



ZONING HEARING BOARD APPLICATION
YORK COUNTY, PENNSYLVANIA

DEC 26 PM 4:13

Part 1:

APPLICANT(S)/EQUITABLE OWNER

Name: Fairview Township
Address: 599 Lewisberry Road
New Cumberland, Pa 17070
Phone: 717-901-5200

EXISTING OWNER OF PROPERTY:

Name: Fairview Township
Address: 599 Lewisberry Road
New Cumberland, Pa 17070

PROPERTY LOCATION:

Address: 850 Lewisberry Road
Lewisberry Pa, 17339
Lot Size: 11.282 acres
Date Purchased: December 18, 2015
Location: 850 Lewisberry Road,
Lewisberry, PA 17339

PRESENT USE OF PROPERTY:

Vacant Elementary School

EXISTING ZONE: RL Rural Living

Part 2:

ZONING REQUEST (Identification of the applicable request(s)):

- () SUBSTANTIVE CHALLENGE
() SPECIAL EXCEPTION
(x) VARIANCE
() APPEAL OF THE ZONING OFFICERS DECISION

SECTION(S) OF ZONING ORDINANCE WHICH APPLY TO THIS REQUEST - Please identify the specific section(s) of the Zoning Ordinance involved in the request):

Section 300-16, Table 4-3 Non Residential Uses - Maximum Impervious Cover

Part 3:

DESCRIPTION OF REQUEST:

See Attached Letter

❖ *Part 4*

LIST ALL INDIVIDUAL PROPERTY OWNERS WITHIN 300 FEET OF THE PERIMETER OF THE ENTIRE PROPERTY.

NAME	ADDRESS	USE TYPE
Barry D. and Sandra Cain	836 Lewisberry Road, Lewisberry, Pa 17039	Residential
Joshua C. & Rachael C. Kessler	Lewisberry Road, Lewisberry, Pa 17039	Vacant Agricultural
Jason & Angela Troutman	870 Lewisberry Road, Lewisberry, Pa 17339	Residential
Mt. Zion Lutheran Church	863 Lewisberry Road, Lewisberry, Pa 17339	Church
Charles E. Shade	851 Lewisberry Road, Lewisberry, Pa 17039	Residential
Elizabeth & Nathan Radabaugh	847 Lewisberry Road, Lewisberry, Pa 17039	Residential
Donald M. & Donna J. Feliksik	835 Lewisberry Road, Lewisberry, Pa 17339	Residential
Ronald A. Romberger	831 Lewisberry Road, Lewisberry, Pa 17339	Residential
Anthony & Amy Harkins	827 Lewisberry Road, Lewisberry, Pa 17339	Residential
Rodney J. Anastasi	834 Lewisberry Road, Lewisberry, Pa 17339	Residential
Larry & Heather Collins	828 Lewisberry Road, Lewisberry, PA 17339	Residential
Mt. Zion Evangelical Lutheran Church	868 Old Stage Road, Lewisberry, Pa 17339	Residential

IN THE MATTER OF : **BEFORE THE FAIRVIEW TOWNSHIP**
THE APPLICATION OF : **ZONING HEARING BOARD**
FAIRVIEW TOWNSHIP : **YORK COUNTY, PENNSYLVANIA**
: **DOCKET NO. 2016-11**

**DECISION GRANTING A VARIANCE TO THE MAXIMUM IMPERVIOUS LOT
COVERAGE UNDER SECTION 300-16 OF THE ZONING ORDINANCE
IN THE RURAL LIVING (RL) ZONING DISTRICT**

The Applicant applied for a variance to Fairview Township Zoning Ordinance, Section 300-16, to increase the maximum amount of permitted impervious lot coverage from 15% to 30% to accommodate a proposed relocation of the Township's Yard Waste and Electronics Recycling Center to 850 Lewisberry Road, New Cumberland, PA, located in the Rural Living (RL) Zoning District of the Township. Hearings on the application were held on January 19, 2017, and February 16, 2017, at 7:00 p.m. at the Fairview Township Municipal Building, 599 Lewisberry Road, New Cumberland, PA 17070.

