

# Supreme Court of Pennsylvania

## Court of Common Pleas Civil Cover Sheet

Montgomery

County



2024-21042-0000 9/4/2024 11:23 AM # 14561762  
Rcpt#2024-29-01119 Fee:\$294.25 Appeal from Zoning Bo  
Main (Public)  
MontCo Prothonotary

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

### Commencement of Action:

- Complaint  Writ of Summons  Petition  
 Transfer from Another Jurisdiction  Declaration of Taking

APPEAL

Lead Plaintiff's Name:

FLAGSHIP

Lead Defendant's Name:

Are money damages requested?  Yes  No

Dollar Amount Requested:  within arbitration limits  
 outside arbitration limits  
(check one)

Is this a Class Action Suit?  Yes  No

Is this an MDJ Appeal?  Yes  No

Name of Plaintiff/Appellant's Attorney:

Edmund Mullin, Carl Weiner

Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)

SECTION B

### Nature of the Case:

Place an "X" to the left of the **ONE** case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

#### TORT (do not include Mass Tort)

- Intentional  
 Malicious Prosecution  
 Motor Vehicle  
 Nuisance  
 Premises Liability  
 Product Liability (does not include mass tort)  
 Slander/Libel/ Defamation  
 Other:

#### CONTRACT (do not include Judgments)

- Buyer Plaintiff  
 Debt Collection: Credit Card  
 Debt Collection: Other  
  
 Employment Dispute: Discrimination  
 Employment Dispute: Other  
  
 Other:

#### CIVIL APPEALS

- Administrative Agencies  
 Board of Assessment  
 Board of Elections  
 Dept. of Transportation  
 Statutory Appeal: Other  
  
 Zoning Board  
 Other:

#### MASS TORT

- Asbestos  
 Tobacco  
 Toxic Tort - DES  
 Toxic Tort - Implant  
 Toxic Waste  
 Other:

#### REAL PROPERTY

- Ejectment  
 Eminent Domain/Condemnation  
 Ground Rent  
 Landlord/Tenant Dispute  
 Mortgage Foreclosure: Residential  
 Mortgage Foreclosure: Commercial  
 Partition  
 Quiet Title  
 Other:

#### MISCELLANEOUS

- Common Law/Statutory Arbitration  
 Declaratory Judgment  
 Mandamus  
 Non-Domestic Relations Restraining Order  
 Quo Warranto  
 Replevin  
 Other:

#### PROFESSIONAL LIABILITY

- Dental  
 Legal  
 Medical  
 Other Professional:

MP

J. EDMUND MULLIN, ESQUIRE  
IDENTIFICATION NO. 9266  
CARL N. WEINER, ESQUIRE  
IDENTIFICATION NO. 34486  
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33657-0000

Montgomery Co Prothonotary  
SEP 4 '24 AM 11:38

ATTORNEYS FOR APPELLANT  
FLAGSHIP PENNSYLVANIA PROPCO, LLC

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CIVIL ACTION – LAW

IN RE: APPEAL BY FLAGSHIP :  
PENNSYLVANIA PROPCO, LLC FROM : NO. 2024- 21042  
WHITPAIN TOWNSHIP’S ENACTMENT :  
OF ORDINANCE NO. 4-265 TO PROVIDE :  
FOR DRIVE-THROUGH VEHICLE CARE :  
FACILITIES IN THE C COMMERCIAL :  
DISTRICT AND COMMUNITY SHOPPING : LAND USE APPEAL  
CENTER OVERLAY DISTRICT :

**NOTICE OF LAND USE APPEAL**

Appellant, Flagship Pennsylvania Propco, LLC, by and through its counsel, Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C., hereby appeals the enactment of Whitpain Township Ordinance No. 4-265 on August 6, 2024 by the Board of Supervisors of Whitpain Township, and in support thereof states the following:

1. This Notice of Land Use Appeal is being filed with the Montgomery County Court of Common Pleas pursuant to 42 Pa.C.S.A. §5571.1 and Section 1002-A of the Pennsylvania Municipalities Planning Code (the “MPC”), 53 P.S. §11002-A regarding violations of MPC Sections 609 and 610, and in accordance with the Pennsylvania Declaratory Judgements Act, 42 Pa.C.S.A. §7533.

NR

2. The Appellant is Flagship Pennsylvania Propco, LLC, a Pennsylvania limited liability company with an address of 950 Herndon Parkway, Suite 400, Herndon, Virginia 20170 (“Flagship”).

3. The Appellee is the Whitpain Township Board of Supervisors with an address of 960 Wentz Road, Blue Bell, Pennsylvania 19422-1835 (“Board of Supervisors”).

4. On August 6, 2024, the Board of Supervisors purportedly enacted Whitpain Township Ordinance No. 4-265, which was meant to amend the Whitpain Township Zoning Ordinance (“Zoning Ordinance”) in the manner described hereinbelow. A true and correct copy of Ordinance No. 4-265 is attached hereto and incorporated herein as Exhibit “A.”

5. Flagship is the equitable owner of certain real property comprising 2.2 *gross* acres +/- at 901 Dekalb Pike in Whitpain Township, Montgomery County, Pennsylvania, being Tax Parcel No. 66-00-01621-00-5 (the “Property”).

6. The Property is a corner lot in the southwest quadrant of the intersection of Skippack and Dekalb Pikes, and is located in the C – Commercial Zoning District.

7. On April 3, 2024, Flagship attended a meeting of the Whitpain Township Planning Committee<sup>1</sup> (“Planning Committee”) to discuss the potential development of a car wash on the Property. Flagship’s counsel inquired as to whether this use was permitted by the Zoning Ordinance. The Township Solicitor indicated that this question needed review. No Township personnel made mention of any potential Zoning Ordinance amendments at this meeting.

8. On May 21, 2024, the Board of Supervisors unanimously voted at its regular meeting to:

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<sup>1</sup> The Planning Committee is a working group that is comprised of Township officials and staff such as the Township Manager, Assistant Township Manager, Township Engineer, Township Solicitor, Township Planner, Zoning Officer, and members of the Board of Supervisors and Township Planning Commission.

“[a]dvertise draft Ordinance No. 4-265 to amend the Code of Whitpain Township at Part II [General Legislation], Chapter 160 [Zoning], by amending and restating Article II [Definitions] and Article XIX [Commercial Districts] to provide specific definitions, standards and criteria for a drive-through vehicle care facility as a special exception.”

