BEFORE THE ZONING HEARING BOARD
OF HILLTOWN TOWNSHIP

APPEAL OF THOMAS LINKE

ADJUDICATION

Thomas Linke ("***Appellant***") filed an appeal ("***Appeal***") with the Zoning Hearing Board of Hilltown Township ("***Board***") on or about October 6, 2021 appealing the issuance of an enforcement notice concerning activities occurring upon property owned by Appellant. The subject property consists of two neighboring parcels located at 2112 and 2118 Hilltown Pike within Hilltown Township, otherwise respectively known as Bucks County Tax Map Parcel Nos. 15-028-129 & 15-028-127 ("***Property***"). The Property is located in the Rural Residential (RR) and the Village Center (VC) Zoning Districts. Appellant operates a nursery, landscaping business, and paving and excavating business on the Property; processes and sells topsoil and other soils from the Property; and stores soils and other materials on the Property. Appellant was cited for his paving, excavating, soil, and storage operations on the Property. In his Appeal, Appellant claims these activities are protected nonconforming uses and that Hilltown Township is equitably prohibited from claiming these activities violate the Township Zoning Ordinance.

Pursuant to the Pennsylvania Municipalities Planning Code, Act 247, as amended ("***MPC***"), the Hilltown Township Zoning Hearing Board held a hearing on this Appeal to receive testimony and evidence on this matter. The hearing was held in the Township Building, located at 13 West Creamery Road, Hilltown, Pennsylvania on November 18, 2021 ("***Hearing***"). On December 2, 2021, the Board deliberated in executive session and then took a vote on this Appeal during a public meeting. Notice of the Hearing was sent to Appellant, adjacent property owners, and properly advertised in the Intelligencer in accordance with the requirements of the MPC. In addition, the Property was posted in accordance with the MPC. Hilltown Township ("***Township***") and the following neighbors: Chuck and Donna Smith, Joe and Shannon Monzo, Bill and Nan Crane, Kevin Craun, Bill and Penny Jaxheimer, and Susan Bonino ("***Intervenors***"), participated as parties in the Appeal. Additionally, Ben Linke, son of Appellant, was also granted party status. Board Chairman John Synder, Board Vice-Chairman David Hersh, and Board Member Stephen Yates were in attendance at the Hearing and took part in the Board's deliberations on this matter. In addition, Peter Nelson, Esquire, the Board's Solicitor and the Board's stenographer were in attendance. At the Hearing, Appellant was represented by Gregg I. Adelman, Esquire; the Township was represented by Jack Wuerstle, Esquire; and the Intervenors were jointly represented by Edward M. Wild, Esquire.

Based on the testimony and evidence presented at the Hearing, the Board, after discussion and due deliberation, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Appellant is Thomas Linke with a mailing address of 2118 Hilltown Pike, Perkasie, PA 18944. (Exhibits B-1).

2. The Property which is the subject of this Appeal is made up of two adjacent parcels, one located at 2112 Hilltown Pike within Hilltown Township, Bucks County, Pennsylvania (TMP No. 15-028-129) and the other located at 2118 Hilltown Pike within Hilltown Township, Bucks County, Pennsylvania (TMP No. 15-028-127). (Exhibits B-1, B-8, I-4, & T-1).

3. Appellant is the title owner of the Property. (Notes of Testimony ("N.T."), 11/18/21, p. 68-69; Exhibit B-1).

4. Based on the deeds attached to Appellant's Appeal, Mr. Linke purchased 2112 Hilltown Pike (TMP 15-028-129) on November 27, 2001 and purchased 2118 Hilltown Pike (TMP 15-028-127) on April 11, 1988. (Exhibit B-1).

5. The Property is split zoned between the Rural Residential (RR) Zoning District and the Village Center (VC) Zoning District. (N.T., 11/18/21, p. 25-26; Exhibit B-1).

6. On September 7, 2021 Mark Sarson, BCO, CZO, the Zoning Officer for Hilltown Township, issued a Zoning Enforcement Notice to Appellant for activities occurring on the property ("***Enforcement Notice***") that are allegedly in violation of the Hilltown Township Zoning Ordinance ("***Zoning Ordinance***"). The Enforcement Notice specifically cited Appellant for operating a G5 Contracting Use, an H-1 Manufacturing Use, and an H-9 Outside Storage Use on the Property. None of these three uses are permitted in either the RR or VC Zoning Districts. (Exhibits B-1 & T-1).