FINDINGS OF FACT

1. The Applicant is Fairview Township, 599 Lewisberry Road, New Cumberland, PA 17070.
2. The Applicant is the owner of the property located at 850 Lewisberry Road, Lewisberry, PA (hereinafter, the "Lot"), which is in the Rural Living (RL) Zoning District of Fairview Township. The gross area of the Lot is 11.282 acres or 491,443.92 square feet. Exhibit A-2.
3. Notice of the hearing was properly advertised; the property was properly posted; and all neighboring property owners required to be notified of the hearing were notified in

accordance with the Township Ordinance and the Pennsylvania Municipalities Planning Code.¹

4. The Lot contains a former elementary school, which is vacant. N.T.² at 9. The Township, desires to use the site for a yard waste compost facility and an electronic recycling drop-off facility.

5. The proposed use is a permitted municipal use in a rural living district (RL) under the Fairview Township Zoning Ordinance. *Zoning Ordinance*, Table 4-2.

6. The Ordinance, however, limits the amount of impervious coverage to 15% of the lot surface for municipal uses in an RL district. Ordinance, Table 4-3. It allows up to 30% impervious cover for residential uses in an RL district. *Id.*

7. The Township seeks a dimensional variance from the impervious coverage requirement of the Fairview Township Zoning Ordinance. The Township's request is to increase the impervious area up to 30% to accommodate the yard waste composting use.

8. The Lot presently has 1.582 acres of impervious cover, Exhibit A-2, which is 16.3% of the Lot's net surface area. N.T. at 73, 99-100.

9. Fairview Township currently operates a recycling facility at a rented location and the lease expires at the end of 2018. N.T. at 8, 16.

10. The Township presented three witnesses in support of the variance request: Donald Martin, Manager of Fairview Township; Keith Reynolds, Highway Foreman for Fairview

¹ The hearing was not properly advertised for January 19, 2017. Therefore, upon the objection of counsel for Joshua Kessler, an adjoining landowner, and with the agreement of counsel for the applicant, after very limited testimony, the hearing was adjourned and was fully re-noticed for the February 16 date. No testimony or evidence of any nature from the January date was considered by the Zoning Hearing Board to be part of this hearing record.

² N.T. stands for Notes of Transcript and refers to the Transcript of the hearing before the Fairview Township Zoning Hearing Board on February 16, 2017.

Township; and Cathy D. Lee, P.E., of Rettew Associates, engineers for Fairview Township. The Township was represented at the hearing by Steven M. Hovis, Esquire, Stock and Leader, 221 West Philadelphia Street, York, PA, Solicitors for Fairview Township.

11. Keith Reynolds' duties for the Township include overseeing all aspects of the recycling center. N.T. at 26-27. He testified that the Township currently conducts a Township-wide leaf collection in the fall of each year and provides a residential drop-off of yard waste, limited to sticks, brush, and woody material. N.T. at 27. He also testified that the Township provides for electronics recycling at the same facility where they handle the leaf collection and yard waste drop-off. N.T. at 27.

12. It is the Township's intent to transfer the leafy waste, yard waste, and electronics recycling to the Lot without expanding the Township's recycling project. N.T. at 27.

13. The Pennsylvania Department of Environmental Protection (hereinafter, "DEP") issues permits to allow recycling and specifically limits the activities and size of property for the recycling center. N.T. at 27-29, 33. The Township has a "permit-by-use" permit for up to a five (5) acre facility from DEP. *Id.* DEP has inspected the property subject to this application and the current permit applies to what has been preliminarily designed for the Lot. *Id.*

14. An employee of Fairview Township will be on site at all times when the facility is open to the public to regulate the manner in which recyclables are dropped off. N.T. at 37-38. Residents will be allowed to drop-off electronics and yard waste during the hours of operation, which will be 8:00 a.m. to 4:30 p.m., Monday through Friday from April through October; and 9:00 a.m. to 12:00 p.m., Monday through Friday and the first and third Saturdays from November through March. *Id.* at 37.

