

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

APPLICATION OF 212 WOOD STREET, LLC

No. 2018-02

PROPERTY: Tax Parcel No. 58-00-15988-00-1

SUPPLEMENTAL DECISION

This is a supplemental decision following a remanded hearing before the Upper Merion Township Zoning Hearing Board (the "ZHB") on June 5, 2019, pursuant to the order of the Honorable Daniel J. Clifford (the "Remand Order"). The Remand Order is attached hereto as Exhibit "A." Judge Clifford's Remand Order, in pertinent part, directed as follows:

- K. Accordingly, this matter is **REMANDED** to the Upper Merion Zoning Hearing Board for the purpose of conducting a public hearing in order to determine the validity of the Zoning Officer's Notice of Violation for the property, pursuant to the Township Code.
- L. The ZHB shall ensure that proper notice of the new hearing is provided to the public.
- M. The Court having remanded this matter for a public hearing before the ZHB in order to determine the validity of the Zoning Officer's Notice of Violation for the property, is not required to address the issue of Landowner's request for additional use variances.

Exhibit A, p. 3-4.

This matter initially arose from a notice of violation issued by the Upper Merion Township (the "Township") zoning officer on November 10, 2017 for the property identified as tax parcel number 58-00-15988-00-1 (the "Property"). The notice of violation asserted that the Property was being used illegally as a "construction yard" for

“excavators, trailers, roll-off containers and other miscellaneous materials and equipment.” [Exhibit ZHB-8.]

The owner of the Property, 212 Wood Street, LLC (“Landowner”), appealed the notice of violation. Landowner challenged the zoning officer’s determination that the use of the Property as a “construction yard” is not a legally nonconforming use.¹ Alternatively, Landowner requested a variety of variances from the requirements of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the “Zoning Ordinance”) to allow a number of non-permitted uses on the Property.

Two hearings were held on Landowner’s application on May 16 and July 18, 2018. The Township, represented by Bernadette A. Kearney, Esq. of Hamburg, Rubin, Mullin, Maxwell, & Lupin, P.C., appeared in opposition to the application.

At the May 16th hearing, Landowner began to present testimony and evidence related to its assertion that the “construction yard” use of the Property is legally nonconforming. Prior to the completion of Landowner’s testimony and evidence, and before any cross-examination or rebuttal by the Township, the ZHB made a determination that it lacked jurisdiction to hear Landowner’s appeal because Landowner’s application had been filed more than 30 days after the notice of violation was issued depriving the ZHB of jurisdiction, and, thus, the zoning officer’s determination was final and unappealable. Landowner then proceeded with its case for the requested variance relief.

¹ Landowner also asserted the existence of a legally nonconforming “recreation use” of the Property in its application. The zoning officer’s notice of violation made no reference to an illegal “recreation use”, and Landowner presented neither evidence, nor argument during the Remand Hearing related to a nonconforming recreation use. Therefore, this issue of whether a legally nonconforming recreation use exists on the Property or was properly before the ZHB was waived.

At the conclusion of the hearing on July 18, 2018, the ZHB voted unanimously to deny the requested variance relief. A notice of the ZHB's decision was issued on July 19, 2018. A written decision with findings of fact and conclusions of law was issued on August 21, 2018 (the "Decision"). The Decision is attached hereto as Exhibit "B," and incorporated herein as though set forth at length.

Landowner filed an appeal on August 16, 2018 and a supplemental appeal which incorporated the Decision. The Township intervened in the appeal. Following briefing and argument by the parties, Judge Clifford issued the Remand Order.

The remand hearing was held before the ZHB on June 5, 2019. Legal notice of the remand hearing was published on May 22 and May 29, 2019. The proof of publication is attached hereto as Exhibit "C." The legal notice for the remand hearing read as follows:

Notice is hereby given that the Zoning Hearing Board of Upper Merion Township will hold a public meeting on Wednesday, June 5, 2019 at 7:00 p.m. in Freedom Hall at the Upper Merion Township Building, 175 West Valley Forge Road, King of Prussia, Pennsylvania, to hear the following matters:

No. 2018-02 The application of 212 Wood Street LLC, as to a certain property known as Parcel# 58-00-15988-00-1. The property is located in the HR Residential Zoning District. The applicant is requesting the following relief: 1) an appeal of the Zoning Officer's Enforcement Notice dated November 10, 2018. 2) An appeal of the Zoning Officer's decision that the non-conforming uses at the property do not exist. 3) In the alternative, the applicant is requesting a Variance from Sections 165-48, 165-50, 165-51 and 165-53 to use the property as a construction yard, including the storage of construction materials and heavy equipment. 3) Also in the Alternative, the application states the Township is barred from enforcing its ordinance through the Doctrine of Laches.

The Montgomery County Court of Common Pleas has remanded this matter for a public hearing before the Zoning Hearing Board in order to determine the validity of the of the Zoning Officer's Notice of Violation for the property, the Zoning Hearing Board is not required to address the issue of Landowner's request for additional use variances

Exhibit C.

