

**LOWER ALLEN  
ZONING HEARING BOARD**

IN THE MATTER OF:      1413 Arcona Road  
                                 Zone: Single Family Rural Residential District (R-2)  
                                 Applicant/Owner: Merritts Properties, LLC  
                                 Application No. 2025-01

REQUEST FOR:            **APPEAL OF MULTIPLE ZONING VIOLATIONS, AND IN  
THE ALTERNATIVE, REQUEST FOR MULTIPLE  
VARIANCES RELATED TO THE EXPANSION OF A NON  
CONFORMING USE**

BEFORE:                   Moran, Chair  
                                 Bonneville, Member  
                                 Massott, Member

**DECISION**

Applicant filed an appeal of multiple zoning violations and in the alternative, an application for multiple variances for zoning relief to expand the non-conforming firewood and mulch production and retail use on the property to include more structures and landscaping supplies for the property located at 1413 Arcona Road (“property”). The property is located in the Single Family Rural Residential (R-2) Zoning District. The Zoning Hearing Board (Board) considered and decided Applicant’s appeal and zoning relief requests at a hearing held on February 20, 2025.

**EXHIBITS**

- B-1 Application packet
- B-2 Certificate of Service of public notice and written notice of hearing on special exception application
- B-3 Zoning Hearing Board Docket Summary
- A-7 Description of Soland v. Zoning Hearing Board case
- A-8 Aerial photos of the property
- A-9 Aerial photos of the property

A-10 Aerial photos of the property

A-11 Google Earth photos of the property 2003-2022 – 5 pgs

A-12 Aerial photos of the property

A-13 Photos of the property

A-14 Photos of houses in area

A-15 Photo of office building/structure on the property

A-16 Chapter 102 Inspection Report by Cumberland County Conservation District

T-1 Notice of Violation with signed receipt by applicant

T-2 Application packet

T-3 BSM website pages -13 pgs

T-4 Lower Allen Township Zoning hearing Board decision for property – Docket 86-30

T-5 Certificate of Non-conforming use

T-6 Zoning Hearing Board decision – Docket 2007-16

T-7 Existing Conditions Plan – 3 pgs

T-8 Pictures of property/Document - Applicant Zoning Appeal

### **FINDINGS OF FACT**

1. On or about December 10, 2024 Merritts Properties, LLC (Applicant) filed an appeal to multiple zoning violations, and in the alternative, an application for multiple variances to expand a non-conforming use on the property located at 1413 Arcona Road, Mechanicsburg, Pennsylvania (property).

2. Applicant received the Notice of Violation of the Lower Allen Township Zoning Ordinance on September 28, 2024. See Ex. T-1

3. Applicant attempted to file the appeal to the Notice of Violation, and the variance application on November 12, 2024, but it was rejected due to being incomplete<sup>1</sup>.

4. A hearing on the appeal and application took place on February 20, 2025.

5. Public notice of the hearing on the application was published in the Patriot News on February 4, 2025, and February 11, 2025. Notice of the hearing was posted at the Lower Allen Township Municipal Building and on Township's website on January 29, 2025, and placed on Applicant's property on February 3, 2025.

6. Notice of the hearing was mailed to Applicant and adjoining property owners on February 4, 2025.

7. No objections as to the method and timing of notice and advertising were raised.

8. No objections as to any of the exhibits submitted into the record at the hearing were raised.

9. The property is located in the Single Family Rural Residential (R-2) Zoning District.

10. The Applicant has standing to pursue the zoning relief requested as it is the owner of the property.

11. Testimony at the hearing was taken from Brandon Merritts behalf of Applicant and Marcus Brandt, the Lower Allen Township Zoning Administrator. Applicant was represented at the hearing by Brian Linsenhach, Esq., from Stone, Wiley & Linsenhach, P.C. The Township was represented at the hearing by its solicitor, Steven Miner, Esq. from Caldwell & Kearns, P.C.

12. The property is approximately 3.64 acres and features an approximate 1050 square foot building/structure, a 1,600 square foot office building/structure, two canopy storage

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<sup>1</sup> The appeal is beyond the 30 day appeal period even if the November 12, 2024 date is used to toll the appeal period.

buildings/structures, and other utility structures in connection with the business operation on the property.

