, an adult individual,)
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CONSTRUCTION SERVICES, INC.,)
a Pennsylvania Corporation,)
Respondents/Appellees.)

VERIFICATION

I, Joseph A. Marino, Petitioner/Appellant, do hereby swear and affirm that I have read the foregoing APPEAL and that the averments therein contained are true and correct to the best of my knowledge, information and belief. Furthermore, I am over the age of 18 years of age and give this unsworn statement knowing it is to authorities and subject to the penalties of 18 Pa.C.S.A. 4904.

So made this 4th day of AUGUST, 2008.

By,



Joseph A. Marino, Petitioner/Appellant

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AUG 11 2008

8/16/08

William A. Shaw
Prothonotary/Clerk of Courts

2008-1460-CD

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08-1460-CD

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Street, Apt. No. or PO Box No. 6266 Saddlebrook Dr.
City, State, ZIP+4 Johnstown, PA 15908*

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08-1460-CD

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City, State, ZIP+4 Clearfield, PA 16830*

PS Form 3800, August 2006 See Reverse for Instructions

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- Attach this card to the back of the mailpiece, or on the front if space permits.

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Planning Board
650th Street
Cleanfield, OH 46820

68-1460-cy

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X *Parvula Peters*

Agent
 Addressee

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Parvula Peters

C. Date of Delivery

AUG 11 2008

D. Is delivery address different from item 1? Yes
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2. Article Number

(Transfer from service label)

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PS Form 3811, February 2004

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08-1460-CD

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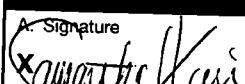
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Prothonotary/Clerk of Courts

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AUG 14 2008

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2008-1460-C0

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<p>1. Article Addressed to: Hirschmann Construction Services, Inc. 6226 Saddleback Dr. Henderson, NV 89014</p> <p>08-1460-C0</p>		<p>2. Article Number (Transfer from service) 7006 2760 0001 8118 2115</p>	
<p>PS Form 3811, February 2004</p>		<p>Domestic Return Receipt</p>	
		<p>102595-02-M-1540</p>	

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
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JOSEPH A. MARINO, an adult individual, :
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v. : No. 08- 1460 -CD

ZONING HEARING BOARD OF CLEARFIELD :
BOROUGH; and HIRSCHMANN :
CONSTRUCTION SERVICES, INC., :
a Pennsylvania Corporation, :

Respondents/Appellees. :

FILED *No. 11145cm*
SEP 17 2008
Wm

William A. Shaw
Prothonotary/Clerk of Courts

Type of Pleading:

**MOTION FOR JUDGMENT IN
FAVOR OF PETITIONER/
APPELLANT JOSEPH A.
MARINO**

Filed By:

Petitioner/Appellant

Counsel of Record:

Theron G. Noble, Esquire
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
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(CIVIL DIVISION)**

JOSEPH A. MARINO, an adult individual,)
Petitioner/Appellant,)) No. 08- 1460 -CD
v.)
ZONING HEARING BOARD OF CLEARFIELD)
BOROUGH; and HIRSCHMANN)
CONSTRUCTION SERVICES, INC.,)
a Pennsylvania Corporation,)
Respondents/Appellees.)

**MOTION FOR JUDGMENT IN FAVOR OF
PETITIONER/APPELLANT JOSEPH A MARINO**

**AND NOW, comes the Petitioner/Appellant, Joseph A. Marino, by and through
his counsel of record, Theron G. Noble, Esquire, of Ferraraccio & Noble, who avers
as follows in support of his MOTION FOR JUDGMENT IN HIS FAVOR:**

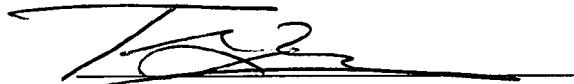
1. Petitioner/Appellant Joseph A. Marino filed an appeal to the Zoning Hearing Board of Clearfield Borough's (first respondent) decision to grant a special exception to Hirschmann Construction Services, Inc., (second respondent) concerning property located at 400 Arnold Avenue, Clearfield, Clearfield County, Pennsylvania, also identified as Tax Map #: 4-2-K08-230-08.
2. That first respondent granted such special exception to convert a former church into an office complex on or about July 16, 2008, despite Petitioner/Appellant's objection and protestation of the same.
3. That Petitioner/Appellant filed his appeal to this Honorable Court on August 8, 2008,

within the thirty (30) days required by law.

