

# Borough of Conshohocken

1 West 1<sup>st</sup> Avenue, Suite 200  
Conshohocken, PA 19428  
610-828-1092

Application: PE-2013-17  
Date Submitted: 10/1/13  
Date Received: 10/1/13 *gms*

## Zoning Application

1. Application is hereby made for :

Special Exception       Variance

Appeal of the decision of the zoning officer

Conditional Use approval

Interpretation of the Zoning Ordinance

Other Confirmation of legal nonconformities and a validity challenge

2. Section of the Zoning Ordinance from which relief is requested:

See Addendum.

3. Address of the property, which is the subject of the application:

1109 & 1119 Fayette Street, Conshohocken, PA 19428

4. Applicant's Name: Provco Pineville Fayette, L.P.

Address: Suite 200, 795 E. Lancaster Avenue, Villanova, PA 19085

Phone Number (daytime): 610.520.2010

E-mail Address: \_\_\_\_\_

5. Applicant is (check one): Legal Owner \_\_\_\_\_; Equitable Owner ;

Tenant \_\_\_\_\_.

6. Property Owner: Dennis E. Moore and Timothy J. Moore

Address: 1201 Fayette Street, Conshohocken, PA 19428

Phone Number: \_\_\_\_\_

7. Lot Dimensions: 225' x 240' (54,000 sq. ft.)

Zoning District: R-O Residential Office

8. Has there been previous zoning relief requested in connection with this

Property? No If yes, please describe. \_\_\_\_\_

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9. Please describe the present use of the property including any existing improvements and the dimensions of any structures on the property.

See Addendum. \_\_\_\_\_

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10. Please describe the proposed use of the property.

See Addendum. \_\_\_\_\_

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11. Please describe proposal and improvements to the property in detail.

See Addendum.

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12. Please describe the reasons the Applicant believes that the requested relief should be granted.

See Addendum.

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13. If a variance is being requested, please describe the following:

a. The unique characteristics of the property: \_\_\_\_\_

See Addendum.

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b. How the Zoning Ordinance unreasonably restricts development of the property: \_\_\_\_\_

See Addendum. \_\_\_\_\_  
\_\_\_\_\_

c. How the proposal is consistent with the character of the surrounding neighborhood. \_\_\_\_\_

See Addendum. \_\_\_\_\_  
\_\_\_\_\_

d. Why the requested relief is the minimum required to reasonably use the property; and why the proposal could not be less than what is proposed. \_\_\_\_\_

See Addendum. \_\_\_\_\_  
\_\_\_\_\_

14. The following section should be completed if the applicant is contesting the determination of the zoning officer.

a. Please indicate the section of the zoning ordinance that is the subject of the zoning officer's decision (attach any written correspondence relating to the determination).

See Addendum. \_\_\_\_\_  
\_\_\_\_\_

b. Please explain in detail the reasons why you disagree with the zoning officer's determination.

See Addendum. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

15. If the Applicant is requesting any other type of relief, please complete the following section.

a. Type of relief that is being requested by the applicant.

See Addendum.  
\_\_\_\_\_  
\_\_\_\_\_

b. Please indicate the section of the Zoning Ordinance related to the relief being requested.

See Addendum.  
\_\_\_\_\_

c. Please describe in detail the reasons why the requested relief should be granted.

See Addendum.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

16. If the applicant is being represented by an attorney, please provide the following information.

a. Attorney's Name: Ross Weiss, Esquire  
Cozen O'Connor

b. Address: 200 Four Falls Corporate Center, Suite 400  
West Conshohocken, PA 19428

c. Phone Number: 610.941.2361

d. E-mail Address: rweiss@cozen.com

I/we hereby certify that to the best of my knowledge, all of the above statements contained in this Zoning Application and any papers or plans submitted with this application to the Borough of Conshohocken are true and correct.

By: [Signature]  
Applicant

\_\_\_\_\_  
Legal Owner

9/25/2013  
Date

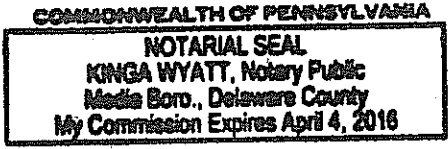
COMMONWEALTH OF PENNSYLVANIA

COUNTY OF MONTGOMERY Delaware

As subscribed and sworn to before me this 25<sup>th</sup> day of September, 2013.

