

**BEFORE THE ZONING HEARING BOARD OF WORCESTER TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**IN RE: APPLICATION OF  
DECKS, LLC**

**NO. 2020-13  
APPLICATION FOR A VARIANCE**

**DECISION**

**I. BACKGROUND**

A public hearing on the above Application was held on August 25, 2020 at the Methacton High School Auditorium, pursuant to Notice as required by the Worcester Township Zoning Ordinance, as amended (hereinafter “Zoning Ordinance”) and the Pennsylvania Municipalities Planning Code. The Applicant/Equitable Owner, Decks, LLC, proposes to operate a landscaping business on the Property located at 2816 Morris Road, Worcester Township, Montgomery County, PA. The Property is located in the LPD – Land Preservation Zoning District.

The Applicant requested the following relief:

A variance from Section 150-110.22 of the Zoning Ordinance, so as to permit the operation of a landscaping business.

A quorum of the Zoning Hearing Board participated in the public hearings and conducted a vote in accordance with law. The Applicant was represented by Andrew Freimuth, Esquire. No neighboring property owners elected to enter appearance as parties, however a few neighbors posed questions or offered comment. The witnesses were duly sworn or affirmed and Notes of Testimony for the hearings were transcribed and are hereby made a part of this record.

At a public meeting on September 1, 2020, the Board voted to deny the application. The Board issues Findings of Fact and Conclusions of Law in support of the Decision and Order.

## **II. FINDINGS OF FACT**

1. The Applicant is Decks, LLC (“Applicant”), the equitable owner of the Property located at 2816 Morris Road, Worcester Township, Montgomery County, PA (“Property”), in the LPD – Land Preservation Zoning District. (N.T. 08/25/20, pp. 15-16, Exhibits A-1, A-4, A-5)

2. The following Exhibits were marked and duly admitted into evidence:

### **BOARD EXHIBITS:**

B-1	Public Notice
B-2	Proof of Publication

### **APPLICANT’S EXHIBITS:**

A-1	Agreement of Sale
A-2	Aerial Photo
A-3	Neighbor Letter of Support
A-4	Site Plan
A-5	Application, Narrative and Deed

3. The Property, as a whole, measures approximately three (3) acres, fronting on Morris Road, with the Pennsylvania Turnpike to the rear, currently occupied by a single-family residence and accessory structures. (N.T. 08/25/20, pp. 4-6, Exhibits A-2, A-4)

4. The Deck Family has owned and operated Decks Hardware in Ambler for over 100 years, and approximately 30 years ago, started a landscaping business, currently operated out of a property in Lower Gwynedd Township. (N.T. 08/25/20, pp. 4-5, 36-37)

5. Decks, LLC operates the landscaping business and has an Agreement of Sale to purchase the Property, so that the Applicant may move its commercial landscaping business to the subject Property. (N.T. 08/25/20, pp. 4-5)

6. The current owner of the Property, Scott Alloway (“Owner”), has lived on the Property and operated his small landscaping business out of the Property for the last thirty (30) years. (N.T. 08/25/20, pp. 6-7)

7. A search of the Township records by the Applicant did not reveal any evidence that the Owner had a permit to operate his landscaping business out of the Property. (N.T. 08/25/20, pp. 6-7)

8. The Applicant presented the testimony of Tim Jones, a real estate broker (“Broker”) who is listing the subject Property for sale. (N.T. 08/25/20, pp. 14-15, Exhibit A-1)

9. Except for the former Visteon Property zoned Industrial Research District in the vicinity, the area surrounding the Property is mostly comprised of vacant land, agricultural and residential uses. (N.T. 08/25/20, pp. 16-17, 35, Exhibit A-2)

10. The Broker testified to the condition of the Property, consisting of an old home in need of repairs fronting on busy Morris Road, with the Turnpike to the rear, presenting challenges to sell as a single-family residence. (N.T. 08/25/20, pp. 17-18)

11. The family of the current Owner has owned the Property since 1978, using it as the family residence with the current owner selling Christmas trees and starting a “fledgling” landscaping business in approximately 1985. (N.T. 08/25/20, pp. 18-19)