7. Appellant appealed the issuance of the Enforcement Notice to the Board on October 6, 2021. (Exhibits B-1 & B-2).

8. The Board held the Hearing on November 18, 2021 concerning the Appeal wherein it accepted testimony and evidence concerning this Appeal. (N.T., 11/18/21, p. 6).

9. At the hearing, Mark Sarson, Thomas E. Linke, and Chuck Smith were called as witnesses and testified. (N.T., 11/18/21, p. 4-5).

10. Mr. Sarson is employed by Barry Isett and Associates and currently works as the Zoning Officer and Code Enforcement Officer for the Township. (N.T., 11/18/21, p. 24-25).

11. This enforcement action was commenced by Mr. Sarson because the Township had received complaints from Township residents concerning the activities on the Property. (N.T., 11/18/21, p. 25).

12. Mr. Sarson visited the Property three times after receiving the complaints, with the first visit being on July 29, 2021 ("***Site Visit***"). (N.T., 11/18/21, p. 26).

13. During his Site Visit, Mr. Sarson observed several different types of materials being stored upon the Property, including millings, broken up concrete and asphalt, tree and shrub debris, soil, and gravel. (N.T., 11/18/21, p. 28-29).

14. During his Site Visit, Mr. Sarson saw two topsoil screeners upon the Property. Mr. Sarson stated that he was familiar with the purpose of a topsoil screener and described them as devices that are used to separate larger and organic items out of soil such as gravel, large pieces of dirt, and debris, to make the soil more marketable as topsoil. (N.T., 11/18/21, p. 28-30).

15. Mr. Sarson stated that the piles of materials being stored upon the Property were probably as high as a two-story house. (N.T. 11/18/21, p. 29-30).

16. Based on his Site Visit, Mr. Sarson determined that there are three zoning violations upon the Property. More specifically, he determined that Appellant is operating a excavating and paving contracting business, which constitutes a G-5 Contracting Use under the Zoning Ordinance; is producing and processing topsoil, which constitutes an H-1 Manufacturing Use under the Zoning Ordinance; and is storing several types of materials, including, but not limited to, soil and topsoil, outside on the Property, which constitutes an H-9 Outdoor Storage Use under the Zoning Ordinance. All three of these Uses, and thus, all of these activities, are not allowed in either the RR or the VC Zoning District. (N.T. 11/18/21, p. 31-32).

17. Mr. Sarson also noted that the piles of materials stored outside on the Property exceeded the eight (8) foot height limitation contained within the Zoning Ordinance and were not properly shielded from the abutting rights-of-way nor the abutting neighbors, in violation of the Zoning Ordinance. (N.T. 11/18/21, p. 29-30, 32).

18. In regards to the G-5 Contracting Use, Mr. Sarson determined that Appellant was operating an excavating business upon the Property and that excavating was occurring in and around the Property. (N.T. 11/18/21, p. 32-33).

19. Mr. Sarson testified that he did not agree with the conclusions of the prior Zoning Officer, David Taylor, which Mr. Taylor set forth in his letter of August 18, 2020 directed to the Smiths. (N.T. 11/18/21, p. 39-40; Exhibit A-4).

20. Mr. Sarson testified that when reviewing the Township file on the Property he saw that historically the Property had been used by Appellant as a nursery with associated landscaping activities. (N.T. 11/18/21, p. 35-36).

21. Mr. Sarson testified that when reviewing the Township file on the Property he did not see any permits issued for a principal use on the Property. More specifically, he stated he did not come across any permits for a G-5 Contracting Use, an H-1 Manufacturing Use, or an H-9 Outdoor Storage Use on the Property. (N.T. 11/18/21, p. 42-43).

22. Mr. Sarson testified that during his Site Visit he saw evidence that soil was being trucked onto the Property for the purposes of it being screened. (N.T. 11/18/21, p. 45-46).

23. Mr. Sarson testified that he observed a half dozen storage trailers parked upon the Property and that he had a discussion with Mr. Linke concerning the items that were stored within these trailers. (N.T. 11/18/21, 9. 46-47).

24. Based on what he saw during his Site Visit, Mr. Sarson determined that the G-5 Contracting Use and the H-1 Manufacturing Use were principal uses on the Property; while any nursery use on the Property was subordinate to these principal uses. (N.T. 11/18/21, p. 48).

25. Mr. Sarson testified that the depictions of the Property shown on the photos collectively marked as Exhibit I-1 generally matched his observations during the Site Visit. (N.T. 11/18/21, p. 50-55; Exhibit I-1).