[Signature]  
Notary Public

(Seal)



*Decision*

(For Borough Use Only)

Application Granted ( )

Application Denied ( )

MOTION:

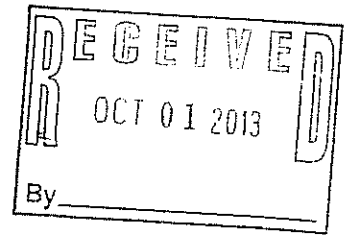
CONDITIONS:

BY ORDER OF THE ZONING HEARING BOARD

	Yes	No
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

DATE OF ORDER: \_\_\_\_\_

***Before the Zoning Hearing Board  
Of The Borough of Conshohocken***



**In re: Zoning Hearing Board Application of Provco Pineville Fayette, L.P.  
Suite 200, 795 E. Lancaster Avenue, Villanova, PA 19085.**

**Addendum To Zoning Hearing Board Application**

**I. Background**

The subject property ("Property") is owned by Dennis F. Moore and Timothy J. Moore ("Moore Brothers") and is located at 1109 & 1119 Fayette Street, and 1201 Butler Pike, Conshohocken, Pennsylvania 19428. The Property is presently zoned R-O Residential Office ("R-O District"), subject to the R-O Residential Office Ordinance ("R-O Ordinance") and is further identified as Tax Parcel Numbers APN # 05-00-03392-005 and APN #05-00-03388-009.

Since 1955 through to the present day, E.F. Moore, Inc. ("Moore") has continuously operated a retail automobile dealership with sales of new and used automobiles, parts, and a service and a body shop on the Property. The retail operation, service and body shop are open for business 6 days a week. The Property contains multiple buildings consisting of one-two stories, and includes fuel tanks. The existing frontage on Fayette Street is a driveway. The structures are used to provide for automobile sales, parking, parts and vehicle storage, administrative offices, and auto repair and service. The site is 100% impervious, and includes a pole sign, parking, display lighting and automobile storage. Immediately across the street is a dry cleaner business and plant. The property is adjacent to a cemetery and the Borough Stadium and playing fields. The current use of the Property is a legally nonconforming use in the R-O District. The Property is at the Borough's boundary with Whitemarsh Township.

Moore has continuously paid sales taxes on a monthly basis on all revenue, and has paid all state and local taxes - including real estate, sewer, mercantile or otherwise, to all state and local taxing bodies. Mr. Dennis Moore, the President of Moore, is on-site each day of the week, and he has continuously maintained the dealership's Conshohocken Business license. At all times, Moore has maintained the existing nonconforming use and has never abandoned its use of the Property as a retail automobile dealership.

On September 17, 2010, the Moore Brothers entered into a ground lease with Pineville Properties, LLC for the Property, which was then assigned to Provco Pineville Fayette, L.P., a Pennsylvania limited partnership ("Applicant"), on October 15, 2011, for purposes of developing a retail WaWa convenience store, with fuel pumps, a canopy, and associated parking on the Property ("Proposed Use"). As a result, the Applicant is the beneficial owner of the Property. Applicant intends to remove all existing buildings, paving and light fixtures, and to reduce the impervious coverage from 100% to 86.4%. To allay any traffic and safety concerns, access to the Property will be limited to two (2) driveways along Fayette Street and a driveway to Eleventh Street via Harry Street. A copy of the proposed site plan is attached hereto as Exhibit "A." Signage will follow the table shown on the site plan.



The Proposed Use constitutes a change in nonconforming use pursuant to Section 27-703.B, as it is equally appropriate or more appropriate to the R-O Residential-Office District, and is no more detrimental than the existing legal nonconforming use.

## **II. Request for Relief**

Applicant requests the following relief:

### **A. Use Issue**

1. Special Exception. A special exception for a change in nonconforming use pursuant to Section 27-703.B and Section 27-610 to allow for a change in the existing nonconforming use of a retail automobile dealership, with underground storage tanks, service and parts, to a retail convenience store, with fuel pumps, a canopy, air pump, ATM, parking, and accessory uses including but not limited to prepared food, take-out food, and underground storage tanks.

2. Use Variance. In the alternative, Applicant seeks a use variance from Section 27-1202 pursuant to Section 27-611 to permit the establishment of a retail convenience store, with fuel pumps, a canopy and parking.

### **B. Dimensional Issues**

1. Legally Nonconforming Dimensions. Applicant claims entitlement to the following existing legal nonconformities on the Property and, in the alternative, variances:

a. Section 27-1205.F limits impervious coverage to 50%. Applicant is reducing the existing legal nonconformity of 100% impervious coverage to 86.4% impervious coverage.

b. Section 27-1207.A prohibits parking in the front yard. The Zoning Code defines "front yard" as "a yard which extends across the full width of a lot, for a depth equal to the minimum front yard setback distance required by the specific regulations of this Chapter, measured from the ultimate right-of-way line." The existing nonconforming use includes parking in the front yard. The Proposed Use does not provide for parking in the front yard as defined in the Zoning Code. However, if the front yard is otherwise defined, Applicant will continue the existing legal nonconforming parking in the front yard.

c. Section 27-2007.I limits the access way on Fayette Street to one accessway. Applicant is reducing the existing legal nonconformity of a

driveway along the entire Fayette Street frontage to two separate driveways along Fayette Street and with access greater than 30 feet wide.