12. The current Owner purchased the Property from his family in approximately 2012, lived on the Property and operated his “single operator” landscaping business with equipment comprised of a pickup truck, two (2) trailers for lawn mowing equipment and a stake-body truck for mulch, materials and Christmas trees; the business employed 6-8 employees. (N.T. 08/25/20, pp. 20-21, 25)

13. The Owner sold the landscaping business, and now continues to use the Property as his residence. (N.T. 08/25/20, pp. 21-22, 27-28)

14. The Owner’s sister lives at the adjacent property, which resulted from a subdivision of the family parcel; she supported the Applicant’s proposal. (N.T. 08/25/20, pp. 22-23, 70-71,

Exhibit A-3)

15. The primary interest from prospective purchasers has been for “mixed use” as a residence and a business use, but such was consistent with the Broker’s advertising of the potential use of the Property for sale, subject to the requirement for a variance for such commercial use. (N.T. 08/25/20, p. 24, 33-35)

16. The house on the Property consists of approximately 3,100 square feet of living area, surely not an overly large house by today’s standards. (N.T. 08/25/20, pp. 27-28)

17. The Broker has received substantial offers on the Property from “around \$300,000” to the current offer which is “very close to where this listing is.” (N.T. 08/25/20, pp. 30-32)

18. It is clear that a “low three hundreds” offer for use as a residence was rejected by the Owner, and the Owner has held out to obtain a price closer to his list price of \$390,000. (N.T. 08/25/20, pp. 33-35)

19. The Broker apparently performed a market analysis not presented to the Board, which determined that a list price of \$390,000 was appropriate for a “mixed-use”, subject to Township approval, but there was no testimony that the Broker performed a market analysis of the property for use as allowed in the LPD District. (N.T. 08/25/20, pp. 33-35)

20. The Applicant presented the testimony of Jonathan Deck, the manager of the proposed landscaping operation. (N.T. 08/25/20, pp. 36-37)

21. The Applicant does not propose to use the Property as a “mixed-use” single-family residence with a business, but rather seeks a use variance to use the Property as if it were zoned for a limited industrial use due to the proposed outdoor storage of significant amounts of landscaping materials. (N.T. 08/25/20, p. 38)

22. It is apparent that the Applicant’s business is a more intense use than the current

Owner's former business use considering the following:

(A) The business operates six days per week, and concentrates 75% on landscaping and 25% on hardscaping.

(B) The Applicant operates an "array of trucks" (currently seven in number) and an "array of trailers" (one "closed and three "open"), as well as landscaping equipment such as mowers and hand tools.

(C) In addition to mowers and hand tools, equipment associated with the business would include snowplows, two skid steer loaders, and a backhoe.

(D) The greenhouse, three-car garage and two-car garage on site would be utilized in conjunction with the business, and landscaping materials such as mulch would be regularly delivered by 18-wheel trucks, which mulch would be stored on-site in a mulch bin to be constructed to the rear of the Property.

(E) The Applicant plans to construct a larger garage/shop for its proposed limited industrial use.

(F) Salt, firewood and left-over materials would be stored on-site.

(G) There are currently two full-time employees and ten seasonal employees in the "green season" and two full-time employees and five seasonal employees in the winter months, but if a snow storm occurs, then ten seasonal employees in the winter.

(H) Employees would meet at the Property every morning around 6:30-7:00 a.m. and "roll-out" from 7:15 – 8:00 a.m., returning from 4:00 – 5:00 p.m., with occasional truck traffic between 8:00 a.m. – 4:00 p.m. for equipment changes or to access materials.

(I) Two employees would work in the "shop" on the Property conducting maintenance and repairs on equipment.

(J) Exterior lighting would be installed, since the Property will not be occupied as a residence.

(K) Security fencing may be installed.

(L) The house would be used for office space, and client and employee meetings.

(M) The Applicant may attempt to rent portions of the house, but the Applicant has not evaluated potential residential use of the Property, and because of the current proposal, such dual use of the property would require additional relief in any event.