26. Mr. Sarson testified that the bringing of excavated materials onto the Property constituted the operation of an excavation business upon the Property. (N.T. 11/18/21, p. 56-57).

27. Mr. Sarson testified that it was clear Appellant was separating the soil that was being brought onto the Property based upon the colors and composition of the different mounds of soil stored on the Property. (N.T. 11/18/21, p. 59).

28. Other than an area of trees that could possibly be used for nursery purposes, Mr. Sarson did not observe any type of nursery activities upon the Property during his Site Visit. (N.T., 11/18/21, p. 61-62).

29. Mr. Sarson testified that Appellant is operating an excavating business on the Property that consists of his company bringing the soil back to the Property and storing it on the Property. The use of machinery to separate and process the excavated soil stored on the Property constitutes a Manufacturing Use; while the existence of the large mounds of soil upon the Property constitutes an Outdoor Storage Use. (N.T., 11/18/21, p. 62-63).

30. Mr. Sarson stated that he saw no evidence of any sort of retail nursery activity occurring upon the Property. (N.T., 11/18/21, p. 63).

31. Mr. Linke testified that the nursery stock located on the Property covers approximately 3 to 4 acres. The nursery stock consists of Green Giant Arborvitaes, Norway Spruce, Weeping Norway Spruce, Locust, Cryptomeria, Synokies, Dragon Eyes, and some other grafted material. (N.T., 11/18/21, p. 69).

32. Mr. Linke testified that his business consists of the nursery, landscaping, paving, excavation, topsoil, and fill dirt activities. (N.T., 11/18/21, p. 69-70).

33. Mr. Linke testified that he has been a landscape contractor since approximately 1984 or 1985. (N.T., 11/18/21, p. 70).

34. Mr. Linke testified that his business stores millings, fill dirt, topsoil, and salt on the Property. (N.T., 11/18/21, p. 71).

35. Mr. Linke testified that in addition to using the topsoil in his own business, he also sells it wholesale to other landscapers. He also sells seed and straw matting wholesale. Mr. Linke uses the millings in conjunction with his paving and landscape businesses. (N.T., 11/18/21, p. 71-73).

36. Appellant uses screeners to separate and sort topsoil on the Property. (N.T., 11/18/21, p. 78; Exhibit I-1).

37. Mr. Linke testified that if the Enforcement Notice is upheld it would not be good for his business; however, it would not eliminate his business entirely. (N.T. 11/18/21, p. 80-81).

38. Mr. Linke testified that the equipment for his paving and excavating businesses are solely stored on the Property. (N.T., 11/18/21, p. 79-82).

39. Mr. Linke testified that originally they did topsoil screening at job sites and not on the Property, but eventually they moved all the topsoil screening onto the Property. (N.T., 11/18/21, p. 85-87).

40. All the topsoil that is screened onsite is brought from off site. None of the topsoil screened onsite is actually from the Property. (N.T., 11/18/21, p. 88-89).

41. At a meeting in front of the Hilltown Township Planning Commission on May 3, 2021, Mr. Linke stated, that in terms of dollars, the nursery constitutes 10% of his business, the topsoil constitutes 40% of his business, and the paving contracting constitutes 50% of his business. Mr. Linke confirmed this statement and these numbers at the Hearing. (N.T., 11/18/21, p. 89-91; Exhibit I-2).

42. Mr. Linke testified that his companies do paving for and sell topsoil to projects completely separate from and having no association with the nursery activities upon the Property. (N.T., 11/18/21, p. 91-92).

43. Mr. Linke testified that the trailers on the Property are for his own personal use and that he does not rent them out to third parties. However, at the May 3, 2021 Hilltown Planning Commission meeting, Mr. Linke stated that he did rent these trailers out. (N.T., 11/18/21, p. 93, 100, & 125-126).

44. Mr. Linke has never applied for a permit from the Township for a G-5 Contracting Use, an H-1 Manufacturing Use, or an H-9 Outdoor Storage Use upon the Property. (N.T.; 11/18/21, p. 94).

45. Mr. Linke testified that he stores sand on the Property to mix in with the topsoil. (N.T., 11/18/21, p. 105).

46. Mr. Linke testified that he mixes manure with his fill dirt as part of the processing of his topsoil. (N.T., 11/18/21, p. 107-108).

47. Mr. Linke stores brush and other leftover wood waste on the Property and brings a third-party company onsite to grind this material into mulch every once in a while. (N.T., 11/18/21, p. 110).