2. Dimensional Variances. In addition to the above legal nonconformities and possible variances, Applicant requests the following dimensional variances:

a. The proposed use includes fuel pump signage, for purposes of posting gas prices. To the extent that the fuel pump signage constitutes incidental signage, Applicant requests a variance from Section 27-2104.2.I to permit such incidental signs to have advertising.

b. A dimensional variance from Section 27-2105.A.1 which limits inter alia the type of signs permitted. The Proposed Use includes a monument sign with changeable copy, for the purpose of displaying gas prices. To the extent the proposed monument sign is determined to be an animated sign, Applicant requests a variance to permit the installation of the proposed monument sign to include changeable copy solely for the purpose of displaying gas prices.

c. A dimensional variance from Section 27-2107.2 which limits the number and size of signs, to one sign, not more than 10 square feet, 4 feet in height, with indirect lighting. The Proposed Use includes a monument sign, 50 square feet in area, ten feet high, which is internally illuminated, and a building mounted sign, which is 66.69 square feet in area, with individual, illuminated channel letters and logo. Applicant requests a variance to permit the installation of the proposed monument sign and the building mounted sign.

**C. Validity Challenge.** In the event the Applicant's request for a special exception, or alternatively, a use variance is not granted, Applicant hereby challenges the requirements of the Borough's Zoning Code as unconstitutionally exclusionary as it applies to the Property.

### **III. Basis for Relief**

The Proposed Use is suitable for the Property and is in the best interest of the community. The requested special exception, or in the alternative, use variance, and requested confirmation of legal nonconformities and, in the alternative, variances and dimensional variances, should be granted for the following reasons:

**A. Applicant's Request for a Special Exception.**

Section 27-703.B provides that a change in a legally nonconforming use is permitted where the proposed use "is equally appropriate or more appropriate to the district in which the property is located, is no more detrimental than the existing nonconforming use, and is not less appropriate and is not more detrimental than the existing nonconforming use." Applicant's Proposed Change in the existing legally nonconforming use satisfies these criteria.

The subject property is occupied by an existing automotive retail use with automotive service, and vehicle parts and storage, which is a legally nonconforming use within the R-O District. The permitted and conditional uses allowed in the R-O District are limited in nature and do not provide a reasonable opportunity to use or develop the site.

Initially, it cannot be over-emphasized that the R-O Ordinance does not apply to this site. The Declaration of Intent for the R-O District states that it is designed to protect existing Victorian and early 20<sup>th</sup> Century buildings and the residential nature of the R-O District. However, prior to and at the time the R-O Ordinance was passed, the Property did not contain a Victorian or an early 20<sup>th</sup> Century residential structure. In addition, the Property was not used for residential purposes. Because the property does not and never did contain a Victorian or early 20<sup>th</sup> Century residence, and has not been used for residential purposes since at least 1955, the Property can never be developed in accordance with the permitted and conditional uses set forth in the R-O Ordinance.

The Proposed Use was designed in keeping with the aspirations of the Revitalization Plan of May 2011, and with the goal of attempting to reduce some of the existing legal nonconformities, while at the same time proposing a use that is (i) equally appropriate or more appropriate to the R-O District, (ii) no more detrimental than the existing nonconforming use; (iii) is not less appropriate to the R-O District; and (iv) is not more detrimental than the existing nonconforming use.

Applicant submits that the Proposed Use as more fully described in the attached site plan constitutes a change in use that satisfies the requirements set forth in Section 27-703.B(1) and (2). The Proposed Change in use from a retail automobile dealership, selling new and used cars, automobile service and body shop constitutes an upgrade to the property. *Suhy v. Zoning Board of Adjustment*, 169 A.2d 62 (Pa. 1961)(a change in use from a used car business to a fuel service station will upgrade, not downgrade, the property). Accordingly, the Proposed Use is more appropriate to the R-O District, is not more detrimental than the existing legally nonconforming use, and is not less appropriate to the R-O District.

Not only is the existing use legally nonconforming, but the structures, parking, accessway and impervious coverage on the Property are also legally nonconforming. The Proposed Use reduces, and in some instances, eliminates, many of the legal nonconformities presently existing on the Property, thereby, reducing any existing detriment to the R-O District. For instance, at present, the impervious coverage of the Property is 100%. The Proposed Use reduces the amount of impervious coverage to 86.4%.

In addition, the Proposed Use eliminates existing legal nonconformities as follows:

1. Section 27-1205.C – There is currently no front yard setback on Harry Street and a 14.3 foot front yard setback on Fayette Street where 25 feet is required. The Proposed Use provides for setbacks of 32 feet and 50.7 feet respectively.
2. Section 27-1205.D – There is currently a 2.4 foot side yard setback where 5 foot side yard setback is required. The Proposed Use provides for a side yard setback of 66.0 feet.
3. Section 27-1207.A – There is existing parking in the front yard. The Proposed Use will not have parking in the front yard.
4. Section 27-1207.B.(3) – Currently, there are parking spaces shown on Harry Street that have no setback from the main building where a 5 foot setback is required. The Proposed Use eliminates this nonconformity.
5. Section 27-2007.F – The current use does not have a buffer strip between the parking lot and the right-of-way of Harry Street and Fayette Street. The Proposed Use will provide for a buffer strip, 10 feet long, along Harry Street and Fayette Street.