(N.T. 08/25/20, pp. 36-67, Exhibits A-2, A-4)

23. With reference to the use variance requested, upon consideration of Section 910.2 of the Pennsylvania Municipalities Planning Code, and Section 150-219 of the Worcester Township Zoning Ordinance, the Board determines the following:

(A) There are no unique physical circumstances or conditions peculiar to the particular Property, resulting in an unnecessary hardship which would justify the requested use variance.

(B) The Property can be used in accordance with applicable zoning as a single-family residence, as is currently the case, and therefore, the authorization of the use variance is not necessary to enable the reasonable use of the Property. The fact that the Property would garner a somewhat lower selling price if sold as a single-family residence (low \$300,000's versus high \$300,000's) does not amount to financial infeasibility to use the Property as zoned.

(C) Any alleged "hardship" has been created by the Owner and Applicant, by

allowing the Property to fall into disrepair, using the Property in excess of the provisions of the Zoning Ordinance, and then proposing to use the Property further contrary to the applicable zoning. Even though the house may require repairs due to deferred maintenance, the Applicant presented no evidence of the cost of renovation in order to prove that it is financially infeasible to use the Property as a single-family residence, or that the required repairs could only be accomplished at a prohibitive expense. The economic considerations advanced by the Applicant cannot serve as the sole basis for relief.

- (D) The granting of the variance will alter the essential character of the neighborhood, would substantially impair the use or development of adjacent Property, and would be detrimental to the public welfare.
- (E) The variance requested is not the minimum variance to afford relief under the circumstances.

24. Under Section 150-217 of the Zoning Ordinance, the Board determines that granting the variance would be contrary to the public interest, and that a literal enforcement of the provisions of the Ordinance does not result in unnecessary hardship.

25. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action with respect to the variance denied herein:

- (A) The Property is not suitable for the use, and the variance is not consistent with the spirit, purpose and intent of the Zoning Ordinance.

(B) The relief will injure or detract from the use of neighboring Property and from the character of the neighborhood, and considering the intensity of the proposed use, the neighboring properties will not be adequately safeguarded.

(C) The proposal will not serve the best interest of the Township, the convenience of the community and the public welfare.

(D) There may not be an adverse impact upon the public services of police and fire protection by the proposed use, but such a finding does not require the granting of relief.

(E) The record does not support a determination whether there would be proper disposal of waste resulting from the proposed use.

(F) The record does not support a determination whether the proposal would not cause runoff water or drainage problems injurious to adjacent or nearby properties.

(G) The record does not support a determination whether the commercial activity on the Property would not cause congestion or hazard on Morris Road, a busy street in the Township.

(H) There are no special circumstances or conditions applying to the Property for which the variance is sought, which would justify the conclusion that the application of the provisions of the Zoning Ordinance would deprive the Applicant of the reasonable use and development of such Property.

(I) The circumstances for which the variance is sought were created by the Owner/Applicant, which circumstances result from general conditions in the zoning district in which the Property is located.

26. The provisions of the Zoning Ordinance do not impose an unnecessary hardship



whatsoever on the land, the Owner, or the Applicant and, therefore, the requested use variance should be denied.

### **III. DISCUSSION**

In Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the Supreme Court of Pennsylvania determined that, in evaluating a hardship for a dimensional variance, the Zoning Hearing Board should consider various factors, including economics, and the characteristics of the surrounding neighborhood, in determining whether a variance would be appropriate. The Court also held that, when considering a dimensional variance, a Zoning Hearing Board should adopt a somewhat more relaxed standard of scrutiny than when the Board is considering a use variance.

In Marshall v. City of Philadelphia and Zoning Board of Adjustment, 626 Pa. 385, 97 A.3d 323 (2014), the Supreme Court recognized that a Property does not have to be valueless in order to obtain a use variance. The Court further indicated that economic considerations may be considered in a use variance case, if the Property can only be brought into conformance at a prohibitive expense. The Supreme Court reiterated in the Hertzberg and Marshall cases, that an Applicant need not prove that the Property cannot be used for any other permitted use in order to be entitled to a variance. Nevertheless, an Applicant seeking a variance must prove that unnecessary hardship will result if the variance is denied, and must also prove that the proposed use is not contrary to the public interest. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). “The burden on an Applicant seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling.” Singer v. Zoning Board of Adjustment, 29 A.3d 144, 149 (Pa. Cmwlth. 2011).