The remand hearing was stenographically recorded. The following members of the ZHB were present at the hearing: Mark S. DePillis, Esq., Vice Chairman; Maria Mengel, Member; M Jonathan Garzillo, Member; Vivian Peikin, Member; and Hedda Schupak, Alternate Member. The ZHB was represented by Marc D. Jonas, Esq. and Zachary A. Sivertsen, Esq. of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was represented by Gerald E. Rath III, Esq. of Blumberg & Rath. The Township was represented by Bernadette A. Kearney, Esq. of Hamburg, Rubin, Mullin, Maxwell, & Lupin, P.C., the Township solicitor.

After careful consideration, the ZHB makes the following supplemental findings of fact and conclusions of law:

A. FINDINGS OF FACT

ZHB HEARING

1. The ZHB marked the following additional exhibits:
 - a. ZHB-18 — Order of the Court of Common Pleas of Montgomery County, the Honorable Daniel J. Clifford, dated April 5, 2019
 - b. ZHB-19 — legal notice for the remand hearing
 - c. ZHB-20 — proof of posting for the remand hearing
 - d. ZHB-21 — proof of publication for the remand hearing
2. Landowner entered the following additional exhibit:
 - a. A-22 — plan entitled “Potential Site Yield Plan of Lands of 212 Wood Street LLC,” prepared by OTM, LLC, dated January, 25, 2019

3. The Township entered the following additional exhibit:
 - a. T-7 — series of ZHB applications for the Property dated May 3, 1984, October 11, 1984, August 21, 1987, July 22, 1988, October 25, 1989, December 17, 1990, December 16, 1991, April 6, 1992, December 18, 1992, December 15, 1993.
4. Landowner presented additional testimony from one witness, Robert Ratoskey, a member of 212 Wood Street, LLC.
5. Mr. Ratoskey testified as follows:
 - a. At the time the Property was purchased in 2016, Mr. Ratoskey believed that storage of construction vehicles and equipment was a permitted as a nonconforming use. [N.T. 6/5/19, p. 12.]
 - b. Landowner presently stores “a lot of trailers,” “overseas containers,” and heavy equipment used for demolition work on the Property. [N.T. 6/5/19, p. 13.]
 - c. Landowner began storing equipment on the Property in mid-1995 when it was still owned by his predecessor in title, Jack Trinsey. [N.T. 6/5/19, pp. 13–15.]
 - d. In 1995, Mr. Ratoskey saw Mr. Trinsey and other contractors storing equipment on the Property. [N.T. 6/5/19, p. 14–15.]
 - e. Mr. Trinsey requested and ultimately obtained a rezoning of the Property from heavy industrial to HR residential in 1982. [N.T. 6/5/19, pp. 23–24.]

- f. Mr. Ratoskey is unaware of the uses permitted when the Property was zoned heavy industrial. [N.T. 6/5/19, p. 24.]
- g. Mr. Ratoskey is unaware of the use of the Property when it was rezoned in 1982. [N.T. 6/5/19, p. 25.]
- h. In a series of ZHB applications from 1984 through 1993, filed by Mr. Trinsey's company, the Port Henley Corporation, the use of the property was identified consistently as "vacant ground." [N.T. 6/5/19, pp. 26–30; Exhibit T-7.] There was no mention of the use of the Property for storage or as a construction yard.
- i. Landowner did not discuss its intended use of the Property as a construction yard with the Township zoning officer prior to purchasing it. [N.T. 5/16/18, p 103; N.T. 6/5/19, p. 32.]
- j. Landowner has never obtained or attempted to obtain a use and occupancy permit for the Property. [N.T. 6/5/19, p. 32.]
- k. Mr. Ratoskey is unaware of any permits, approvals, or other writings from the Township that gave the prior owner permission to use the Property to store construction equipment. [N.T. 6/5/19, p. 32.]
- l. Mr. Ratoskey does not know whether construction equipment was stored on the Property in 1982. [N.T. 6/5/19, pp. 33–34.]

6. Landowner initially stated its intention to recall Bradford Grauel, the engineer and surveyor who had testified at a previous hearing on this matter. However, Mr. Grauel was unable to attend the remand hearing. Following the testimony of Mr.

Ratoskey, the Landowner decided to proceed without additional testimony from Mr. Grauel. [N.T. 6/5/19, p. 36.]

B. DISCUSSION

The only issue before the ZHB on remand was Landowner's appeal of the notice of violation on the basis that the construction yard and recreational use of the Property are legally nonconforming uses.

Section 165-199.A of the Zoning Ordinance provides the following:

Continuation. Any lawful building or structure or any lawful use of a building or structure or land existing on the effective date of this chapter or any amendment thereto which does not conform to the provisions of this chapter or any subsequent amendment shall be considered a lawful nonconforming building, structure or use and may be continued, except as otherwise provided herein.

Zoning Ordinance § 165-199.A.