**B. In the Alternative, Applicant Requests a Use Variance.**

In the alternative, the Applicant requests a use variance as it is not economically feasible to preserve or to construct on the Property a Victorian or early 20<sup>th</sup> Century residence, the stated purpose of the restrictions set forth in the R-O Ordinance.

An applicant seeking a variance must demonstrate that unnecessary hardship will result if a variance is denied, and the proposed use will not be contrary to the public interest. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983)(citing *Taliaferro v. Darby Twp. Zoning Hearing Board*, 873 A.2d 807, 812 (Pa. Commw. 2005)). To establish the existence of an unnecessary hardship, an applicant must prove the following:

(1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property is valueless for any purpose permitted by the zoning ordinance. The applicant must show the hardship is unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district. Mere evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance.

*Catholic Social Services Housing Corporation v. Zoning Hearing Board of Edwardsville Borough*, 18 A.3d 404, 407-408 (Pa. Commw. 2011) (citing *Taliaferro*, 873 A.2d at 812).

As is demonstrated below, the physical features of the Property are such that it cannot be used for a permitted use, and this hardship is unique to the Property, compelling the issuance of the requested use variance.

First, the R-O Ordinance states that it is the intent of the district to “encourage the retention and preservation of existing Victorian and early 20<sup>th</sup> Century residences by permitting residential uses and conditionally allowing limited office conversions.” As such, the R-O Ordinance only permits the following uses as of right in the R-O District:

1. Single-family detached dwellings.
2. Single-family semi-detached dwellings.
3. Municipal or government office.
4. Accessory uses, in compliance with Part 8, General Regulations, § 27-811.

§27-1202. None of these uses are suitable for the Property given its size, location, and dimensions.

The R-O Ordinance permits the following conditional uses:

1. Professional office for the practice of medicine, law, engineering, architecture or design, real estate, insurance, financial consultation.
2. Studio for photography, music or dance.
3. Residential conversions, compliance with Part 8, General Regulations, § 27-825 of this Chapter.
4. Funeral home.
5. Bed-and-breakfast, in compliance with Part 8, General Regulations, § 27-813, of this Chapter.
6. Signs, in compliance with Part 21 of this Chapter.
7. Parking lots, only when as a secondary use to the primary use.
8. Other uses of similar intensity and scale.
9. Day-care facilities subject to Part 8, §27-812 of this Chapter.

§27-1203. However, in order to obtain a conditional use, the conditional use standards require that:

1. All conditional uses must have their primary façade oriented toward Fayette Street.
2. The conditional use must preserve, utilize and maintain an existing building in a manner that is consistent with the existing Victorian/early 20<sup>th</sup> Century character of this Section of Fayette Street. If an existing building is demolished, then no conditional use will be permitted.
3. The conditional use must preserve, repair, and maintain the front façade and, if existing, the front porch in conformance with the Borough of Conshohocken Façade Improvement Guidelines. Any building addition shall be located to the rear, and shall be compatible with the existing building in size, scale, and materials. Stairways, fire escapes and other structural alterations shall be located to the rear or side of the building.
4. The conditional use must preserve the existing front yard as a landscaped open space. The only impervious coverage in the front yard will be sidewalks or pedestrian access paths. the landscaping shall be of the type traditionally found in the Upper Fayette Street area (shade trees, foundation plantings, grass, etc.).
5. There shall be no parking lots or required off-street parking spaces permitted between the front wall of the principal structure and the curb of the street toward which that wall is oriented in the R-O District.
6. All refuse areas shall be screened from the view of the adjacent streets or residential districts by a landscaped screen buffer and/or an opaque fence or wall at least six feet high and not more than eight feet high, in conjunction with landscape material.

§27-1204 (emphasis supplied). The existing legally nonconforming use does not contain a Victorian or early 20<sup>th</sup> Century residence, and the Property also does not have a front façade, front porch, or front yard. As a result, it is impossible for the Property to be used in accordance with the permitted uses and the conditional uses permitted in the R-O District.

Second, and as set forth above, for more than fifty years, the Property has been used and is currently being used as a retail new and used automobile dealership with automobile service, as a legally nonconforming use in the R-O District. The Property is also the largest lot in the R-O Residential Office District, with frontage on Fayette Street, a four lane road, and is immediately adjacent to a cemetery, and the Borough Stadium and playing fields. Immediately across the street from the Property is a dry cleaner and plant, Towne Valet cleaners, which has front yard parking, and which operates from five days a week from 7 am until 6:30 pm, and on

Saturdays from 8 am to 5:30 pm. Given the unique size of the property, the surrounding uses, and its inability to comply with the stated intent of the R-O Residential Office District, the Applicant is unable to develop the Property in accordance with any of the permitted or conditional uses of the R-O Residential Office District.