A Zoning Hearing Board is the sole determiner of the credibility of witnesses. Taliaferro

v. Darby Township Zoning Hearing Board, 873 A.2d 807 (Pa. Cmwlth. 2005), Tri-County Landfill, Inc. v. Pike Township Zoning Hearing Board, 83 A.3d 488 (Pa. Cmwlth. 2014). The Zoning Hearing Board has discretionary power to determine whether a party has met its burden of proof. Broussard v. Zoning Board of Adjustment, 831 A.2d 764 (Pa. Cmwlth. 2003), affirmed on appeal @ 589 Pa. 71, 907 A.2d 494 (2006), Cohen v. Zoning Board of Adjustment of the City of Philadelphia, 276 A.2d 352 (Pa. Cmwlth. 1971).

The case before the Board involves a request for a use variance so as to permit the Property to be devoted exclusively to business use without any showing of hardship. As this is an application for a use variance, the Board cannot utilize the relaxed standard of review under Hertzberg. The Property is currently being used as zoned as a single-family residence. The Owner can make reasonable use of the land, and has, in fact, exceeded the uses allowed. There is no reason for further relief to permit industrial use of the Property in a Land Preservation District. It should be noted that the proposed business use of the property is not permitted in the LPD District, and the outside storage of materials as proposed by the Applicant is not even permitted in the C-Commercial Zoning District (Section 150-118.E of the Zoning Ordinance), but rather only permitted in the LI - Limited Industrial Zoning District (Section 150-134.E) and the IR - Industrial Research Zoning District (Section 150-134.8.E).

The Board's decision to deny the relief requested is fully in accordance with the appellate court rulings. The Board did not hold the Applicant to the high bar of proving that the Property has no value or cannot be used for any other permitted use. The Property can be used in accordance with applicable zoning as a single-family residence, as is currently the case, and therefore, the authorization of the use variance is not necessary to enable the reasonable use of the Property. The fact that the Property would garner a somewhat lower selling price (low \$300,000's versus high

\$300,000's) if sold as a single-family residence does not amount to financial infeasibility to use the Property as zoned. Any alleged "hardship" has been created by the Owner and Applicant by allowing the Property to fall into disrepair, using the Property in excess of the provisions of the Zoning Ordinance, and then proposing to use the Property further contrary to the applicable zoning. Even though the house may require repairs due to deferred maintenance, the Applicant presented no evidence of the cost of renovation in order to prove that it is financially infeasible to use the Property as a single-family residence, or that the required repairs could only be accomplished at a prohibitive expense.

Under Hertzberg and Marshall, the applicable case law still holds that a variance cannot be granted for solely economic reasons, and economic considerations alone cannot support even a dimensional variance, let alone a use variance. Dunn v. Middletown Township Zoning Hearing Board, 143 A.3d 494 (Pa. Cmwlth. 2016). The Board found no justification for the relief requested from a hardship standpoint. The relief requested is simply not required at all to reasonably use the Property, and surely not to the extent requested.

Unfortunately, the facts which would support a finding of unnecessary hardship required to grant variance relief with respect to the request were not available, otherwise, the Applicant's very capable and experienced counsel would have surely presented same. The fact of the matter is that there is no hardship whatsoever which would allow the Board to grant the use variance requested.

#### **IV. CONCLUSIONS OF LAW**

1. The Zoning Hearing Board has jurisdiction over the subject matter of the application.
2. The Applicant is the equitable owner of the Property in question.

3. The Applicant and the subject matter are properly before the Board, and the Applicant has standing to submit the Application.

4. Hearing notices were duly published and posted in accordance with law, by advertisement in the newspaper and posting on the Property.