A true and correct copy of the minutes of this meeting is attached hereto and incorporated herein as Exhibit “B.” Even though the proposed ordinance would effectively prohibit Flagship’s car wash, no one from the Township informed Flagship that the Board of Supervisors was planning to take this action.

9. On May 22, 2024, Flagship’s counsel sent the following email to the Township Manager and Solicitor:

“Roman we are wondering whether we can get onto your June planning committee meeting agenda. Greg have you ever made a final determination on the fact that we would need a special exception? Also, [do] you guys know of someone, an architect, who you deal with that would be good to make the car wash look like an old Stone building like the restaurants in Broadaxe and Bluebell?”

10. On June 4, 2024, the Township Solicitor responded in an email *sent at 11:09 p.m.:*

“Ed – My apologies for the delay. We did review, and under the current ordinance, the carwash would require a special exception. However, the Board has since announced intention to adopt a particular ordinance related to drive-through vehicle care facilities. It has been sent to the Planning Commission. I am attaching it here. We would welcome comment.”

This was the first occasion where the Township informed Flagship that a zoning amendment was in the works. Still, the anodyne description of the draft ordinance in this email did not indicate that it would, in effect, prohibit Flagship’s proposed car wash on the Property. A true and correct copy of the May 22, 2024 and June 4, 2024 emails is attached hereto and incorporated herein as Exhibit “C.”

11. Early the next morning, on June 5, 2024, Flagship attended a second meeting of the Planning Committee. This meeting occurred before Flagship was able to review the draft ordinance attached to the Township Solicitor's 11:09 p.m. email of the previous night. At this meeting, Flagship sought input regarding the design of the car wash project, and the Township reiterated the need for the special exception. The Township personnel in attendance did not mention that the ordinance would prohibit Flagship's proposed car wash.

12. The draft ordinance attached to the Solicitor's June 4, 2024 email bore the notation "v2" at the bottom of each page ("Ordinance Version 2"). Ordinance Version 2 (i) defined the term "Drive-Through Vehicle Care Facility," and (ii) added it as a use permitted by special exception in the C – Commercial Zoning District, subject to certain regulations. Among those regulations are a requirement for a minimum lot area of two (2) *developable* acres, and a prohibition of the use on any corner lot. A true and correct copy of Ordinance Version 2 is attached hereto and incorporated herein by reference as Exhibit "D."

13. Ordinance Version 2 (and all successor versions discussed below), defines a "Drive-Through Vehicle Care Facility" as follows:

**"DRIVE-THROUGH VEHICLE CARE FACILITY**

A non-residential facility specifically designed for vehicle care services to be performed by mechanized means, attendant employees or by the customer-motorists where vehicles move through a facility or are intended to remain on the property for only a short period of time for the services to be performed. ***This use includes all types of car washes***, rapid oil change businesses, windshield replacement services, and similar short-term vehicle care services, as determined by the Code Enforcement Officer." (Emphasis added.)

14. Zoning Ordinance Section 160-7 currently defines a "developable acre" as "[a]ll land within the lot lines *except* that located within existing rights-of-way of public roads and

overhead utility lines, *floodplains* and land continuously covered with water.” (Emphasis added.)

15. Ordinance Version 2 would prohibit Flagship’s proposed car wash on the Property because (i) it is a corner lot, and (ii) it comprises only 1.4 *developable* acres +/- since it is encumbered by an area of floodplain along its southern boundary.

16. The Board of Supervisors submitted *only* Ordinance Version 2 to the Whitpain Township Planning Commission (“Township Planning Commission”) for review<sup>2</sup>. A true and correct copy of the June 11, 2024 Township Planning Commission meeting agenda is attached hereto and incorporated herein as Exhibit “E.” The Board of Supervisors did not submit any of the subsequent versions of the proposed ordinance (discussed hereinbelow) to the Township Planning Commission or to the Montgomery County Planning Commission (“County Planning Commission”).

17. Based upon the Township Solicitor’s comment that a special exception is required for a car wash, on July 1, 2024, Flagship submitted an application to the Whitpain Township

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<sup>2</sup> It is clear that the Board of Supervisors submitted only Ordinance Version 2 to the Township Planning Commission, because the relevant June 11, 2024 Township Planning Commission agenda item is described as follows:

“Review of Ordinance No. 4-265 – An Ordinance amending the Code of the Township of Whitpain at Part II [General Legislation], Chapter 160 [Zoning], by amending and restating Article II [Definitions] and Article XIX [C Commercial Districts] to provide specific definitions, standards and criteria for a drive-through vehicle care facility as a special exception.”

There is no mention, here, of the amendatory provisions for Article XXXVIII [Community Shopping Center Overlay District] that made their way into the subsequent versions of the proposed ordinance (discussed hereinbelow), and the Township Planning Commission did not discuss any other versions of the ordinance at any of its other meetings.

Zoning Hearing Board for a special exception pursuant to Zoning Ordinance Section 160-119.N<sup>3</sup> to operate a car wash on the Property (“Application”). A true and correct copy of the Application is attached hereto and incorporated herein as Exhibit “F.” Of particular relevance to the Application is Zoning Ordinance Section 160-121.B, which requires that all uses in the C – Commercial District have a minimum lot area of 6,000 square feet.

18. By letter dated July 8, 2024 (the “ZO Letter”), the Township’s Zoning Officer rejected the Application due to the pendency of Ordinance No. 4-265. A true and correct copy of the ZO Letter is attached hereto and incorporated herein as Exhibit “G.”

19. On July 16, 2024, the Board of Supervisors convened a hearing on the proposed ordinance (the “July Hearing”). The ordinance discussed at the July Hearing bore the notation “v4” at the bottom of each page (“Ordinance Version 4”). Ordinance Version 4 is not identical to Ordinance Version 2. Ordinance Version 4 added Drive-Through Vehicle Care Facilities as a use permitted by conditional use in the Community Shopping Center Overlay District, and reduced the minimum required lot area to one-and-one-half (1.5) developable acres. A true and correct copy of Ordinance Version 4 is attached hereto and incorporated herein by reference as Exhibit “H.”

20. At the July Hearing, the Board of Supervisors continued the matter to August 6, 2024.

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<sup>3</sup> Zoning Ordinance Section 160-119.N provides as follows:

**“§160-119. Use regulations.**

A building may be erected, altered, or used and a lot or premises may be used or occupied for any of the following purposes and no other;

...

N. Any use of the same general character as any use hereinbefore specifically permitted by special exception.”

21. Ordinance Version 4 would still prohibit Flagship’s proposed car wash on the Property because (i) it is a corner lot, and (ii) it comprises only 1.4 *developable* acres +/- due to the area of floodplain.