In addition, the R-O Ordinance unreasonably restricts the development of the Property because the Zoning Ordinance limits development in this district to essentially two uses – the preservation of existing Victorian and early 20<sup>th</sup> Century residences, and the limited conversion of those existing Victorian and early 20<sup>th</sup> Century residences to office space. By way of example, the R-O Ordinance states that a conditional use must “preserve, utilize and maintain an existing building in a manner that is consistent with the existing Victorian/early 20<sup>th</sup> Century character of this Section of Fayette Street” and “[i]f an existing building is demolished, then no conditional use will be permitted.” § 27-1204.2. Since the Property does not have nor has it ever had an existing Victorian or early 20<sup>th</sup> Century residence constructed on it, through no fault of its own, the Applicants cannot develop the Property in accordance with the express purpose of the existing zoning ordinance. Other than the dry cleaner property, this is a hardship that is unique to this Property.

Moreover, the Applicant’s Proposed Use for the Property is not detrimental to the public health, safety and welfare and is consistent with the character of the surrounding neighborhood. The surrounding properties are not being used for residential purposes, and include a dry cleaner, office space, a cemetery, and playing fields. Consequently, there will not be a substantial impact on the character of the neighborhood with the proposed use. Further, the existing legally nonconforming use is essentially automotive retail – the sale and repair of new and used automobiles, with parts, storage, and fuel tanks. The Applicant’s Proposed Use consists of a retail convenience store, with fuel pumps, and a canopy structure, with reasonable provisions for the safe ingress and egress of cars, pedestrians, and deliveries. Thus, the Proposed Use is substantially similar, but less intensive than the existing use of the Property. Finally, the proposed use will substantially improve the subject property and the Property will be better maintained.

Finally, the requested relief is the minimum required to reasonably use the property, and cannot be less than what is proposed. The Proposed Use and the associated dimensional issues are the minimum necessary to protect public health, safety and welfare. Provisions have been made for safe entry and exist onto the Property, for the safe dispensing and delivery of fuel, the removal of trash, and the safe operation of the convenience store including lighting, parking, and deliveries. Effort has been made to decrease the impervious coverage (100% to 87.3%), and other existing legal nonconforming variances, and where applicable, to comply with all other zoning requirements required in the R-O Residential Office district. Consequently, for all these reasons, Applicant’s request for a use variance should be granted.

**C. Applicant’s Requests for Confirmation of Dimensional Legal Nonconformities and, in the Alternative, Variances and Dimensional Variances.**

The Applicant requests that the following variances be granted to minimize any hardship in the Applicant’s pursuit of the requested use:

1. Legal Nonconformities:
  - i. Section 27.1205.F – to permit more than 50% impervious coverage.
  - ii. Section 27-1207.A – to permit parking in the front yard.
  - iii. Section 27-2007.I to permit more than one access way on Fayette Street and to have an access way greater than 30 feet wide.
  
2. Dimensional Variances:
  - i. The proposed use includes fuel pump signage, for purposes of posting gas prices. To the extent that the fuel pump signage constitutes incidental signage, Applicant requests a variance from Section 27-2104.2.I to permit such incidental signs to have advertising.
  - ii. Section 27-2105.A.1 to permit the proposed monument sign to include changeable copy solely for purposes of displaying gas prices; and
  - iii. Section 27-2107.2 to permit the installation of a monument sign, 10 feet high, with an area of fifty square feet, which shall be internally illuminated, and a building mounted sign, with an area of 66.69 square feet, with individual, illuminated channel letters and logo.

The requested variances set forth above should be granted because the Proposed Use is suitable for the Property, is in the best interest of the community, and the relief requested is necessary to accomplish these goals.

The Proposed Use is one of the recommended uses as set forth in the Revitalization Plan Update, dated May 2011, which suggests that the Borough accommodate additional retailers and suggests a 6,000 square foot convenience store. The retail convenience store proposed here is only 4,670 square feet.

The Proposed Use is a suitable and appropriate use of the Property. The Property is surrounded by non-residential uses - a cemetery, offices, playing fields and stadium, a dry cleaner, and fronts on a four lane road. The Property never had or has a Victorian or 20<sup>th</sup> Century building on it, and it has never been used for residential purposes. The Property is also one of the largest lots in the R-O Residential District, making it unsuitable for residential development as a single or semi-detached dwelling.