5. With reference to the use variance requested, upon consideration of Section 910.2 of the Pennsylvania Municipalities Planning Code, and Section 150-219 of the Worcester Township Zoning Ordinance, the Board determines the following, as a matter of law:

- (A) There are no unique physical circumstances or conditions peculiar to the particular Property, resulting in an unnecessary hardship which would justify the requested use variance.
- (B) The Property can be used in accordance with applicable zoning as a single-family residence, as is currently the case, and therefore, the authorization of the use variance is not necessary to enable the reasonable use of the Property. The fact that the Property would garner a somewhat lower selling price if sold as a single-family residence (low \$300,000's versus high \$300,000's) does not amount to financial infeasibility to use the Property as zoned.
- (C) Any alleged "hardship" has been created by the Owner and Applicant, by allowing the Property to fall into disrepair, using the Property in excess of the provisions of the Zoning Ordinance, and then proposing to use the Property further contrary to the applicable zoning. Even though the house may require repairs due to deferred maintenance, the Applicant presented no evidence of the cost of renovation in order to prove that it is financially

infeasible to use the Property as a single-family residence, or that the required repairs could only be accomplished at a prohibitive expense. The economic considerations advanced by the Applicant cannot serve as the sole basis for relief.

- (D) The granting of the variance will alter the essential character of the neighborhood, would substantially impair the use or development of adjacent Property, and would be detrimental to the public welfare.
- (E) The variance requested is not the minimum variance to afford relief under the circumstances.

6. Under Section 150-217 of the Zoning Ordinance, the Board determines that granting the variance denied herein would be contrary to the public interest, and that a literal enforcement of the provisions of the Ordinance does not result in unnecessary hardship, as a matter of law.

7. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action, and determines the following as a matter of law:

- (A) The Property is not suitable for the use, and the variance is not consistent with the spirit, purpose and intent of the Zoning Ordinance.
- (B) The relief will injure or detract from the use of neighboring Property and from the character of the neighborhood, and considering the intensity of the proposed use, the neighboring properties will not be adequately safeguarded.
- (C) The proposal will not serve the best interest of the Township, the convenience of the community and the public welfare.

(D) There may not be an adverse impact upon the public services of police and fire protection by the proposed use, but such a finding does not require the granting of relief.

(E) The record does not support a determination whether there would be proper disposal of waste resulting from the proposed use.

(F) The record does not support a determination whether the proposal would not cause runoff water or drainage problems injurious to adjacent or nearby properties.

(G) The record does not support a determination whether the commercial activity on the Property would not cause congestion or hazard on Morris Road, a busy street in the Township.

(H) There are no special circumstances or conditions applying to the Property for which the variance is sought, which would justify the conclusion that the application of the provisions of the Zoning Ordinance would deprive the Applicant of the reasonable use and development of such Property.

(I) The circumstances for which the variance is sought were created by the Owner/Applicant, which circumstances result from general conditions in the zoning district in which the Property is located.

8. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever on the land, the Owner, or the Applicant and, therefore, the requested use variance should be denied.

**V. OPINION**

Upon consideration of the evidence and testimony presented regarding the Application, the Zoning Hearing Board of Worcester Township determines that the Application should be denied. The Board therefore enters the following Order.

BEFORE THE ZONING HEARING BOARD OF WORCESTER TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: APPLICATION OF  
DECKS, LLC

NO. 2020-13  
APPLICATION FOR A VARIANCE

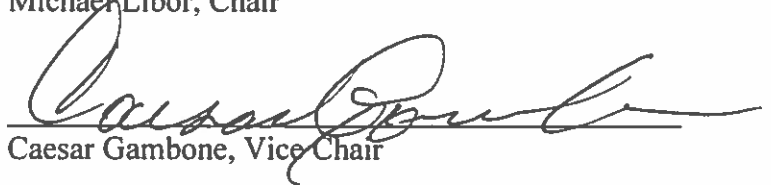
ORDER

A variance from Section 150-110.22 of the Zoning Ordinance, so as to permit the operation of a landscaping business is **DENIED**. The Application is **DENIED** in its entirety.

WORCESTER TOWNSHIP ZONING HEARING BOARD



Michael Libor, Chair



Caesar Gambone, Vice Chair



John D'Lauro, Secretary

Alternate

Bradford Smith

Order Entered: 9/16/20

Circulation Date: 9/16/20

This Decision and Order of the Board is final and any appeal of it must be filed with the Court of Common Pleas of Montgomery County within thirty (30) days following the Circulation Date set forth above.

The Board reserves the right to supplement these Findings of Fact and Conclusions of Law in support of this Decision if an appeal is filed.