22. Ordinance Version 4 was never submitted to the Township Planning Commission or the County Planning Commission for review.

23. On July 23, 2024 and July 30, 2024, the Township published legal notices for the August 6, 2024 hearing in *The Times Herald*. The notices provided, in pertinent part, as follows:

“On August 6, 2024 after 6 p.m., the Whitpain Township Board of Supervisors, during its regularly scheduled meeting, will consider enacting the following:

Ord. No. 4-265 (amended), an Ordinance amending the Code of the Township of Whitpain at Part II [General Legislation], Chapter 160 [Zoning], by amending and restating Article II [Definitions], Article XIX [C Commercial Districts], and Article XXXVIII [Community Shopping Center Overlay District] to provide specific definitions, standards and criteria for a Drive-Through Vehicle Care Facility as a special exception and a conditional use.

...  
***A public hearing on a previous version of the Ordinance [Ordinance Version 4] was held on July 16, 2024. The ordinance has since been amended, and a second hearing on the amended ordinance will be held as stated above in this notice...***  
(Emphasis added.)

A true and correct copy of the legal notices is attached hereto and incorporated herein as Exhibit “I.”

24. On August 6, 2024, the Board of Supervisors convened a hearing regarding the amended ordinance (the “August Hearing”). The ordinance discussed at the August Hearing bore the notation “v5” at the bottom of each page (“Ordinance Version 5”). Ordinance Version 5 is not identical to Ordinance Version 4. Ordinance Version 5 eliminated the prior versions’ prohibition of Drive-Through Vehicle Care Facilities on corner lots.



25. Ordinance Version 5 still prohibits Flagship's proposed car wash on the Property because it comprises only 1.4 *developable* acres +/- due to the area of floodplain.

26. Ordinance Version 5 was never submitted to the Township Planning Commission or the County Planning Commission for review.

27. At the conclusion of the August Hearing, the Board of Supervisors voted to enact Ordinance Version 5 as Whitpain Township Ordinance No. 4-265, which is attached hereto as Exhibit "A."

**COUNT ONE: PROCEDURAL CHALLENGE TO ORDINANCE NO. 4-265**

28. Flagship hereby incorporates all preceding paragraphs as if the same were set forth herein at length.

29. MPC Section 1002-A(b) provides as follows:

"(b) Challenges to the validity of a land use ordinance raising procedural questions or alleged defects in the process of enactment or adoption shall be raised by appeal taken directly to the court of common pleas of the judicial district in which the municipality adopting the ordinance is located in accordance with 42 Pa.C.S.A. §5571.1 (relating to appeals from ordinances, resolutions, maps, etc.)."

30. 42 Pa.C.S.A. §5571.1 provides, in pertinent part, as follows:

"(a) **Applicability; court of common pleas.—**

(1) This section shall apply to any appeal raising questions relating to an alleged defect in the process of or procedure for enactment or adoption of any ordinance, resolution, map or similar action of a political subdivision.

(2) An appeal pursuant to this section shall be to the court of common pleas.

(b) **Appeals of defects in statutory procedure.—**

- (1) Any appeal raising questions relating to an alleged defect to statutory procedure shall be brought within 30 days of the intended effective date of the ordinance...

31. 42 Pa.C.S.A. §5571.1(g) defines “intended effective date,” as follows:

“‘Intended effective date.’ Notwithstanding the validity of the challenged ordinance, the effective date specified in the challenged ordinance or, if no effective date is specified, the date 60 days after the date the ordinance would have been finally adopted but for the alleged defect in the process of enactment or adoption.”

32. Ordinance No. 4-265 was purportedly enacted on August 6, 2024. Section 6 thereof provides that “[t]his Ordinance shall become effective five (5) days after enactment.” Flagship commenced this matter within thirty (30) days of the intended effective date of Ordinance No. 4-265.

33. Statutory steps for enactment of ordinances are mandatory and nonwaivable. Lower Gwynedd Township v. Gwynedd Properties, Inc., 591 A.2d 285 (Pa. 1991). The procedures established by the legislature for the enactment of ordinances must be followed strictly in order for an ordinance to be valid. Id. at 287.

34. MPC Section 609 provides as follows:

**“§609. Enactment of Zoning Ordinance Amendments.-**

...

(b)(1) Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice...

(c) In the case of an amendment other than that prepared by the planning agency, the governing body shall submit **each such amendment** to the planning agency at least 30 days prior to the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations.

...

(e) If a county planning agency shall have been created for the county in which the municipality proposing the amendment is located, then at least 30 days prior to the public hearing on the amendment by the local governing body, the municipality shall submit the

proposed amendment to the county planning agency for recommendations.” (Emphasis added.) 53 P.S. §10609.

35. Under MPC Section 609(c) it is “clear cut” that each version of a zoning ordinance amendment must be submitted to the Township Planning Commission, no matter how minor any revisions thereto may be. Hanover Healthcare Plus, Inc. v. Zoning Hearing Board of Penn Township, 875 A.2d 1255 (Pa. Cmwlth. 2005). Although MPC Section 609(e) does not include the word “each,” the entirety of MPC Section 609 requires that each version of a zoning ordinance amendment be submitted to the County Planning Commission. Id. at 1257-8.

36. Ordinance No. 4-265 was not prepared by the Township Planning Commission.

37. The Board of Supervisors purportedly enacted Ordinance No. 4-265 on August 6, 2024. A draft of Ordinance No. 4-265 (Ordinance Version 5) had to be submitted to the Township Planning Commission and County Planning Commission on or before July 7, 2024 to provide them with the minimum thirty (30) day review period mandated by MPC Sections 609(c) and (e). Ordinance Version 5 was not submitted *at all* to the Township Planning Commission or County Planning Commission.

38. Ordinance Version 5 revised the provisions of Ordinance Version 4 by removing a key prohibition of the use on corner lots. Ordinance Version 4 was the subject of the July Hearing. The July Hearing took place only twenty-one (21) days before the August Hearing. Given that the legal notices for the August Hearing (for Ordinance Version 5) mention that “a previous version of the Ordinance [Ordinance Version 4]” was the subject of the July Hearing, and that “[t]he ordinance has *since* been amended...” (Emphasis added.), it is clear that Ordinance Version 5 did not even *exist* thirty (30) days before the August Hearing. It was, therefore, impossible for the Township Planning Commission and County Planning Commission

to even be accorded their mandatory thirty (30) day review periods in accordance with MPC Section 609(c) and (e).