In addition, the Proposed Use will not substantially injure or detract from the use of the neighboring property, or from the character of the neighborhood, and the use of the adjacent property will not be substantially impacted. The requested dimensional legal nonconformities, or variances, and dimensional variances are *de minimis* and will have little or no impact on the surrounding property and neighborhood. As such, the Proposed Use, the legal nonconformities or variances and dimensional variances attendant to that use, are no more detrimental and are equally or more appropriate to the R-O Residential District, than the current legally nonconforming use.

Lastly, and perhaps most importantly, the Proposed Use, and the legal nonconformities or variances and dimensional variances requested, are designed in accordance with all applicable safety and industry standards, will not endanger the safety of persons or property, and will not adversely affect transportation or unduly burden public facilities. Accordingly, the Applicant requests that the Board grant the requested relief.

**D. In the Event Applicant's Requests for a Special Exception, Use Variance and Confirmation of Legal Nonconformities or Variances and Dimensional Variances are not Granted, Applicant challenges the Borough's Zoning Code as Unconstitutionally Exclusionary.**

As applied to the Property, the R-O Ordinance is unconstitutional because the R-O Ordinance prohibits all use of the Property whether the proposed use constitutes a change in a nonconforming use, a continuance or expansion of a nonconforming use, a permitted use or a conditional use because the Property has never had, nor can it have in the future a Victorian or early 20<sup>th</sup> Century residence.

As is readily evident in reviewing the Borough Zoning Map, the Property is the largest tract of land in the R-O District. Similarly sized parcels within the Borough generally fall within the BC District, or one of the Specially Planned Districts. The Property also exceeds the size of adjoining parcels, whether they be part of the R-O District or BR-1 District.

The Property is different from all other sites in the immediate neighborhood in that it has been utilized as a legally non-conforming commercial property for over fifty years, unlike any other adjoining property or tract within the immediate neighborhood. This legal nonconforming use is bolstered by the fact that the Subject Property enjoys a significant frontage along Fayette Street, a major roadway, and that its frontage on Fayette Street is also larger in size than any other property within the R-O District.

In addition, the Borough Revitalization Report, and the Comprehensive Plan, recommend that the Borough encourage the development, support business reinvestment, and support a cohesive and attractively built environment. The R-O Ordinance, as applied to the Property, frustrates these fundamental purposes. Rather, under the smoke screen of allegedly preserving Victorian and early 20<sup>th</sup> Century buildings, to preserve the residential nature of this 5 block area, the R-O District prevents development, discourages business reinvestment, and perpetuates a hodge-podge of construction, thwarting all efforts of the Moore Brothers to develop the Property. Given its location, large size and frontage, the Subject Parcel, unlike any other parcel in the R-O District, is uniquely positioned to accommodate new business development, while enhancing the

existing uses of the surrounding parcels. However, because of the restrictions and limitations set forth in the R-O Ordinance, requiring the preservation and continued use of Victorian or early 20<sup>th</sup> Century residential buildings attendant to any use of property in the R-O District, the Property cannot be developed.

Finally, it is without dispute that prior to and when the Borough enacted the five block R-O Ordinance, it did so with the knowledge that the Subject Property did not satisfy the stated purposes of the R-O District. When this Ordinance was written and enacted, the Subject Property did not conform, was treated separately from all other parcels within the R-O District, with a few exceptions, and even today, the Subject Property does not conform with the stated intent of the R-O District. There is only one R-O District, in the entire Borough, and it is a five block area, containing other commercial uses, including a dry cleaning plant, with a parking lot, and several office conversions. Since the Subject Property can never comply with the legislative intent for the R-O District, by definition, since it has never been used as a residential parcel and does not contain a Victorian or turn-of-the-century building, the denial of the Applicant's requests for relief treats the Subject Property differently from all other parcels of the same size and frontage within the Borough, to the detriment of the property owner's constitutional rights. In essence, the R-O Ordinance, as applied to the Property constitutes *de jure and de facto* exclusionary zoning because it excludes the Proposed Use on its face, and imposes conditions on any change in use that cannot, in fact, be accomplished. *Township of Exeter v. Zoning Hearing Board*, 962 A.2d 653, 660 (Pa. 2009).

The right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental interference except as necessary to protect the interests of the public and neighboring property owners, is of ancient origin, recognized in the Magna Carta, and memorialized in Article I, Section 1 of the Pennsylvania Constitution. *Id.* at 727. The limit beyond which the power to zone in the public interest may not transcend is the protected property rights of individual landowners. *Id.* at 728.

The natural or zealous desire of many zoning boards to protect, improve, and develop their community, to plan a city, or a township or a community that is both practical and beautiful, and to conserve the property values as well as the tone of that community is commendable. But they must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish.

*Id.* (citing *Cleaver v. Board of Adjustment*, 200 A.2d 408, 413 n. 4 (Pa. 1964)).