15. The yard waste will be ground on site and residents will be encouraged to return to the facility to pick up compost. Fairview Township will continue to rent a commercial wood grinder for two two-week periods a year to mulch the “woody” yard waste. N.T. at 34-35. Dust will be eliminated, or minimized by adding water to the machine, the same process used at the current location. *Id.* at 35.

16. The leaf compost will also be piled on site and turned once a month for four hours to facilitate decomposition. N.T. at 40. The equipment used to turn the leaf compost is smaller than an 18-wheeler trailer and only about half as high. A 500 hp diesel engine runs the equipment and the noise produced is comparable to that of a large lawn mower. *Id.* at 39-40.

17. There will be no processing of electronic waste on-site. The electronics dropped off at this location will be stacked and then hauled away for disposal. N.T. at 30. These electronics will be dry; therefore, there will be no contact with liquids, chemicals, or fumes at the site.

18. Cathy D. Lee, P.E., of Rettew Associates, 5031 Richard Lane, Suite 111, Mechanicsburg, PA, testified as the project manager and township engineer for the project. Ms. Lee testified that the newly purchased property, the subject of this application, is a current nonconforming lot with 16.3% impervious cover. N.T. at 73. Ms. Lee further testified that under the proposed plan, the majority of the new impervious surface would be where the rows of compost material would be placed. *Id.* at 74. The proposed plan also includes a stormwater management facility and minor curbing to direct rain water into the storm water management facility. *Id.*

19. The storm water management facility will put stormwater back into the ground before it leaves the property resulting in less stormwater leaving the property than is currently the case. *Id.*

20. Fencing will be placed around the perimeter and will comply with DEP and Township ordinance requirements. N.T. at 38, 76. DEP generally requires a buffer of 300 feet between the facility and nearby residences. N.T. at 76-81. If there is less than 300 feet, the Township may comply by either obtaining a written approval from the adjoining neighbor, or placing buffers 5' to 6' tall along the edge of the property so the residents won't see the facility. *Id.* at 77. The proposed project complies with the buffer fencing and buffer requirements. *Id.* at 76-81.

21. The Township proposes to use the existing entrance to the Lot. N.T. at 82-83. Rettew Associates conducted a sight-distance study for that entrance and found that the Lot meets the 40 mph distance requirement with respect to traffic and the distances necessary to make a safe turn into the facility. PennDOT must address any other traffic issues. *Id.*

22. Testifying in opposition to the request was Josh Kessler, an adjacent property owner, 892 Lewisberry Road, Lewisberry, PA. Mr. Kessler was represented by Glenn Parno, Esquire, Capozzi & Adler, 1200 Camp Hill Bypass, Suite 205, Camp Hill, PA. Mr. Kessler owns four lots comprising approximately 74 acres. N.T. at 102, 107. Two of the lots adjoin the Lot. Mr. Kessler's house is on the back side of the Lot, with limited visibility of the proposed facility due to topography and foliage.

23. Mr. Kessler testified that his concerns revolve around the proposed recycling facility not being cost-effective, being close to residences, including his own, being noisy,

creating dust, being unsafe for vehicle access, and having the potential for illegal dumping of debris during off hours. N.T. at 103-106. Mr. Kessler suggests, through his counsel, that permitting a compost facility in the rural district would alter the essential character of the neighborhood. *Id.* at 17.

24. While the primary concern with any increase in the amount of impervious cover is the potential for increased run-off, no party has raised an issue regarding stormwater run-off. It is notable, however, that the amount of impervious surface requested is the same amount the zoning ordinance would permit if the Lot were subdivided and used for residences. Furthermore, the testimony establishes that the Township will incorporate a stormwater management pond into the project with the effect of reducing stormwater run-off below its current level.