39. For these reasons, the enactment of Whitpain Township Ordinance No. 4-265 was procedurally defective, and should be declared invalid, void *ab initio*, and of no force and effect.

**COUNT II: DECLARATORY JUDGMENT / SPECIAL LEGISLATION**

40. Flagship hereby incorporates all preceding paragraphs as if the same were set forth herein at length.

41. The Pennsylvania Declaratory Judgments Act provides that “[a]ny person...whose rights, status, or other legal relations are affected by a...municipal ordinance...may have determined any question of construction or validity arising under the ordinance...and obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa.C.S.A. §7533.

42. An application for relief under the Pennsylvania Declaratory Judgments Act “shall be in the form prescribed by general rules.” 42 Pa.C.S.A. §7538(b).

43. Pennsylvania Rule of Civil Procedure 1602 provides that “[i]n any civil action, a party may include in the claim for relief a prayer for declaratory relief and the practice and procedure shall follow, as nearly as may be, the rules governing that action.” Pa.R.C.P. 1602.

44. Flagship is adversely affected by the purported enactment of Ordinance No. 4-265. Prior to the purported enactment of Ordinance No. 4-265, Zoning Ordinance Section 160-121.B required a minimum lot area of only 6,000 square feet for any use in the C – Commercial District, including Flagship’s proposed car wash. The Property complies with this regulation. Ordinance No. 4-265 increases the minimum required lot area to 1.5 developable acres for Flagship’s proposed car wash. The Property cannot comply with that regulation.

45. Article III, Section 32 of the Pennsylvania Constitution prohibits a governing body from enacting legislation which singles out a person or entity for particularized or special treatment. Warner Company v. Zoning Hearing Board of Tredyffrin Township, 612 A.2d 578, 583 (Pa. Cmwlth. 1992). Zoning acts and ordinances passed under them are valid and constitutional whenever they are not unjustly discriminatory, or arbitrary, or unreasonable, or confiscatory in their application to a particular or specific piece of property. Commercial Properties, Inc. v. Peternel, 211 A.2d 514, 518 (Pa. 1965). The theory of special legislation applies to “situations where amendatory zoning ordinances were adopted to deprive the applicant of vested rights in permits issued before the amendment or to prevent a permitted use in the pending application.” Appeal of Apgar, 661 A.2d 445, 448 (Pa. Cmwlth. 1995).

46. Flagship first introduced its proposed car wash development to the Township at the April 3, 2024 Planning Committee meeting. Over the next four (4) months, the Township prepared, and presumably circulated and discussed internally, at least five (5) versions of a zoning ordinance amendment that comprehensively regulates car washes in the Township, and twice authorized the advertisement of hearings therefor. All versions of the proposed zoning ordinance amendment prohibit Flagship’s proposed car wash. During this period, Flagship incurred significant expense engaging in continuous good faith discussions with Township personnel to refine the design of its proposed car wash.

47. The Township did not inform Flagship that the Township was in the process of drafting and enacting such an ordinance until the Township Solicitor sent his late-night June 4, 2024 email to Flagship’s counsel. At the June 5, 2024 Planning Committee meeting, Flagship continued its discussions with the Township regarding the design of the car wash; the Township still did not mention the proposed ordinance’s impact on Flagship’s car wash proposal. The

Township pointedly avoided mentioning that the proposed ordinance would bar Flagship's proposed car wash until the Township Zoning Officer sent the ZO Letter on July 8, 2024, a mere eight (8) days before the July Hearing for Ordinance Version 4.

48. Without Ordinance No. 4-265, Flagship could obtain a special exception to allow the car wash on the Property pursuant to Zoning Ordinance Section 160-119.N. Zoning Ordinance Section 160-121.B requires that every single use in the C – Commercial District be on a lot of at least 6,000 square feet.

49. Ordinance No. 4-265 raised the minimum lot area requirement only for Drive-Through Vehicle Care Facilities (car washes) to 1.5 developable acres (or, 65,340 square feet). This represents an *eleven-fold* increase from the 6,000 square foot minimum lot area requirement that remains unchanged for every other use in the C – Commercial District.

50. The new 1.5 developable acre minimum lot area requirement happens to be just enough to prohibit Flagship's car wash on the Property, which comprises 1.4 developable acres.


51. The Board of Supervisors clearly enacted Ordinance No. 4-265 to single Flagship out for particularized treatment in order to prevent its proposed car wash on the Property.

**WHEREFORE**, for the foregoing reasons, Flagship respectfully requests that this Honorable Court enter an Order affirming this Land Use Appeal, and finding that Whitpain Township Ordinance No. 4-265 is procedurally defective, and that it constitutes illegal special legislation, and that it is therefore invalid, void *ab initio*, and of no force and effect.

Respectfully Submitted,

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, P.C.

By:

  
\_\_\_\_\_  
J. EDMUND MULLIN  
CARL N. WEINER  
*Attorneys for Appellant*  
*Flagship Pennsylvania Propco, LLC*

Date: September 4, 2024

**VERIFICATION**

I, J. Edmund Mullin, Esquire, upon information received from the Appellant, verify that the statements made in the foregoing Notice of Land Use Appeal are true and correct, to the best of my knowledge, information and belief. The Appellant cannot make the verification to the foregoing document because its verification cannot be obtained within the time allowed for filing this verification. The statements made herein are subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, P.C.

By:

  
\_\_\_\_\_  
J. EDMUND MULLIN  
*Attorney for Appellant*  
*Flagship Pennsylvania Propco, LLC*

Date: September 4, 2024




**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted,

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, P.C.