The above cautionary words are applicable here. The Applicant has submitted a Zoning Application, which does not evidence an intent to abandon a nonconforming use, but rather, evidences "a genuine effort to sell and then to change *an existing nonconforming use to a new nonconforming use*," in full accord with the existing Borough Code. The Applicant has further demonstrated that its Proposed Use will not harm the public health, safety, morals and general welfare, and has demonstrated that the Proposed Use will not endanger the Comprehensive Plan. The Applicant has further submitted a site plan that will greatly improve, enhance, and benefit

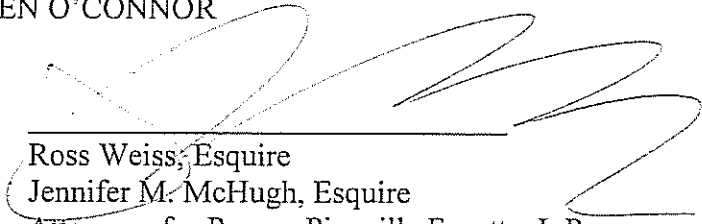
the surrounding land. As such, any denial of the Applicant's requests for relief on the basis that the Proposed Use does not comply with the R-O Ordinance would constitute an unconstitutional act, which cannot withstand review.

For all these reasons, and in the event that the Applicant's request for a special exception, with the requested legal nonconformities or variances and dimensional variances is denied, or in the alternative, the Applicant's request for a use variance, together with the requested legal nonconformities or variances and dimensional variances is denied, the Applicant respectfully submits that the R-O Ordinance as applied to the Property is unconstitutional.

On the basis of the foregoing, Applicant requests that the relief set forth herein and requests that the Zoning Hearing Board schedule a hearing on the instant Application.

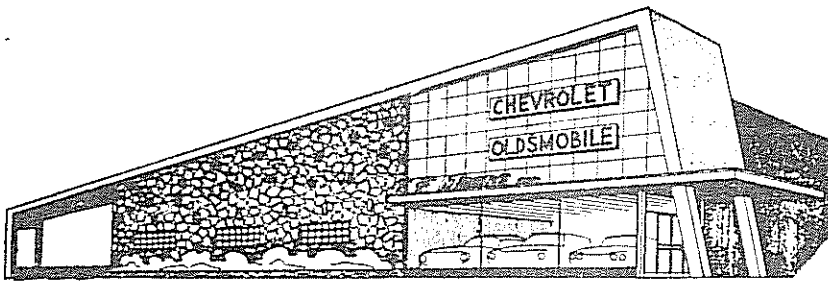
Respectfully Submitted,  
COZEN O'CONNOR

BY:



Ross Weiss, Esquire  
Jennifer M. McHugh, Esquire  
Attorneys for Provco Pineville Fayette, L.P.

Dated: September <sup>30</sup>\_\_, 2013



# E.F. MOORE, Inc.

12th Avenue & Fayette Street  
P.O. Box 192 • Conshohocken, PA 19428

## Chevrolet - Oldsmobile

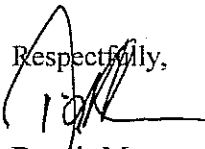
September 19, 2013

Conshohocken Zoning Hearing Board  
1 West First Avenue, Suite 200  
Conshohocken, PA 19428

**Re: 1109-1201 Fayette Street - Authorization To File Application**

Dear Board Members,

This letter shall serve as notice that the owners of above mentioned property have entered into a lease agreement with Provco Pineville Fayette, L.P. and that it is authorized to file the Application to the Conshohocken Zoning Hearing for zoning relief for the construction of a convenience store with gasoline sales.

Respectfully,  
  
Dennis Moore

## GROUND LEASE

THIS GROUND LEASE is made as of September 17<sup>th</sup>, 2010 between Dennis Moore and Timothy Moore, individuals, as Landlord ("Landlord"), and Pineville Properties, LLC as Tenant ("Tenant").

## RECITALS

A. Landlord is the owner of that certain parcel of land located at 1109-1201 Fayette Street, Conshohocken, Pennsylvania (the "Property or Leased Property"), as more particularly described in Exhibit A (Legal Description) and Exhibit A-1 (Sketch Plan) attached hereto and made a part hereof.

B. Tenant intends to develop and construct certain improvements on a portion of the Property consisting of retail uses, together with parking areas (collectively, the "Improvements"), all in accordance with the plans and specifications therefor, as such may be modified from time to time in accordance with the provisions of this Ground Lease (the "Plans").

C. Landlord desires to lease the Property to Tenant, and Tenant desires to lease the Leased Property from Landlord and to construct the Improvements thereon on the terms and conditions contained herein.

## AGREEMENTS

NOW, THEREFORE, in consideration of the foregoing, Landlord and Tenant, intending to be legally bound hereby, agree as follows:

1. Leased Property. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord the Property, on the terms and conditions set forth herein.