4. That the Prothonotary of Clearfield County proceeded to serve said appeal on the respondents pursuant to law.
5. That first respondent did not transmit the record to the Prothonotary as required pursuant to law in order for said appeal to proceed.
6. That after a reasonable length of time had lapsed in order for first respondent to have transmitted its record in this matter, counsel for Petitioner/Appellant sent a letter to the solicitor for first respondent inquiring about the status of this matter.
7. The Solicitor for first respondent responded that since second respondent has decided not to further pursue this matter that first respondent would also not respond to Petitioner/Appellant's appeal. A true and correct copy of said letter is attached hereto as Exhibit "A".
8. As per said letter, Counsel for Petitioner/Appellant contacted the Clearfield Borough Manager, left a message in conformity to said letter (as said Borough Manager was not available), requesting a return call if in fact the Borough's status was different than in said letter. It is also noted that said letter purports to also have been provided to said Borough manager.
9. That last week a similar call was placed to the Zoning Officer for Clearfield Borough, who also was not available, a message left asking for a return call as to the status of this matter, and said call has also yet to be returned.
10. That the clear indication by said letter and failure to return phone calls is that neither Respondent/Appellees intend to oppose said appeal or proceed with the special exception.

WHEREFORE, Petitioner respectfully requests this Honorable Court to enter JUDGMENT in his favor, granting his APPEAL, reversing the special exception granted to the premises located at 400 Arnold Avenue, Clearfield, Pennsylvania, and award costs of this action to Petitioner.

Respectfully Submitted,



Theron G. Noble, Esquire
Attorney for Petitioner/Appellant
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D. #: 55942

BELIN, KUBISTA & RYAN LLP
ATTORNEYS AT LAW
15 NORTH FRONT STREET
P.O. BOX 1
CLEARFIELD, PENNSYLVANIA 16830

CARL A. BELIN, JR.
KIMBERLY M. KUBISTA
JOHN R. RYAN

CARL A. BELIN
1901-1997
AREA CODE 814
TELEPHONE 765-8972
FAX (814) 765-9893

September 12, 2008

Theron G. Noble, Esquire
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830

RE: Zoning Hearing Board of Clearfield Borough, et al.

Dear Terry:

In response to your letter of September 10, 2008, this will confirm that I am solicitor for the Zoning Hearing Board for the Borough of Clearfield. Copies of the Appeal documents were provided to me by the Borough shortly after they were served.

Shortly after the appeal was filed, I was advised that the applicant had decided not to pursue its plans for the development of the property in question. In light of that decision, the Zoning Board and the Borough decided not to oppose the appeal.

I was instructed not to take any further action. You may wish to confirm the status of the matter with the Borough Manager.

Very truly yours,

BELIN, KUBISTA & RYAN LLP



John R. Ryan

JRR/kdm

cc: Leslie Stott, Clearfield Borough Zoning Hearing Board (w/enc.)

— [REDACTED] —
— Exhibit "A" —

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

JOSEPH A. MARINO, an adult individual,)
Petitioner/Appellant,)) No. 08- 1460 -CD
v.)
ZONING HEARING BOARD OF CLEARFIELD)
BOROUGH; and HIRSCHMANN)
CONSTRUCTION SERVICES, INC.,)
a Pennsylvania Corporation,)
Respondents/Appellees.)