By:

  
\_\_\_\_\_  
J. EDMUND MULLIN  
CARI N. WEINER  
*Attorneys for Appellant*  
*Flagship Pennsylvania Propco, LLC*

Date: September 4, 2024

# Supreme Court of Pennsylvania

## Court of Common Pleas Civil Cover Sheet

Montgomery County



2024-21042-0000 9/4/2024 11:23 AM # 14561762  
Rcpt#2024-29-01119 Fee:\$294.25 Appeal from Zoning Bo  
Main (Public)  
MontCo Prothonotary

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

<b>Commencement of Action:</b> <input type="checkbox"/> Complaint <input type="checkbox"/> Writ of Summons <input type="checkbox"/> Petition <input type="checkbox"/> Transfer from Another Jurisdiction <input type="checkbox"/> Declaration of Taking		APPEAL
Lead Plaintiff's Name: <u>FLAGSHIP Pennsylvania People LLC</u>	Lead Defendant's Name: <u>Whitpain Township Board of Supervisors</u>	
Are money damages requested? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Dollar Amount Requested: <input type="checkbox"/> within arbitration limits (check one) <input type="checkbox"/> outside arbitration limits	
Is this a <i>Class Action Suit</i> ? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Is this an <i>MDJ Appeal</i> ? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Name of Plaintiff/Appellant's Attorney: <u>Edmund Mullin, Carl Weiner</u>		
<input type="checkbox"/> Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)		

SECTION B

**Nature of the Case:** Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

<b>TORT (do not include Mass Tort)</b> <input type="checkbox"/> Intentional <input type="checkbox"/> Malicious Prosecution <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Nuisance <input type="checkbox"/> Premises Liability <input type="checkbox"/> Product Liability (does not include mass tort) <input type="checkbox"/> Slander/Libel/ Defamation <input type="checkbox"/> Other: _____	<b>CONTRACT (do not include Judgments)</b> <input type="checkbox"/> Buyer Plaintiff <input type="checkbox"/> Debt Collection: Credit Card <input type="checkbox"/> Debt Collection: Other _____ <input type="checkbox"/> Employment Dispute: Discrimination <input type="checkbox"/> Employment Dispute: Other _____ <input type="checkbox"/> Other: _____	<b>CIVIL APPEALS</b> Administrative Agencies <input type="checkbox"/> Board of Assessment <input type="checkbox"/> Board of Elections <input type="checkbox"/> Dept. of Transportation <input type="checkbox"/> Statutory Appeal: Other _____ <input checked="" type="checkbox"/> Zoning Board <input type="checkbox"/> Other: _____
<b>MASS TORT</b> <input type="checkbox"/> Asbestos <input type="checkbox"/> Tobacco <input type="checkbox"/> Toxic Tort - DES <input type="checkbox"/> Toxic Tort - Implant <input type="checkbox"/> Toxic Waste <input type="checkbox"/> Other: _____	<b>REAL PROPERTY</b> <input type="checkbox"/> Ejectment <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Ground Rent <input type="checkbox"/> Landlord/Tenant Dispute <input type="checkbox"/> Mortgage Foreclosure: Residential <input type="checkbox"/> Mortgage Foreclosure: Commercial <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Other: _____	<b>MISCELLANEOUS</b> <input type="checkbox"/> Common Law/Statutory Arbitration <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Mandamus <input type="checkbox"/> Non-Domestic Relations Restraining Order <input type="checkbox"/> Quo Warranto <input type="checkbox"/> Replevin <input type="checkbox"/> Other: _____
<b>PROFESSIONAL LIABILITY</b> <input type="checkbox"/> Dental <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional: _____		

MP

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33657-0000

Montgomery Co Prothonotary  
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ATTORNEYS FOR APPELLANT  
FLAGSHIP PENNSYLVANIA PROPCO, LLC

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CIVIL ACTION – LAW

IN RE: APPEAL BY FLAGSHIP :  
PENNSYLVANIA PROPCO, LLC FROM : NO. 2024- 21042  
WHITPAIN TOWNSHIP’S ENACTMENT :  
OF ORDINANCE NO. 4-265 TO PROVIDE :  
FOR DRIVE-THROUGH VEHICLE CARE :  
FACILITIES IN THE C COMMERCIAL :  
DISTRICT AND COMMUNITY SHOPPING : LAND USE APPEAL  
CENTER OVERLAY DISTRICT :

**NOTICE OF LAND USE APPEAL**

Appellant, Flagship Pennsylvania Propco, LLC, by and through its counsel, Hamburg, Ruben, Mullin, Maxwell & Lupin, P.C., hereby appeals the enactment of Whitpain Township Ordinance No. 4-265 on August 6, 2024 by the Board of Supervisors of Whitpain Township, and in support thereof states the following:

1. This Notice of Land Use Appeal is being filed with the Montgomery County Court of Common Pleas pursuant to 42 Pa.C.S.A. §5571.1 and Section 1002-A of the Pennsylvania Municipalities Planning Code (the “MPC”), 53 P.S. §11002-A regarding violations of MPC Sections 609 and 610, and in accordance with the Pennsylvania Declaratory Judgements Act, 42 Pa.C.S.A. §7533.

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2. The Appellant is Flagship Pennsylvania Propco, LLC, a Pennsylvania limited liability company with an address of 950 Herndon Parkway, Suite 400, Herndon, Virginia 20170 (“Flagship”).

3. The Appellee is the Whitpain Township Board of Supervisors with an address of 960 Wentz Road, Blue Bell, Pennsylvania 19422-1835 (“Board of Supervisors”).

4. On August 6, 2024, the Board of Supervisors purportedly enacted Whitpain Township Ordinance No. 4-265, which was meant to amend the Whitpain Township Zoning Ordinance (“Zoning Ordinance”) in the manner described hereinbelow. A true and correct copy of Ordinance No. 4-265 is attached hereto and incorporated herein as Exhibit “A.”

5. Flagship is the equitable owner of certain real property comprising 2.2 *gross* acres +/- at 901 Dekalb Pike in Whitpain Township, Montgomery County, Pennsylvania, being Tax Parcel No. 66-00-01621-00-5 (the “Property”).

6. The Property is a corner lot in the southwest quadrant of the intersection of Skippack and Dekalb Pikes, and is located in the C – Commercial Zoning District.

7. On April 3, 2024, Flagship attended a meeting of the Whitpain Township Planning Committee<sup>1</sup> (“Planning Committee”) to discuss the potential development of a car wash on the Property. Flagship’s counsel inquired as to whether this use was permitted by the Zoning Ordinance. The Township Solicitor indicated that this question needed review. No Township personnel made mention of any potential Zoning Ordinance amendments at this meeting.

8. On May 21, 2024, the Board of Supervisors unanimously voted at its regular meeting to:

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<sup>1</sup> The Planning Committee is a working group that is comprised of Township officials and staff such as the Township Manager, Assistant Township Manager, Township Engineer, Township Solicitor, Township Planner, Zoning Officer, and members of the Board of Supervisors and Township Planning Commission.

“[a]dvertise draft Ordinance No. 4-265 to amend the Code of Whitpain Township at Part II [General Legislation], Chapter 160 [Zoning], by amending and restating Article II [Definitions] and Article XIX [C Commercial Districts] to provide specific definitions, standards and criteria for a drive-through vehicle care facility as a special exception.”