2. Ground Lease Term.

2.1 Initial Ground Lease Term. The initial term ("Initial Term") of this Ground Lease shall commence on the Commencement Date (as hereinafter defined), and terminating on the "Termination Date", which shall be twenty (20) years from and after the Rent Commencement Date (as hereinafter defined) unless sooner terminated or extended pursuant to any provision herein; provided, if the Rent Commencement Date is other than the first day of a calendar month, the Initial Term shall end twenty (20) years from the first day of the calendar month following the Rent Commencement Date. The "Commencement Date" shall mean the date that Tenant receives a fully signed original of this Ground Lease from Landlord.

2.2 Options to Extend. Provided Tenant is not in default of this Ground Lease beyond any applicable grace period, at the time of exercise of any such option to extend and at the commencement of any Extension Term (as hereinafter defined), Tenant shall have the right to extend the Initial Term of this Ground Lease for six (6) consecutive Extension Terms of five (5) years each (each an "Extension Term"), each such Extension Term to commence upon the expiration of the Initial Term or the then current applicable Extension Term, provided, that if Tenant elects to exercise its extension option, Tenant shall provide written notice thereof to

Error! Unknown document property name.

IN WITNESS WHEREOF the parties hereto have caused this Ground Lease to be executed, under seal, as of the date first recited above.

LANDLORD:

  
\_\_\_\_\_  
DENNIS MOORE

  
\_\_\_\_\_  
TIMOTHY MOORE

TENANT:

[PINEVILLE ENTITY - TO BE FORMED]

By:  (SEAL)

Name Joseph S. Betts Jr.

Title: VP

**Missing Exhibits**

Condition of Property Upon Landlord Vacating  
Agreement of Sale

ASSIGNMENT OF LEASE

15 THIS ASSIGNMENT OF LEASE (this "Agreement") is made and entered into as of the day of October, 2011 (the "Effective Date") by and between PINEVILLE PROPERTIES, LLC, a Pennsylvania limited liability company ("Assignor") and PROVCO PINEVILLE FAYETTE, L.P., a Pennsylvania limited partnership ("Assignee"),

WITNESSETH:

WHEREAS, Assignor, as "Tenant", and Dennis Moore and Timothy Moore, individually, as "Landlord", entered into that certain Lease Agreement dated September 17, 2010 (the "Lease");

WHEREAS, Assignor desires to transfer and assign to Assignee all of Assignor's right, title, interest and obligations as "Tenant" in, to and under the Lease arising from and after the Effective Date, and Assignee desires to assume and accept an assignment of all Assignor's right, title, interest and obligations as "Tenant" in, to and under the Lease arising from and after the Effective Date.

NOW, THEREFORE, for an in consideration of the mutual promises contained herein and of other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, Assignor and Assignee hereby agree as follows:

1. Assignor does hereby sell, assign, transfer, convey and set over absolutely unto Assignee all of Assignor's right, title, interest, powers, obligations and privileges in, to and under the Lease.

2. Assignee does hereby accept an assignment, transfer and conveyance of all of Assignor's right, title, interest, powers, obligations and privileges in, to and under the Lease, and Assignee hereby assumes and agrees to be bound by and timely perform, observe, discharge, and otherwise comply with each and every one of the agreements, duties, obligations, covenants and undertakings upon the part of Landlord to be kept and performed under the Lease (but only to the same extent as same would have arisen and been binding on Assignor absent such assignment) commencing from and after the Effective Date,

3. Assignee hereby indemnities and agrees to hold harmless Assignor from and against any and all liabilities, claims, demands, obligations, assessments, losses, costs, damages, and expenses of any nature whatsoever (including, but without limiting the generality of the foregoing, attorneys fees and court costs) which Assignor may incur, sustain or suffer or which may be asserted or charged against Assignor, arising out of, pertaining to or in any way connected with Assignee's obligations, duties or liabilities under the Lease from and after the Effective Date.

4. This Agreement shall bind and inure to the benefit of the parties and their respective successors, legal representatives and assigns. Neither this Agreement nor any term, provisions, or condition hereof may be changed, amended or modified, and no obligation, duty or liability of any party hereto may be released, discharged or waived, except in a writing signed by all parties hereto.

IN WITNESS WHEREOF, Assignor and Assignee have caused this Agreement to be executed as of the date first above written.

**ASSIGNOR:**

PINEVILLE PROPERTIES, LLC

By: *Dennis Moore*  
Its: Vice President

**ASSIGNEE:**

PROVCO PINEVILLE FAYETTE, ~~LLC~~ <sup>L.P.</sup> (10)  
by its general partners

PINEVILLE FAYETTE, INC. G.P. LLC (13)

By: *[Signature]*  
Its: Member

PROVCO FAYETTE, INC. G.P. LLC (B)

By: *[Signature]*  
Its: Manager

**CONSENT**

The undersigned, the "Landlord" under the Lease hereby consents to the foregoing assignment which consent is provided pursuant to the terms of the Lease.

*[Signature]*  
DENNIS MOORE

*[Signature]*  
TIMOTHY MOORE