13. The property is bounded on the north by the Charter residential development, on the west by property of Pennsylvania Power and Light Company, to the south by a residential property, and to the east by residential properties and an open field/lot that features a bakehouse .

14. There are two (2) access drives into the property along Arcona Drive; the one to the south of the property was created recently by applicant without obtaining the necessary permit(s).

15. Applicant purchased the property in March 2021.

16. Since the date of purchase, applicant has demolished the office building/structure, and replaced it with a larger office building/structure with showroom that is on the property.

17. Applicant has constructed/installed a greenhouse within the front yard setback, two canopy storage structures, and installed multiple self-storage units along the rear property line that encroaches into the rear yard setback.

18. There are two businesses on the property: BSM Landscaping & Tree Service, and Camp Hill Forest Products. See Exhibit T-3.

19. A prior owner operated Camp Hill Forest Products on the property which mainly consisted of producing firewood that was either sold on-site to customers or hauled off-site to other locations. See Ex. T-4.

20. Thereafter, in 2007, a subsequent owner, George Hill, filed an application for a variance to extend or enlarge the non-conforming use of firewood and mulch production and erect another building on-site to allow Mr. Hill to lease space to landscape contractors for storage of equipment and materials, as well as vehicles on the property.

21. Applicant also applied for a special exception to change the lawful non-conforming use on-site to another non-conforming use of substantially the same character.

22. The Board denied the variance as Mr. Hill failed to meet the necessary elements for a variance; including the failure to establish that there were unique physical circumstances or conditions to the property which created an unnecessary hardship. See Ex. T-6.

23. The Board denied Mr. Hill's request for a special exception as the proposed operation of a storage facility for materials, equipment, and vehicles for landscape contractors was not of substantially the same character as the lawful non-conforming mulch and firewood production use. See Ex. T-6.

24. Applicant performs the following activities on, or through, the operations on the property; landscaping and trees service, landscaping supply, a greenhouse, acceptance of dumping materials, hardscaping and supplies, outdoor fire pits and fixtures, waterscape supplies, propane filling, and firewood delivery.

### **CONCLUSIONS OF LAW**

1. The Lower Allen Township Zoning Hearing Board has jurisdiction to hear the above-captioned zoning appeal and the variance application pursuant to Section 220-269(B)(3) & (5) of the Lower Allen Township Zoning Ordinance and 53 P.S. Section 10616.1 and 10909.1(a)(5) of the Pennsylvania Municipalities Planning Code.

2. Proper notice of the hearing was given to the public and to all interested parties.

3. Exhibits B-1 through B-3, A-7 through A-16, and T-1 through T-8 were properly admitted into evidence.

4. The Township has sustained its burden of proving that Applicant has violated the Township Zoning Ordinance in accordance with the attached discussion and decision

5. Applicant has failed to sustain its burden of proof for multiple variances to the Township Zoning Ordinance in accordance with the attached discussion and decision.

6. Applicant's appeal of the notice of violation issued by the Township dated September 26, 2024 and received by Applicant on September 28, 2024, which was filed on November 12, 2024, was untimely.

### **DISCUSSION**

Applicant received a Notice of Violation from Lower Allen Township Zoning and Codes Administrator, Marcus Brandt, on September 28, 2024. (See B-1 & T-2). Although the Notice advised applicant of a ten (10) day appeal period, the ordinance states that all appeals from determinations by the Zoning Officer shall be made to the Zoning Hearing Board within 30 days of the date of the determination. See Section 220-268(A)(2) The Notice of Violation is dated September 26, 2024, however, it was received by the applicant on September 28, 2024. Applicant filed the appeal to the Notice with the Township November 12, 2024, which was beyond the 30 appeal period, which expired on or about October 28, 2024. (Notes of Testimony 2/20/2025 p.38) A failure to appeal a notice of zoning violation to the Zoning Hearing Board renders the zoning officer's determination of violation unassailable. *Borough of Latrobe v. Pohland (Estate of Pohland)*, 702 A.2d 1089, 1092 Section 616.1(c)(6) of the MPC dictates a conclusive determination of violation when a landowner, after receiving an enforcement notice, continues an allegedly unlawful use without appealing to the Zoning Hearing Board, and subpart (3) of that same subsection requires such enforcement notices at the very least to state "the *specific* violation with a description of the requirements which have not been met." 53 P.S. § 10616.1(c)(3). The Notice of Violation specifically lists each section of the Zoning Ordinance that has been violated and the specific activity that caused and/or resulted in the violation of the respective sections of