ORDER

AND NOW, this _____ day of September, 2008, this Court being satisfied that the Appeal filed by Petitioner/Appellant in the above captioned matter was timely filed, proper in all respects and that Respondents do not intend to oppose the same, hereby ORDERS, ADJUDICATES, and DECREES as follows:

- 1) That JUDGMENT is entered in favor of Petitioner/Appellant Joseph A. Marino and against Respondents/Appellees Zoning Hearing Board of Clearfield Borough and Hirschmann Construction Services, Inc.;
- 2) That the special exception granted by Zoning Hearing Board of Clearfield Borough to Hirschmann Construction Services, Inc., on or about July 16, 2008 is hereby reversed and vacated concerning the premises located at 400 Arnold Avenue, Clearfield, Pennsylvania; and
- 3) Respondent Zoning Hearing Board of Clearfield Borough shall be liable to Petitioner/Appellant Joseph A. Marino for record costs incurred in this matter.

By the Court,

Fredric J. Ammerman, PJ

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

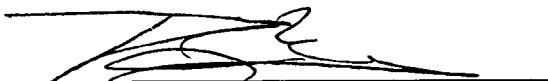
JOSEPH A. MARINO, an adult individual,)
Petitioner/Appellant,) No. 08- 1460 -CD
v.)
ZONING HEARING BOARD OF CLEARFIELD)
BOROUGH; and HIRSCHMANN)
CONSTRUCTION SERVICES, INC.,)
a Pennsylvania Corporation,)
Respondents/Appellees.)

CERTIFICATE OF SERVICE

I, Theron G. Noble, Esquire, of Ferraraccio & Noble, counsel for Petitioner/Appellant does hereby certify this 16th day of September, 2008, that I did send a true and correct copy of the foregoing and attached MOTION FOR JUDGMENT IN FAVOR OF PETITIONER/APPELLANT to the below indicated persons, being all respondents and their known counsel, via United States mail, first class, postage pre-paid, addressed as follows:

John Ryan, Esquire Belin & Kubista P.O. Box 1 Clearfield, PA 16830 (Solicitor for ZHB)	Hirschmann Construction Services, Inc 6222 Saddlebrook Dr. Hermitage, PA 16148 (second respondent)
--	---

Respectfully Submitted,



Theron G. Noble, Esquire
Attorney for Petitioner/Appellant
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D. #: 55942

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

JOSEPH A. MARINO, an adult individual,)
Petitioner/Appellant,) No. 08- 1460 -CD
v.)
ZONING HEARING BOARD OF CLEARFIELD)
BOROUGH; and HIRSCHMANN)
CONSTRUCTION SERVICES, INC.,)
a Pennsylvania Corporation,)
Respondents/Appellees.)

ORDER

AND NOW, this _____ day of September, 2008, this Court being satisfied that the Appeal filed by Petitioner/Appellant in the above captioned matter was timely filed, proper in all respects and that Respondents do not intend to oppose the same, hereby ORDERS, ADJUDICATES, and DECREES as follows:

- 1) That JUDGMENT is entered in favor of Petitioner/Appellant Joseph A. Marino and against Respondents/Appellees Zoning Hearing Board of Clearfield Borough and Hirschmann Construction Services, Inc.;
- 2) That the special exception granted by Zoning Hearing Board of Clearfield Borough to Hirschmann Construction Services, Inc., on or about July 16, 2008 is hereby reversed and vacated concerning the premises located at 400 Arnold Avenue, Clearfield, Pennsylvania; and
- 3) Respondent Zoning Hearing Board of Clearfield Borough shall be liable to Petitioner/Appellant Joseph A. Marino for record costs incurred in this matter.