"A lawful nonconforming use is a use that predates the enactment of a prohibitory zoning restriction..." *Hunterstown Ruritan Club v. Straban Twp. Zoning Hearing Bd.*, 143 A.3d 538, 545 (Pa. Cmwlth. 2016) (emphasis added). The right to maintain a nonconforming use is only available for uses that were lawful when they came into existence. *Hafner v. Zoning Hearing Bd. of Allen Twp.*, 974 A.2d 1204, 1210–1211 (Pa. Cmwlth. 2009). Preexisting illegal uses cannot become nonconforming uses. *Lantos v. Zoning Hearing Bd. of Haverford Twp.*, 621 A.2d 1208 (Pa. Cmwlth. 1993).

The burden of proof rests with the property owner to establish the existence of a prior nonconforming use. *TKO Realty, LLC v. Zoning Hearing Bd. of City of Scranton*, 78 A.3d 732, 735 (Pa. Cmwlth. 2013). This burden requires the property owner to provide

“conclusive proof by way of objective evidence of the precise extent, nature, time of creation, and continuation of the alleged nonconforming use.” *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh*, 997 A.2d 423 (Pa. Commw. Ct. 2010) (citing *Jones v. N. Huntingdon Twp. Zoning Hearing Bd.*, 467 A.2d 1206, 1207 (Pa. Cmwlth. 1983)).

For example, in *Jones v. North Huntingdon Township Zoning Hearing Board*, 467 A.2d 1206 (Pa. Cmwlth. 1983) a property owner received citations for parking commercial vehicles on his property located in a residential zoning district. He argued before the zoning hearing board that he had been parking commercial vehicles on the property prior to the enactment of the zoning ordinance in 1964, and, thus, his use was legally nonconforming. The property owner had owned the type of commercial equipment at issue since 1957 and, from time to time, had kept it either at his property or that of his father since that time. He also offered the testimony of several neighbors that from time to time prior to 1964 they had observed construction equipment on his property.

The court concluded that the property owner had not established the existence of a legally nonconforming use:

This evidence depicts a sporadic, intermittent and imprecisely stated business use of residentially zoned property, and is not objective evidence of the precise extent, nature, time of creation and continuation of nonconforming use as required by law.

Jones, 467 A.2d at 1208 (Pa. Cmwlth. 1983).

The evidence presented by Landowner in the present matter was even more imprecise than that offered in *Jones*. The sum of Mr. Ratoskey’s testimony on the issue of the nonconforming was that in 1995 he began storing construction equipment on the Property and, at that time, he observed equipment stored there by other individuals and

entities. Mr. Ratoskey offered neither photographs, nor documents, nor other witnesses to corroborate this claim.

If the ZHB were to credit Mr. Ratoskey's testimony as true, it establishes only that this illegal use has been ongoing since 1995. Landowner presented no evidence or testimony regarding when the storage of construction equipment was a permitted use on the Property or precisely when the use became lawfully nonconforming. Without this information, there was no basis on which to find that Landowner's desired use of the Property is legally nonconforming.

Landowner's testimony and evidence established at most that the illegal use had been occurring since 1995; not 1982. The applicant in *Jones* provided testimony that his use had been occurring prior to the adoption of the applicable zoning ordinance. Yet, the Court in *Jones* still found this was insufficient to establish that the use was legally nonconforming.

The burden of proof on the issue of a legally nonconforming use rested with Landowner. The evidence presented by Landowner was markedly insufficient.

C. CONCLUSIONS OF LAW

1. To demonstrate that a use is legally nonconforming an applicant must establish through objective evidence the precise extent, nature, time of creation, and continuation of the use -- that the use was lawful when it came into existence and was subsequently rendered nonconforming by the enactment of a prohibitory zoning restriction.

2. Landowner did not establish when the construction yard use of the Property was established or that it was lawful when it came into existence.

3. Landowner did not establish when the construction yard use of the Property was rendered lawfully nonconforming by the enactment of a prohibitory zoning restriction.

4. Landowner did not establish that the construction yard use of the Property had been ongoing since the enactment of a prohibitory zoning restriction.

5. Landowner failed to demonstrate that the construction yard use of the Property is a legally nonconforming use of the Property.

At the conclusion of the June 5, 2019 remanded hearing, the ZHB voted unanimously to deny the appeal of the zoning officer's notice of violation. On June 6, 2019 (incorrectly dated June 6, **2018**), the ZHB mailed the following notice of decision:


This letter constitutes notice of the decision of the Upper Merion Township Zoning Hearing Board following the remanded supplemental hearing held on June 5, 2019, pursuant to the order of the Honorable Daniel J. Clifford dated April 5, 2019.

The Zoning Hearing Board voted to deny the appeal of the Zoning Officer's Notice of Violation.

Because the appeal was denied, the Zoning Hearing Board will issue a decision with findings of fact, conclusions of law, and reasons.

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



Mark S. DePillis, Esquire, Vice Chairman