the Zoning Ordinance. The Board finds the violations listed in the Notice of Violation dated September 26, 2024 are conclusively determined due to applicant's failure to timely appeal the Notice of Violation to the Zoning hearing Board within the 30 day appeal period.

Even if applicant had timely appealed the Notice of Violation, the Township met its burden of proving the violation listed in the Notice. In an appeal of a zoning violation, the Township bears the burden of proving the zoning violation. *Hartner v. Zoning Hearing Board of Upper St. Clair Twp.*, 840 A.2d 1068, 1070 (Pa. Cmwlth. 2004). Also, the MPC states that "In any appeal of an enforcement notice to the zoning hearing board, the municipality shall have the responsibility of presenting its evidence first. 53 P.S. Section 10616.1(d). The parties agreed that the applicant would present its evidence, and its case in support of the multiple variance requests first followed by the Township. (N.T. p.10-11).

The Notice listed the following violations of the Township Zoning Ordinance:

Applicant constructed a new principal structure and multiple accessory structures on the property without obtaining any permits in violation of Section 220-262:

**§ 220-262. Permits.**

**A.** Requirements of permits. A zoning permit shall be required prior to the erection, construction, reconstruction, addition, conversion, alteration or use of any building, structure or portion thereof prior to the use or change in use of a building, structure or land and prior to the change or extension of a nonconforming use. It shall be unlawful for any person to commence work for the erection, construction, reconstruction, addition, conversion, alteration or use of any building or for a change in land use until a zoning permit has been duly issued therefor. No such zoning permit shall be required in case of normal maintenance activities or minor repairs. Applicants are hereby notified that a building permit may also be required.

Additionally, there were no inspections of the construction by the Zoning Officer or his representative in violation of Section 220-263:

**§ 220-263.**

Inspection by the Zoning Officer. It shall be the duty of the Zoning Officer or his duly appointed representative to make the following minimum number of inspections of property for which a permit has been issued. Such inspections shall be in addition to any required to determine compliance with Chapter 70, Building Construction and Safety Standards. A,B,C state inspections are to occur at the beginning of construction, throughout construction and a final inspection.

A Certificate of Occupancy was required but not obtained by Applicant in violation of Section 220-265:

**§ 220-265.** Certificate of use and occupancy.

**A.** A certificate of use and occupancy shall be a statement issued by the Zoning Officer setting forth that a building, structure, parcel or use of land complies with the provisions of this chapter.

The prior structure(s) and use on the property were non-conforming. A non-conforming use can be enlarged and/or extended as long as it does not exceed 50% of the floor area or use of the existing (prior) structure or use. Section 220-222(B)

**§ 220-222. Extensions or enlargements.**

**B.** The foregoing extensions or enlargements of such nonconforming buildings, structures or uses shall be subject to the following conditions: (1) The extension or enlargement shall conform to the height, area, yard and impervious coverage regulations of the district in which it is located. Where a building, structure or use is nonconforming as to a required side yard or rear yard setback, the established nonconforming setback may be continued, so long as the proposed extension or enlargement does not project further into any yard, whether a front, side or rear yard, than the original setback line extended. Extension or enlargement of the nonconforming use, building or structure shall not exceed 50% of the floor area or use existing on the effective date of this chapter or the date of an amendment thereto thereby creating the nonconformity.