By the Court,

Fredric J. Ammerman, PJ

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

JOSEPH A. MARINO, an adult individual, *
Petitioner/Appellant *
vs. * NO. 08-1460-CD
ZONING HEARING BOARD OF CLEARFIELD *
BOROUGH; and HIRSCHMANN CONSTRUCTION *
SERVICES, INC., a Pennsylvania Corporation, *
Respondents/Appellees *

ORDER

NOW, this 22nd day of September, 2008, upon consideration of the Motion for Judgment in Favor of Petitioner/Appellant Joseph A. Marion, filed by Theron G. Noble, Esquire, it is the ORDER of this Court that argument of said Motion be and is hereby scheduled for the **21st day of October, 2008 at 2:00 p.m.** in Courtroom No. 1 of the Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT,


FREDRIC J. AMMERMAN
President Judge

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William A. Shaw
Prothonotary/Clerk of Courts

ICC Atty Noble

ICC Zoning Board
6 South Front St.
Clearfield, PA 16830
ICC Hirschmann Construction
6222 Saddlebrook Dr.
Hermitage, PA 16148

610

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

JOSEPH A. MARINO, an adult individual, :
Petitioner/Applicant :
vs. : No. 08 - 1460 - C.D.
ZONING HEARING BOARD OF :
CLEARFIELD BOROUGH; and :
HIRSCHMANN CONSTRUCTION :
SERVICES, INC., a Pennsylvania :
corporation, :
Respondents/Appellees :
:

MOTION FOR CONTINUANCE

Filed on behalf of:
Appellee, ZONING HEARING BOARD
OF CLEARFIELD BOROUGH

Counsel of Record for
this Party:

John R. Ryan
Attorney-At-Law

Pa. I.D. 38739

BELIN, KUBISTA & RYAN LLP
15 N. Front Street
P.O. Box 1
Clearfield, PA 16830
(814) 765-8972

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S William A. Shaw (GW)
Prothonotary/Clerk of Courts

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

JOSEPH A. MARINO, an adult individual,	:	
Petitioner/Applicant	:	
	:	
vs.	:	No. 08 – 1460 – C.D.
	:	
ZONING HEARING BOARD OF	:	
CLEARFIELD BOROUGH; and	:	
HIRSCHMANN CONSTRUCTION	:	
SERVICES, INC., a Pennsylvania	:	
corporation,	:	
Respondents/Appellees	:	

MOTION FOR CONTINUANCE

NOW COMES, the Zoning Board for the Borough of Clearfield, Appellee above named, and by its Attorneys, Belin, Kubista & Ryan, LLP, moves the Honorable Court as follows:

1. This Court has scheduled argument upon a Motion filed by the Appellant for October 21, 2008, at 2:00 p.m.
2. Counsel for Movant has a prior commitment to appear at several depositions in another matter on that date and is therefore not available.
3. Counsel for Appellant has been advised by letter dated September 25, 2008, of Movant's intention to request a continuance and to date has not indicated whether he opposes or consents to same.

WHEREFORE, Movant requests that the Court continue the argument scheduled for

October 21, 2008, to another date and time consistent with the Court's schedule.

BELIN, KUBISTA & RYAN LLP



John R. Ryan
Attorney for Appellee, Zoning Hearing
Board of Clearfield Borough

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

JOSEPH A. MARINO, an adult individual, :
Petitioner/Applicant :
:
vs. : No. 08 - 1460 - C.D.
:
ZONING HEARING BOARD OF :
CLEARFIELD BOROUGH; and :
HIRSCHMANN CONSTRUCTION :
SERVICES, INC., a Pennsylvania :
corporation, :
Respondents/Appellees :
:

ORDER

AND NOW, this 10th day of October, 2008, upon consideration of the foregoing Motion for Continuance, it is the ORDER of this Court that said Motion be and is hereby granted.

The Argument scheduled in the above-captioned matter for October 21, 2008, is continued until the 17th day of November, 2008, at 9:00 o'clock A.m. in Courtroom No. 1 of the Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT:


Fredric J. Ammerman
President Judge

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10/13/08 Atty Ryan
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William A. Shaw
Prothonotary/Clerk of Courts

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

JOSEPH A. MARINO, an adult individual, :
Petitioner/Applicant :
:
vs. : No. 08 – 1460 – C.D.
:
ZONING HEARING BOARD OF :
CLEARFIELD BOROUGH; and :
HIRSCHMANN CONSTRUCTION :
SERVICES, INC., a Pennsylvania :
corporation, :
Respondents/Appellees :
:

CERTIFICATE OF SERVICE

Filed on behalf of:
Respondent/Appellee, Zoning Hearing
Board of Clearfield Borough

Counsel of Record for
this Party:

John R. Ryan
Attorney-At-Law

Pa. I.D. 38739

BELIN, KUBISTA & RYAN LLP
15 N. Front Street
P.O. Box 1
Clearfield, PA 16830
(814) 765-8972

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William A. Shaw
Prothonotary/Clerk of Courts

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

JOSEPH A. MARINO, an adult individual,	:	
Petitioner/Applicant	:	
	:	
vs.	:	No. 08 – 1460 – C.D.
	:	
ZONING HEARING BOARD OF	:	
CLEARFIELD BOROUGH; and	:	
HIRSCHMANN CONSTRUCTION	:	
SERVICES, INC., a Pennsylvania	:	
corporation,	:	
Respondents/Appellees	:	

CERTIFICATE OF SERVICE

This is to certify that I have served a certified copy of Motion for Continuance filed on behalf of ZONING HEARING BOARD OF CLEARFIELD BOROUGH, Respondent/Appellee in the above captioned matter, together with a certified copy of the Order granting said Motion and rescheduling Argument, on the following party by postage prepaid first-class United States mail, on the 14th day of October, 2008:

Thereon G. Noble, Esquire
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
Attorney for Petitioner/Applicant

This will further certify that I provided Attorney Noble with a copy of the said Motion and proposed Order prior to filing same via facsimile on October 6, 2008.

BELIN, KUBISTA & RYAN LLP



John R. Ryan
Attorney for Respondent/Appellee
Zoning Hearing Board of Clearfield
Borough

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

JOSEPH A. MARINO, AN }
ADULT INDIVIDUAL }
VS } NO. 08-1460-CD
ZONING HEARING BOARD OF }
CLEARFIELD BOROUGH; AND }
HIRSCHMANN CONSTRUCTION }
SERVICES, INC., A }
PENNSYLVANIA CORPORATION }

ORDER

NOW, this 17th day of November, 2008, following argument on the Petitioner's Request for Payment of Record Costs by the Zoning Hearing Board, it is the ORDER of this Court that both parties have no more than Seven (7) Days from this date in which to submit further legal references to the Court relative the issue.

BY THE COURT.



President Judge

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Noble
Ryan

Beth William A. Shaw *ICE* Hirsch
Prothonotary/Clerk of Courts *1/22/23*

ICE Hirschmann Construction
6222 Saddle Brook Dr.
Hermitage, PA 16148

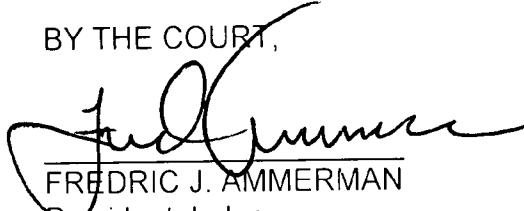
IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOSEPH A. MARINO, an adult individual, * No. 08-1460-CD
Plaintiff *
vs. *
ZONING HEARING BOARD OF CLEARFIELD *
BOROUGH, and HIRSCHMANN CONSTRUCTION *
SERVICES, INC., a Pennsylvania Corporation, *
Defendants *
*

O R D E R

AND NOW, this 2nd day of December, 2008, it is the ORDER of this Court that
the Petitioner's Request for Payment of Record Costs by the Zoning Hearing Board be
and is hereby DENIED, as the matter involved a public question pursuant to 42
Pa.C.S.A. §1726(2)(ii).

BY THE COURT,


FREDRIC J. AMMERMAN
President Judge

FILED 12/4/2008
DEC 02 2008
S
William A. Shaw
Prothonotary/Clerk of Courts
ICC Hirschmann Construction
60202 Saddlebrook Drive
Hermitage, PA 16148
(6W)