A true and correct copy of the minutes of this meeting is attached hereto and incorporated herein as Exhibit “B.” Even though the proposed ordinance would effectively prohibit Flagship’s car wash, no one from the Township informed Flagship that the Board of Supervisors was planning to take this action.

9. On May 22, 2024, Flagship’s counsel sent the following email to the Township Manager and Solicitor:

“Roman we are wondering whether we can get onto your June planning committee meeting agenda. Greg have you ever made a final determination on the fact that we would need a special exception? Also, [do] you guys know of someone, an architect, who you deal with that would be good to make the car wash look like an old Stone building like the restaurants in Broadaxe and Bluebell?”

10. On June 4, 2024, the Township Solicitor responded in an email *sent at 11:09 p.m.:*

“Ed – My apologies for the delay. We did review, and under the current ordinance, the carwash would require a special exception. However, the Board has since announced intention to adopt a particular ordinance related to drive-through vehicle care facilities. It has been sent to the Planning Commission. I am attaching it here. We would welcome comment.”

This was the first occasion where the Township informed Flagship that a zoning amendment was in the works. Still, the anodyne description of the draft ordinance in this email did not indicate that it would, in effect, prohibit Flagship’s proposed car wash on the Property. A true and correct copy of the May 22, 2024 and June 4, 2024 emails is attached hereto and incorporated herein as Exhibit “C.”

11. Early the next morning, on June 5, 2024, Flagship attended a second meeting of the Planning Committee. This meeting occurred before Flagship was able to review the draft ordinance attached to the Township Solicitor's 11:09 p.m. email of the previous night. At this meeting, Flagship sought input regarding the design of the car wash project, and the Township reiterated the need for the special exception. The Township personnel in attendance did not mention that the ordinance would prohibit Flagship's proposed car wash.

12. The draft ordinance attached to the Solicitor's June 4, 2024 email bore the notation "v2" at the bottom of each page ("Ordinance Version 2"). Ordinance Version 2 (i) defined the term "Drive-Through Vehicle Care Facility," and (ii) added it as a use permitted by special exception in the C – Commercial Zoning District, subject to certain regulations. Among those regulations are a requirement for a minimum lot area of two (2) *developable* acres, and a prohibition of the use on any corner lot. A true and correct copy of Ordinance Version 2 is attached hereto and incorporated herein by reference as Exhibit "D."

13. Ordinance Version 2 (and all successor versions discussed below), defines a "Drive-Through Vehicle Care Facility" as follows:

**"DRIVE-THROUGH VEHICLE CARE FACILITY**

A non-residential facility specifically designed for vehicle care services to be performed by mechanized means, attendant employees or by the customer-motorists where vehicles move through a facility or are intended to remain on the property for only a short period of time for the services to be performed. ***This use includes all types of car washes***, rapid oil change businesses, windshield replacement services, and similar short-term vehicle care services, as determined by the Code Enforcement Officer." (Emphasis added.)

14. Zoning Ordinance Section 160-7 currently defines a "developable acre" as "[a]ll land within the lot lines *except* that located within existing rights-of-way of public roads and

overhead utility lines, *floodplains* and land continuously covered with water.” (Emphasis added.)

15. Ordinance Version 2 would prohibit Flagship’s proposed car wash on the Property because (i) it is a corner lot, and (ii) it comprises only 1.4 *developable* acres +/- since it is encumbered by an area of floodplain along its southern boundary.

16. The Board of Supervisors submitted *only* Ordinance Version 2 to the Whitpain Township Planning Commission (“Township Planning Commission”) for review<sup>2</sup>. A true and correct copy of the June 11, 2024 Township Planning Commission meeting agenda is attached hereto and incorporated herein as Exhibit “E.” The Board of Supervisors did not submit any of the subsequent versions of the proposed ordinance (discussed hereinbelow) to the Township Planning Commission or to the Montgomery County Planning Commission (“County Planning Commission”).

17. Based upon the Township Solicitor’s comment that a special exception is required for a car wash, on July 1, 2024, Flagship submitted an application to the Whitpain Township

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<sup>2</sup> It is clear that the Board of Supervisors submitted only Ordinance Version 2 to the Township Planning Commission, because the relevant June 11, 2024 Township Planning Commission agenda item is described as follows:

“Review of Ordinance No. 4-265 – An Ordinance amending the Code of the Township of Whitpain at Part II [General Legislation], Chapter 160 [Zoning], by amending and restating Article II [Definitions] and Article XIX [C Commercial Districts] to provide specific definitions, standards and criteria for a drive-through vehicle care facility as a special exception.”

There is no mention, here, of the amendatory provisions for Article XXXVIII [Community Shopping Center Overlay District] that made their way into the subsequent versions of the proposed ordinance (discussed hereinbelow), and the Township Planning Commission did not discuss any other versions of the ordinance at any of its other meetings.

Zoning Hearing Board for a special exception pursuant to Zoning Ordinance Section 160-119.N<sup>3</sup> to operate a car wash on the Property (“Application”). A true and correct copy of the Application is attached hereto and incorporated herein as Exhibit “F.” Of particular relevance to the Application is Zoning Ordinance Section 160-121.B, which requires that all uses in the C – Commercial District have a minimum lot area of 6,000 square feet.

18. By letter dated July 8, 2024 (the “ZO Letter”), the Township’s Zoning Officer rejected the Application due to the pendency of Ordinance No. 4-265. A true and correct copy of the ZO Letter is attached hereto and incorporated herein as Exhibit “G.”

19. On July 16, 2024, the Board of Supervisors convened a hearing on the proposed ordinance (the “July Hearing”). The ordinance discussed at the July Hearing bore the notation “v4” at the bottom of each page (“Ordinance Version 4”). Ordinance Version 4 is not identical to Ordinance Version 2. Ordinance Version 4 added Drive-Through Vehicle Care Facilities as a use permitted by conditional use in the Community Shopping Center Overlay District, and reduced the minimum required lot area to one-and-one-half (1.5) developable acres. A true and correct copy of Ordinance Version 4 is attached hereto and incorporated herein by reference as Exhibit “H.”

20. At the July Hearing, the Board of Supervisors continued the matter to August 6, 2024.

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<sup>3</sup> Zoning Ordinance Section 160-119.N provides as follows:

**“§160-119. Use regulations.**

A building may be erected, altered, or used and a lot or premises may be used or occupied for any of the following purposes and no other:

...

N. Any use of the same general character as any use hereinbefore specifically permitted by special exception.”



21. Ordinance Version 4 would still prohibit Flagship’s proposed car wash on the Property because (i) it is a corner lot, and (ii) it comprises only 1.4 *developable* acres +/- due to the area of floodplain.