Applicant's new structures on the property, including accessory structures, expansion of concrete corrals, and outside display area exceed 50% of prior structure and/or use floor area. This is evident based upon the testimony of all structures, supplies, storage units, and other materials



added to the site since applicant purchased the property in March 2021. Additionally, overhead photos of the property in April 2020 compared to photos from March 2024, show the clear expansion of the activities and operations on-site. (See Ex. T-8).

**§ 220-223. Reconstruction and restoration.**

**A.** A nonconforming building, structure or use which is damaged by fire, explosion, windstorm or other natural or criminal acts may be reconstructed and used for the same purposes, provided that:

- (1) The reconstruction and/or restoration of the building or structure is commenced within one year from the date of occurrence of the damage and is carried to completion without undue delay; and
- (2) The reconstructed building, structure or occupied area does not exceed the height, area and volume of the original structure and occupied use.

Applicant admitted he demolished a primary structure (office building) and constructed a new primary structure on the property. (N.T. p.25). Applicant alleged the structure was dilapidated. (See Ex. B-1, application narrative). This basis does not meet the requirements of the Ordinance.

Applicant constructed the new primary structure within the minimum side yard setback stated in Section 220-24(B).

**§ 220-24. Yard regulations.**

**B.**

- (2) Minimum side yard: 20 feet.

Applicant constructed the office building/structure 15 feet from the side yard property line; within the 20 foot setback. (N.T. p.25).

Applicant constructed a greenhouse in the front yard setback and multiple self storage containers, and one canopy storage building on or along the rear property line in violation of Section 220-150.

**§ 220-150. Accessory structures.** Accessory structures shall comply with the following provisions:

**A.** An accessory structure shall not be erected or an existing accessory building shall not be substantially altered within any front yard setback<sup>2</sup>.

**B.** Any accessory structure may be erected within one of the side yard setbacks or within the rear yard setback, provided that:

(2) Structures accessory to a nonresidential use shall not be located less than 15 feet from any lot line.

One of the accessory structures/buildings at the rear of the property exceed the 25 ft. height restriction stated in Section 220-22

**§ 220-20. Building height limit.**

**B.** No accessory building shall be erected to a height in excess of 25 feet.

The canopy storage building not along the rear property line measured approximately 30 feet, in violation of the ordinance. (N.T. p. 21) The rear or back canopy building measured 23 ½ feet, and was not in violation of the ordinance.

The impervious coverage exceeds the 30% allowed in the R-2 District in violation of Section 220-23

**§ 220-23. Impervious coverage.**

Impervious coverage shall not exceed 30%

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<sup>2</sup> The front yard setback for non-residential buildings is 40 ft.

Applicant admitted that the impervious coverage exceeds 30% of the property, but believes he can make changes to the property, and structure thereon, to become compliant with the impervious coverage requirement of the R-2 Zoning District.

Applicant constructed a new entrance to the property close to the southern property line that violates the applicable side yard setback in violation of Section 220-244(A)(7) which states: Motor vehicle access to lots shall be provided as follows:

**§ 220-244. Motor vehicle access.**

Motor vehicle access to lots shall be provided as follows:

**A.** Driveways. Driveways shall have the following characteristics:

(7) All driveways shall be set back at least five feet from any adjacent side or rear lot lines.

(a) A driveway may be located less than five feet from a property line if a written agreement exists between the affected property owners allowing a lesser distance. Such agreement shall be recorded in the Cumberland County Office of Recorder of Deeds, and shall be binding on all future property owners, heirs and assigns of both properties.

Applicant also failed to obtain a Highway Occupancy Permit and/or a Right of Way Permit prior to constructing the access drive to the property.

The Township has met its burden of proving the violations listed in the Notice of Violation dated September 26, 2024.

**VARIANCE**

Applicant seeks multiple variances in light of its activities on-site and the zoning violations listed by the Township. In reviewing the application requesting multiple variances, the Zoning Hearing Board must take into account the criteria as set forth in Section 220-269 of the Township Zoning Ordinance which states the following:

## **Section 220-269 Zoning Hearing Board**

### **C. Variances.**

The Zoning Hearing Board shall hear requests for variances where it is alleged that the provisions of this chapter inflict unnecessary hardship upon the applicant. The Zoning Hearing Board may, by rule, prescribe the form of application and may require application to the Zoning Officer. The Zoning Hearing Board may grant a variance, provided that the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of this chapter in the district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of this chapter and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(4) That the variance, if authorized, will not alter the essential character of the district in which the property is located nor substantially or permanently impair the appropriate use or development of adjacent property nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and represent the least modification possible of the regulation in issue. In granting any variance, the Zoning Hearing Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this chapter.