48. Mr. Linke testified that he sells stone, straw, screened topsoil, and nursery stock from the Property. He sells most of these items wholesale, but he does sell some of these items, at times, retail to homeowners. Mr. Linke does not sell any nursery stock retail to homeowners. (N.T., 11/18/21, p. 114-115).

49. The Smith residence is located at 3 Highpoint Road and abuts the Property. (N.T., 11/18/21, p. 119).

50. The Smith's have lived on their property for 25 years. This property is a little over ten acres. The Smiths own four horses and have chickens, cats, dogs and other accoutrements of a small farmstead. (N.T.; 11/18/21, p. 119).

51. Mr. Smith testified that in 2019 the piles of soil on the Property suddenly got much, much larger and taller than had previously existed during the years the Smiths resided on their property. Moreover, activities regarding these piles of topsoil became much more numerous, continuous, and noisy at that point in time. (N.T., 11/18/21, p. 121-122).

52. Mr. Smith has seen the contracting business, the topsoil manufacturing, and the outdoor storage of materials all occurring upon the Property. (N.T.; 11/18/21, p. 122-125).

53. Mr. Smith has not observed a nursey operating from the Property in recent years. (N.T., 11/18/21, p. 135-136).

54. Mr. Smith testified that the piles of soil upon the Property are significantly larger now than they were five years ago. (N.T., 11/18/21, p. 132-133; Exhibit I-5).

55. Mr. Smith testified that there clearly is a paving contacting business being operated from the Property. (N.T., 11/18/21, p. 136; Exhibit I-1).

56. Mr. Smith testified that topsoil is clearly being manufactured upon the Property. (N.T., 11/18/21, p. 136-137; Exhibit I-1).

57. Mr. Smith testified that all the photos that make up Exhibit I-1 (except those copied from Appellant's social media outlets and website) were taken between March 2020 and October 2020. Mr. Smith further testified that the site conditions are significantly worse today than what is depicted in the photos that constitute Exhibit I-1. (N.T., 11/18/21, p. 138; Exhibit I-1).

58. Other than the photos taken from Appellant's social media outlets and website, all the photos that constitute Exhibit I-1 were taken from the Smith's property. (N.T., 11/18/21, p. 144; Exhibit I-1).

59. The photos taken of the dirt piles abutting the Smith residence show these piles of dirt of being at least thirty (30) feet in height. (Exhibit I-1).

60. The photos presented at the Hearing depict the storage of several different types of soil on the Property in large piles greatly exceeding the size of an average single-family home. (Exhibits I-1 & I-3).

61. The photograph taken by the Smiths on October 18, 2016 shows a much smaller pile of fill dirt on the Property than currently exists on the Property at the time of the Hearing. (N.T., 11/18/21, p. 132-133; Exhibits I-1 & I-5).

62. The photos included in Exhibit I-1 that were taken from Appellant's website show a large excavating and paving business being operated from the Property. (Exhibit I-1).

63. Photos B and J of Exhibit I-1 have the orientation most similar to the photo that constitutes Exhibit I-5. (N.T., 11/18/21, p. 144; Exhibits I-1 & I-5).

64. The expansion of the topsoil business and the increased activities concerning the topsoil business has had a massive negative impact upon the community neighboring the Property due to the increase in noise, dust, and dirt produced from these activities on the Property. (N.T., 11/18/21, p. 121-131, 136-137, 142-143, 149-152; Exhibit I-2, p. 5-8).

65. Appellant presented no evidence as to any specific permitted retail use upon the Property, nor did Appellant provide any evidence as to where on the Property any retail sales were occurring or in which Zoning District those sales were occurring.

66. An I-5 Accessory Outside Storage Use is not allowed in either the RR or the VC Zoning Districts.

67. An E-1 Retail Store is allowed within the VC Zoning District but is not allowed within the RR Zoning District.

68. No evidence was presented at the Hearing that the August 18, 2020 letter from David Taylor (Exhibit A-4) was ever provided to Appellant prior to the issuance of the Enforcement Notice or that Appellant relied on this letter in any way.

69. The following persons were accepted as parties at the Hearing and were represented as a group by Mr. Edward Wild, Esquire:

Kevin Craun, 2 Highpoint Road, Perkasie, PA 18944 (TMP # 15-028-126-002)
Chuck and Donna Smith, 3 Highpoint Road, Perkasie, PA 18944 (TMP # 15-028-126-003)
Joe and Shannon Monzo, 4 Highpoint Road, Perkasie, PA 18944 (TMP # 15-028-126-004)
Bill and Penny Jaxheimer, 6 Highpoint Road, Perkasie, PA 18944 (TMP # 15-028-126-006)
Bill and Nan Crane, 9 Highpoint Road, Perkasie, PA 18944 (TMP # 15-028-126-008)
Susan Bonino, 2102 Hilltown Pike, Perkasie, PA 18944 (TMP # 15-028-131-001).