25. As to Mr. Kessler's concerns, the Board finds the following:

- a. Whether the project is cost-effective is not an issue that is properly before the Zoning Hearing Board;
- b. The DEP fencing and buffering requirements obviate any reasonable concerns for residences near the proposed facility regarding uncontrolled access to the site and the site's appearance;
- c. While Mr. Kessler voiced concern about health and safety risks, he offered no evidence of health or safety risks would actually result from the proposed facility;
- d. Furthermore, during the time it has operated its existing recycling facility, the Township has had only one complaint regarding dust, which it cured by adding water to the grinding machine during operation. Dust has not

been an issue since the Township began adding water to the grinder and will not be an issue with the new facility;

- e. During the time it has operated the existing recycling facility, the Township has had no complaints regarding noise; the grinder and the machine for turning leaves are used infrequently and during normal waking hours; they make noise comparable to a large lawnmower; any noise from the recycling facility will be minimal.
- f. There is usually no odor from the material being recycled and none is expected; and
- g. The Township has not had any problems regarding recyclables being dropped-off while the facility is closed and there is no evidence to indicate future problems with recyclable material being dropped-off after hours.

26. Neither the proposed variance, nor the proposed facility will change the essential character of the zoning district or neighborhood .

27. The proposed variance is insignificant and the public interest is protected by alternate means.

DISCUSSION

Fairview Township Zoning Ordinance, Table 4-3 of Section 300-16, establishes a limit of 15% maximum impervious lot coverage for all non-residential uses. The Township's Zoning Ordinance directs the Zoning Hearing Board to "hear requests for variances where it is alleged that the provisions of [the Ordinance] inflict unnecessary hardship upon the applicant."

Zoning Ordinance, §300-99 E(4). The Zoning Hearing Board may grant a variance where all of the following findings are made, where relevant in a given case:

- (a) There are unique physical circumstances or conditions... peculiar to the property and the unnecessary hardship is due to such conditions...;
- (b) That because of such physical circumstances or conditions, there is not a 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 reasonable use of the property;
- (c) That such unnecessary hardship has not been created by the... [applicant];
- (d) That the variance... will not alter the essential character of the zoning district or neighborhood...;
- (e) That the variance... will represent the minimum variance that will afford relief and will represent the least modification possible of the regulations in issue; [and]
- (f) The proposed use complies with Article VI of this chapter relating to Floodplain Overlay Zoning District (FPO) and Chapter 151, relating to floodplains...

The Zoning Ordinance requirements for grant of a variance are quite restrictive, however, the Zoning Hearing Board must emphasize that this case involves a permitted use and the variance sought is a dimensional variance. Furthermore, Pennsylvania recognizes the doctrine of *de minimis* variances. In the case of a *de minimus* variance, “the traditional grounds for a variance... need not be met.” *Lewis v. Zoning Hearing Board of Northampton Township*, 2433 C.D. 2009 (Pa. Cmwlth. 2009) (unreported opinion). Stated alternatively, “Where the requirements for a variance have not been met, a zoning hearing board may grant a *de minimus* variance...” *Suburban Realty, L.P. v. Zoning Hearing Board*, 16 D&C 5th 312, 323 (Monroe

County 2010) citing *Consantino v. Zoning Hearing Bd.*, 618 A.2d 1193, 1196 (Pa. Cmwlth. 1996). There are no set criteria for granting a *de minimus* variance; instead, one may be granted according to the particular circumstances of the individual case. *Bailey v. Zoning Hearing Board of the City of Philadelphia*, 801 A.2d 492, 504 (Pa. 2002). It is clear, however, that “[t]he percentage of the requested variance is not the sole criteria in determining what is *de minimis*.” *Suburban Realty, L.P.*, *supra*, at 323, citing *Middletown v. Zoning Hearing Bd.*, 682 A.2d 900, 9032 (Pa. Cmwlth. 1996). A zoning hearing board may grant a *de minimis* variance when it finds that, under the circumstances, the proposed deviation is “insignificant and the public interest is protected by alternate means.” *Nettleton v. Zoning Board of Adjustment of the City of Pittsburgh*, 828 A.2d 1033, 1038 (Pa. 2003). Stated alternatively, the Zoning Hearing Board may grant a *de minimis* variance when forcing strict compliance with the zoning ordinance would cause hardship for the applicant without concomitant benefit to the public. *See Pyzdrowski v. Board of Adjustment*, 263 A.2d 426, 431 (Pa. 1970). The decision to grant a *de minimis* variance is left to the discretion of the zoning hearing board. *200 W Montgomery Ave. Ardmore v. Zoning Hearing Board of Lower Merion Twp.*, 985 A.2d 995 (Pa. Cmwlth. 2009).