Applicant submitted a request for variances to the following sections of the Zoning Ordinance:

A. Section 220-222 Extensions and Enlargements

Applicant claims that if the expansion is beyond 50% of the non-conforming use, structure or building on the property, it is entitled to a variance for the difference. The non-conforming use on the property was for production of mulch and firewood. In 2007, George Hill owned the property and filed an application for a variance to extend or enlarge the non-conforming use of firewood and mulch production and erect another building on-site to allow Mr. Hill to lease space to landscape contractors for storage of equipment and materials, as well as vehicles on the property. He also applied for a special exception to change the lawful non-conforming use on-site to another non-conforming use of substantially the same character. The Board denied the variance as Mr. Hill failed to meet the necessary elements for a variance; including the failure to establish that there were unique physical circumstances or conditions to the property which created an unnecessary hardship. See Ex. T-6 The Board also denied Mr. Hill's request for a special exception as the proposed operation of a storage facility for materials, equipment, and vehicles for landscape contractors was not of substantially the same character as the lawful non-conforming mulch and firewood production use. See Ex. T-6. Applicant's activities on-site have expanded beyond production and sale of firewood and mulch. It includes landscaping supply, a greenhouse, landscaping and trees service, acceptance of dumping materials, hardscaping and supplies, outdoor fire pits and fixtures, waterscape supplies, propane filling, and firewood delivery. The activities on-site require a variance for additional uses on the property which are not permitted in the R-2 zoning district.

Applicant argues that the additional uses are subject to the de minimis variance standard, instead of the stricter use variance standard. The *de minimis* doctrine is an extremely narrow exception to the heavy burden of proof which a party seeking a **variance** must normally bear." *Swemley v. Zoning Hearing Board of Windsor Township*, 698 A.2d 160, 162 (Pa. Cmwlth. 1997) (quoting *King v. Zoning Hearing Board of the Borough of Nazareth*, 76 Pa. Commw. 318, 463 A.2d 505, 505 (Pa. Cmwlth. 1983)). "This exception may be applied where (1) only a minor deviation from the zoning ordinance is sought and (2) rigid compliance with the ordinance is not necessary for the preservation of the public interests sought to be protected by the ordinance." *Id.* "The determination of whether or not the *de minimis* doctrine applies requires careful consideration of both of these factors." *Id.* Where the *de minimis* doctrine applies, there is no need to resort to any other theory of relief. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033 (Pa. 2003). *Pequea Twp. v. Zoning Hearing Bd.*, 180 A.3d 500, 504 Typically, a de minimis standard applies to dimensional variance requests; which involves a request to adjust a zoning ordinance for purposes of using the property in a manner consistent with the applicable regulations, whereas a use variance [\*\*9] involves a proposal "to use property in a manner that is wholly outside zoning regulations." *Hertzberg v. Zoning Bd. of Adjustment of Pittsburgh*, 554 Pa. 249, 721 A.2d 43, 47 (Pa. 1998). *Soland v. Zoning Hearing Bd.*, 311 A.3d 1208, 1213. However, a use variance can be de minimis. Zoning hearing boards have discretion to grant or deny a *de minimis* variance where the variation requested is "minor and rigid compliance with the zoning ordinance is not necessary to protect public policy concerns." *Hawk v. City of Pittsburgh Zoning Bd. of Adjustment*, 38 A.3d 1061, 1066 (Pa. Cmwlth. 2012) In *Soland*, the de minimis variance doctrine was applied to a case in which the variance request was more technical than substantial. This is not such a case and involves

expansion of additional non-conforming uses to the property. The additional uses are not a minor change from the permitted uses in the R-2 zone.