22. Ordinance Version 4 was never submitted to the Township Planning Commission or the County Planning Commission for review.

23. On July 23, 2024 and July 30, 2024, the Township published legal notices for the August 6, 2024 hearing in *The Times Herald*. The notices provided, in pertinent part, as follows:

“On August 6, 2024 after 6 p.m., the Whitpain Township Board of Supervisors, during its regularly scheduled meeting, will consider enacting the following:

Ord. No. 4-265 (amended), an Ordinance amending the Code of the Township of Whitpain at Part II [General Legislation], Chapter 160 [Zoning], by amending and restating Article II [Definitions], Article XIX [C Commercial Districts], and Article XXXVIII [Community Shopping Center Overlay District] to provide specific definitions, standards and criteria for a Drive-Through Vehicle Care Facility as a special exception and a conditional use.

...  
***A public hearing on a previous version of the Ordinance [Ordinance Version 4] was held on July 16, 2024. The ordinance has since been amended, and a second hearing on the amended ordinance will be held as stated above in this notice...***  
(Emphasis added.)

A true and correct copy of the legal notices is attached hereto and incorporated herein as Exhibit “I.”

24. On August 6, 2024, the Board of Supervisors convened a hearing regarding the amended ordinance (the “August Hearing”). The ordinance discussed at the August Hearing bore the notation “v5” at the bottom of each page (“Ordinance Version 5”). Ordinance Version 5 is not identical to Ordinance Version 4. Ordinance Version 5 eliminated the prior versions’ prohibition of Drive-Through Vehicle Care Facilities on corner lots.

25. Ordinance Version 5 still prohibits Flagship’s proposed car wash on the Property because it comprises only 1.4 *developable* acres +/- due to the area of floodplain.

26. Ordinance Version 5 was never submitted to the Township Planning Commission or the County Planning Commission for review.

27. At the conclusion of the August Hearing, the Board of Supervisors voted to enact Ordinance Version 5 as Whitpain Township Ordinance No. 4-265, which is attached hereto as Exhibit “A.”

**COUNT ONE: PROCEDURAL CHALLENGE TO ORDINANCE NO. 4-265**

28. Flagship hereby incorporates all preceding paragraphs as if the same were set forth herein at length.

29. MPC Section 1002-A(b) provides as follows:

“(b) Challenges to the validity of a land use ordinance raising procedural questions or alleged defects in the process of enactment or adoption shall be raised by appeal taken directly to the court of common pleas of the judicial district in which the municipality adopting the ordinance is located in accordance with 42 Pa.C.S.A. §5571.1 (relating to appeals from ordinances, resolutions, maps, etc.).”

30. 42 Pa.C.S.A. §5571.1 provides, in pertinent part, as follows:

“(a) **Applicability; court of common pleas.**—

(1) This section shall apply to any appeal raising questions relating to an alleged defect in the process of or procedure for enactment or adoption of any ordinance, resolution, map or similar action of a political subdivision.

(2) An appeal pursuant to this section shall be to the court of common pleas.

(b) **Appeals of defects in statutory procedure.**—

- (1) Any appeal raising questions relating to an alleged defect to statutory procedure shall be brought within 30 days of the intended effective date of the ordinance...

31. 42 Pa.C.S.A. §5571.1(g) defines “intended effective date,” as follows:

“‘Intended effective date.’ Notwithstanding the validity of the challenged ordinance, the effective date specified in the challenged ordinance or, if no effective date is specified, the date 60 days after the date the ordinance would have been finally adopted but for the alleged defect in the process of enactment or adoption.”

32. Ordinance No. 4-265 was purportedly enacted on August 6, 2024. Section 6 thereof provides that “[t]his Ordinance shall become effective five (5) days after enactment.” Flagship commenced this matter within thirty (30) days of the intended effective date of Ordinance No. 4-265.

33. Statutory steps for enactment of ordinances are mandatory and nonwaivable. Lower Gwynedd Township v. Gwynedd Properties, Inc., 591 A.2d 285 (Pa. 1991). The procedures established by the legislature for the enactment of ordinances must be followed strictly in order for an ordinance to be valid. Id. at 287.

34. MPC Section 609 provides as follows:

**“§609. Enactment of Zoning Ordinance Amendments.-**

...

(b)(1) Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice...

(c) In the case of an amendment other than that prepared by the planning agency, the governing body shall submit **each such amendment** to the planning agency at least 30 days prior to the hearing on such proposed amendment to provide the planning agency an opportunity to submit recommendations.

...

(e) If a county planning agency shall have been created for the county in which the municipality proposing the amendment is located, then at least 30 days prior to the public hearing on the amendment by the local governing body, the municipality shall submit the

proposed amendment to the county planning agency for recommendations.” (Emphasis added.) 53 P.S. §10609.

35. Under MPC Section 609(c) it is “clear cut” that each version of a zoning ordinance amendment must be submitted to the Township Planning Commission, no matter how minor any revisions thereto may be. Hanover Healthcare Plus, Inc. v. Zoning Hearing Board of Penn Township, 875 A.2d 1255 (Pa. Cmwlth. 2005). Although MPC Section 609(e) does not include the word “each,” the entirety of MPC Section 609 requires that each version of a zoning ordinance amendment be submitted to the County Planning Commission. Id. at 1257-8.

36. Ordinance No. 4-265 was not prepared by the Township Planning Commission.

37. The Board of Supervisors purportedly enacted Ordinance No. 4-265 on August 6, 2024. A draft of Ordinance No. 4-265 (Ordinance Version 5) had to be submitted to the Township Planning Commission and County Planning Commission on or before July 7, 2024 to provide them with the minimum thirty (30) day review period mandated by MPC Sections 609(c) and (e). Ordinance Version 5 was not submitted **at all** to the Township Planning Commission or County Planning Commission.

38. Ordinance Version 5 revised the provisions of Ordinance Version 4 by removing a key prohibition of the use on corner lots. Ordinance Version 4 was the subject of the July Hearing. The July Hearing took place only twenty-one (21) days before the August Hearing. Given that the legal notices for the August Hearing (for Ordinance Version 5) mention that “a previous version of the Ordinance [Ordinance Version 4]” was the subject of the July Hearing, and that “[t]he ordinance has **since** been amended...” (Emphasis added.), it is clear that Ordinance Version 5 did not even **exist** thirty (30) days before the August Hearing. It was, therefore, impossible for the Township Planning Commission and County Planning Commission

to even be accorded their mandatory thirty (30) day review periods in accordance with MPC Section 609(c) and (e).