The Commonwealth Court affirmed the grant of a *de minimis* variance that allowed a land owner to increase the impervious area on his lot by at least 31% (and perhaps more than 50.9%) beyond the zoning ordinance limitation when it found that such increase would not harm public health or safety. *Lewis v. Zoning Hearing Board of Northampton Township*, 2433 C.D. 2009 (Pa. Cmwlth. 2009) (unreported opinion). Speculation as to possible health or safety harm does not justify denial of a *de minimis* variance. *BBW Properties, Inc. v. Upper Merion Township*, 973 C.D. 2008 (Pa. Cmwlth. 2008) (unreported opinion). The Commonwealth Court also

affirmed a *de minimis* variance which allowed subdivision of a 0.847 acre lot resulting in lots of 0.5 and 0.347 acres in an area zoned for minimum 1 acre lots when the owner agreed to take the necessary steps to alleviate sewage concerns. *Middletown v. Zoning Hearing Board*, 682 A.2d 900, 903 (Pa. Cmwlth. 1978).

Whether to grant a *de minimis* variance turns on the effect that the deviation from the ordinance will have on the public interest. *See Suburban Realty, L.P. v. Zoning Hearing Board*, 16 D & C 5th 312, 325 (Monroe County 2010). When the applicant seeks a variance to increase the amount of impervious coverage on his land, the issue before the Zoning Hearing Board concerns the prevention of flooding caused by run-off. *See id.* In *Suburban Realty, L.P.*, a case very similar to the one now before the Zoning Hearing Board, the Commonwealth Court affirmed grant of a *de minimis* variance when the variance allowed deviation from the zoning ordinance's impervious coverage requirement, but the applicant offered to use "pervious" material instead of concrete or asphalt and agreed to modify the existing detention basin to mitigate run-off from excess ground cover. *See id.* Here, the evidence shows that the Township will install a storm water facility to actually decrease the amount of run-off from its current state.

In light of the above referenced law, the foregoing findings and conclusions justify granting the requested variance to the amount of impervious coverage, because the proposed use is allowed under the zoning ordinance, the amount of impervious coverage requested is no more than that allowed under other permitted uses, the amount of run-off will actually decrease with completion of the proposed project, the community's health and safety concerns are adequately addressed and protected under the proposal, and the proposal will not change the nature of the community.

CONCLUSIONS

1. The proposed use is a permitted use.
2. The application seeks only a variance from the amount of impervious coverage allowed for the use under the Fairview Township Zoning Ordinance.
3. The proposed increase in impervious coverage is no more than that allowed for other uses and the proposed project will include a storm water facility that will actually reduce rain water run off from its current levels. Accordingly, the proposed increase is *de minimis*.
4. Because this application involves a *de minimis* variance, the Applicant need not demonstrate that because of unique topographical or other features or circumstances, literal compliance with the requirements of the Ordinance would impose an unreasonable and unnecessary hardship upon the Applicant in the use of its property.
5. The proposed project addresses the community's health and safety concerns and provides for them so that there will be no detriment to community health and safety arising from the project.
6. The proposed project will be contained and buffered such that it will not change the essential character of the zoning district or neighborhood.
7. On the basis of the testimony and documentary evidence presented, the Board concludes that the requested variance should be granted.

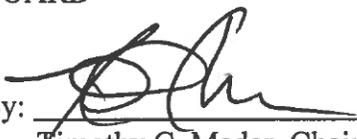
DECISION

On the basis of the foregoing findings and conclusions, and on the basis of all testimony and evidence presented at the hearing, the application for a variance should be granted as described in the proposal.

The application was approved upon the motion made by Mr. Bashore, seconded by Mr. Maxwell and adopted 3-0 by the Board members present and voting.

FAIRVIEW TOWNSHIP ZONING HEARING
BOARD

Dated: March 28, 2017

By: 

Timothy C. Mader, Chairman

Distribution:

Steven M. Hovis, Esquire, *Attorney for Applicant*

Glenn A. Parno, Esquire, *Attorney for Mr. Kessler*