The Board determines that the de minimis variance doctrine is not applicable to the instant case, and the use variance standard will remain the standard for the request to include additional uses on the property. No evidence was submitted that there are unique physical conditions or circumstances to the property that create an unnecessary hardship that prevent the owner from developing and/or using the property in compliance with the zoning ordinance. The Board finds Applicant failed to sustain its burden of proving the necessary elements for the requested use variance.

The remaining requests are for dimensional variances to:

Section 220-223 Reconstruction and Restoration

Section 220-24(B)(2) Yard Regulations

Section 220-20(B) Building Height Requirement

Common law distinguishes between a dimensional variance and a use variance. A use variance applicant requests to use the property in a manner prohibited by the zoning regulation. *Hertzberg v. Zoning Bd. of Adjustment*, 554 Pa. 249, 264, 721 A.2d 43, 47 (Pa. 1998). A dimensional variance allows for the reasonable adjustment of the zoning regulation in order to utilize the property as desired. *Dunn v. Middletown Twp. Zoning Hearing Bd.*, 143 A.3d 494, 501 (Pa. Commw. 2016).

When considering a dimensional variance for purposes of determining unnecessary hardship, a Zoning Hearing Board is able to consider multiple factors not applicable to the use variance test, such as the financial hardship created by any work necessary to bring the property into strict compliance with the ordinance, the economic detriment to the applicant if the variance

was denied, and the characteristics of the surrounding neighborhood. *Soc'y Created to Reduce Urban Blight v. Zoning Bd. of Adjustment*, 771 A.2d 874, 877 (Pa. Commw. 2001). Unreasonable economic burden may be considered in determining the presence of unnecessary hardship. *Yeager v. Zoning Hearing Bd. Of City of Allentown*, 779 A.2d 595, 598 (Pa. Cmwlth. 2001) In *Marshall v. City of Philadelphia*, 97 A.3d 323 (Pa. 2014), the Pennsylvania Supreme Court stated “This Court has repeatedly made clear that in establishing hardship, an applicant for a variance is not required to show that the property at issue is valueless without the variance or that the property cannot be used for any permitted purpose” *Id.* at 330 A dimensional variance therefore compels a slightly lowered standard from a use variance, but must still address the aforementioned factors, including the showing of an unnecessary hardship. *Tri-Cnty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 520 (Pa. Commw. 2014). The reason for treating a dimensional variance more leniently than a use variance is that the applicant is asking for nothing more than a reasonable adjustment of the zoning regulations for the purpose of utilizing the property in a manner consistent with the zoning regulation. *Hertzburg* at p. 264

The variances requested are to cure the zoning violations listed in the September 26, 2024 Notice of Violation, including the reconstruction of the primary structure (office building) within the side yard setback, construction the rear canopy storage building and the self-storage units within the rear yard setback, the greenhouse within the front yard setback, and the 30 foot high canopy storage building that sits next to the rear canopy building.

Applicant did not submit any evidence that there are unique physical conditions or circumstances to the property that create an unnecessary hardship that prevent the owner from developing and/or using the property in compliance with the zoning ordinance. Applicant did not



submit any evidence as to the economic burden it would assume in order to bring the property into compliance with the Zoning Ordinance.

Accordingly, we find that Applicant has failed to sustain its burden of proof for the multiple variances requested to comply with the zoning ordinance.

**ORDER**

Applicant's appeal of the Notice of Violation dated September 26, 2024 is denied as the Township sustained its burden of proving the existence of the violations listed in the Notice.

Applicant's appeal of the Notice of Violation dated September 26, 2024 was untimely filed on November 12, 2024 and is denied.

Applicant's request for a variance to add uses not permitted in the R-2 zoning district is denied.

Applicant's request for dimensional variance to Sections 220-222, 220-223, 220-24(B) and 220-20(B) of the Zoning Ordinance are denied.

This Order applies to the property located at 1413 Arcona Road, Mechanicsburg, PA.

**- SIGNATURE PAGE TO FOLLOW -**

**LOWER ALLEN TOWNSHIP ZONING HEARING BOARD**

Date: 4/2/25

By: Ann Moran  
Ann Moran, Chair