39. For these reasons, the enactment of Whitpain Township Ordinance No. 4-265 was procedurally defective, and should be declared invalid, void *ab initio*, and of no force and effect.

**COUNT II: DECLARATORY JUDGMENT / SPECIAL LEGISLATION**

40. Flagship hereby incorporates all preceding paragraphs as if the same were set forth herein at length.

41. The Pennsylvania Declaratory Judgments Act provides that “[a]ny person...whose rights, status, or other legal relations are affected by a...municipal ordinance...may have determined any question of construction or validity arising under the ordinance...and obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa.C.S.A. §7533.

42. An application for relief under the Pennsylvania Declaratory Judgments Act “shall be in the form prescribed by general rules.” 42 Pa.C.S.A. §7538(b).

43. Pennsylvania Rule of Civil Procedure 1602 provides that “[i]n any civil action, a party may include in the claim for relief a prayer for declaratory relief and the practice and procedure shall follow, as nearly as may be, the rules governing that action.” Pa.R.C.P. 1602.

44. Flagship is adversely affected by the purported enactment of Ordinance No. 4-265. Prior to the purported enactment of Ordinance No. 4-265, Zoning Ordinance Section 160-121.B required a minimum lot area of only 6,000 square feet for any use in the C – Commercial District, including Flagship’s proposed car wash. The Property complies with this regulation. Ordinance No. 4-265 increases the minimum required lot area to 1.5 developable acres for Flagship’s proposed car wash. The Property cannot comply with that regulation.

45. Article III, Section 32 of the Pennsylvania Constitution prohibits a governing body from enacting legislation which singles out a person or entity for particularized or special treatment. Warner Company v. Zoning Hearing Board of Tredyffrin Township, 612 A.2d 578, 583 (Pa. Cmwlth. 1992). Zoning acts and ordinances passed under them are valid and constitutional whenever they are not unjustly discriminatory, or arbitrary, or unreasonable, or confiscatory in their application to a particular or specific piece of property. Commercial Properties, Inc. v. Peternel, 211 A.2d 514, 518 (Pa. 1965). The theory of special legislation applies to “situations where amendatory zoning ordinances were adopted to deprive the applicant of vested rights in permits issued before the amendment or to prevent a permitted use in the pending application.” Appeal of Apgar, 661 A.2d 445, 448 (Pa. Cmwlth. 1995).

46. Flagship first introduced its proposed car wash development to the Township at the April 3, 2024 Planning Committee meeting. Over the next four (4) months, the Township prepared, and presumably circulated and discussed internally, at least five (5) versions of a zoning ordinance amendment that comprehensively regulates car washes in the Township, and twice authorized the advertisement of hearings therefor. All versions of the proposed zoning ordinance amendment prohibit Flagship’s proposed car wash. During this period, Flagship incurred significant expense engaging in continuous good faith discussions with Township personnel to refine the design of its proposed car wash.

47. The Township did not inform Flagship that the Township was in the process of drafting and enacting such an ordinance until the Township Solicitor sent his late-night June 4, 2024 email to Flagship’s counsel. At the June 5, 2024 Planning Committee meeting, Flagship continued its discussions with the Township regarding the design of the car wash; the Township still did not mention the proposed ordinance’s impact on Flagship’s car wash proposal. The

Township pointedly avoided mentioning that the proposed ordinance would bar Flagship's proposed car wash until the Township Zoning Officer sent the ZO Letter on July 8, 2024, a mere eight (8) days before the July Hearing for Ordinance Version 4.

48. Without Ordinance No. 4-265, Flagship could obtain a special exception to allow the car wash on the Property pursuant to Zoning Ordinance Section 160-119.N. Zoning Ordinance Section 160-121.B requires that every single use in the C – Commercial District be on a lot of at least 6,000 square feet.

49. Ordinance No. 4-265 raised the minimum lot area requirement only for Drive-Through Vehicle Care Facilities (car washes) to 1.5 developable acres (or, 65,340 square feet). This represents an *eleven-fold* increase from the 6,000 square foot minimum lot area requirement that remains unchanged for every other use in the C – Commercial District.

50. The new 1.5 developable acre minimum lot area requirement happens to be just enough to prohibit Flagship's car wash on the Property, which comprises 1.4 developable acres.

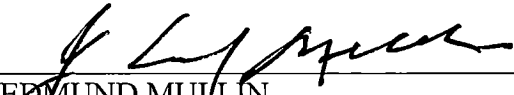
51. The Board of Supervisors clearly enacted Ordinance No. 4-265 to single Flagship out for particularized treatment in order to prevent its proposed car wash on the Property.

**WHEREFORE**, for the foregoing reasons, Flagship respectfully requests that this Honorable Court enter an Order affirming this Land Use Appeal, and finding that Whitpain Township Ordinance No. 4-265 is procedurally defective, and that it constitutes illegal special legislation, and that it is therefore invalid, void *ab initio*, and of no force and effect.

Respectfully Submitted,

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, P.C.

By:

  
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J. EDMUND MULLIN  
CARL N. WEINER  
*Attorneys for Appellant*  
*Flagship Pennsylvania Propco, LLC*

Date: September 4, 2024

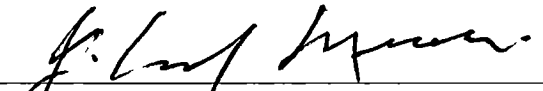


**VERIFICATION**

I, J. Edmund Mullin, Esquire, upon information received from the Appellant, verify that the statements made in the foregoing Notice of Land Use Appeal are true and correct, to the best of my knowledge, information and belief. The Appellant cannot make the verification to the foregoing document because its verification cannot be obtained within the time allowed for filing this verification. The statements made herein are subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, P.C.

By:

  
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J. EDMUND MULLIN  
*Attorney for Appellant*  
*Flagship Pennsylvania Propco, LLC*

Date: September 4, 2024

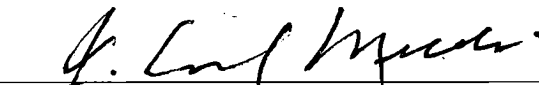
**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully Submitted,

HAMBURG, RUBIN, MULLIN,  
MAXWELL & LUPIN, P.C.

By:

  
\_\_\_\_\_  
J. EDMUND MULLIN  
CARI N. WEINER  
*Attorneys for Appellant*  
*Flagship Pennsylvania Propco, LLC*

Date: September 4, 2024