(N.T., 11/18/21, p. 10-17; Exhibit B-8).

70. The following Exhibits were presented at the Hearing and accepted into the Record by the Board:

B-1	Appeal and Attachments
B-2	Cover Letter for Appeal, dated October 6, 2021
B-3	Legal Notice for Hearing
B-4	Notice of Hearing to Property Owners
B-5	Hearing Notice to Appellant
B-6	Posting Certifications of Hearing
B-7	Proof of Publication of Legal Notice for Hearing
B-8	List of Intervenors
T-1	Township Enforcement Notice, dated September 7, 2021
A-1	1983 Hilltown Township Zoning Ordinance
A-2	Section 404 Table of Use Regulations
A-3	Excerpt Section 405 Use Regulations
A-4	David Taylor Letter to Smiths, dated August 18, 2020
A-5	Listings from other Landscaping Business
I-1	Smith Photographs (A-T)
I-2	Township Planning Commission Minutes for May 3, 2021
I-3	Aerial Photograph of Property
I-4	Tax Map of Property and Surrounding Area
I-5	2016 Photograph of Property from Smith Residence

71. The Hearing was properly advertised; the Property was properly posted; and all the parties and neighbors properly notified of the Hearing. (Exhibits B-3 - B-7).

DISCUSSION

This matter arises out of an appeal from the Enforcement Notice that the Township issued against Appellant. Specifically this Enforcement Notice alleges that Appellant is operating a G-5 Contracting Use, an H-1 Manufacturing Use, and an H-9 Outdoor Storage Use upon the Property where none of these Uses are allowed within the VC or RR Zoning Districts. Under Section 616.1(d) of the MPC, when an enforcement notice is appealed, the issuing municipality is obligated to present its evidence in support of the issuance of such notice first. 53 P.S. §10616.1. Once the municipality makes out a prima facie claim in support of the allegations contained in that notice, the burden shifts to the accused property owner to disprove such claims or to provide some other defense to the allegations set forth in the enforcement notice. *See Hartner v. ZHB of Upper St. Clair Twp.*, 840 A.2d 1068 (Pa. Commw. Ct. 2004).

During the Hearing, the Township presented Mr. Sarson, its Zoning Officer, to set forth its evidence in support of the issuance of the Enforcement Notice. Mr. Sarson testified that he visited the Property and observed various activities on the Property that supported the subsequent issuance of the Enforcement Notice. In particular, Mr. Sarson testified that he saw piles of soil and

machinery on the Property supporting his belief that excavating activities are occurring on the Property. His observations of the soil piles and topsoil screening machines support his finding that the manufacturing of topsoil is occurring on the Property. Lastly, his observation of the various piles of soil on the Property support his allegation that outside storage is occurring the Property. Mr. Sarson's testimony was further supported by the photographs submitted by the Intervenors of the soil piles on the Property and machinery being used in conjunction with Appellant's activities on the Property. (Exhibits I-1 and I-3). Lastly, Mr. Sarson's testimony and the Township's evidence was further supported by the unrebutted testimony of Mr. Smith, as well as the testimony of Appellant, Mr. Linke. Based on the testimony and documentary evidence presented by all the witnesses, the Board concludes that Appellant is operating a G-5 Contracting Use on the Property, namely an excavating and paving business; is operating a Manufacturing Use upon the Property, namely topsoil processing and sales; and is conducting outdoor storage upon the Property, namely the storage of various piles of soil, asphalt, and other debris.[1] As such, the Township appropriately issued the Enforcement Notice and made out a prima facie case in support of the issuance of the Enforcement Notice at a Hearing.

In defense of these contracting, manufacturing, and storage activities occurring upon the Property, Appellant argued at the Hearing that such activities were permitted as an expansion of the existing legal nonconforming A2 Nursery Use upon the Property and in the alternative that the Township was equitably prohibited from preventing these activities taking place upon the Property. A legal nonconforming use is an activity that commenced on a parcel ground either prior to the establishment of zoning regulations or under zoning regulations that permitted this activity, and then subsequently established zoning regulations prohibited this activity. *Pietropaolo v. ZHB of Lower Marion Twp.*, 979 A.2d 969, 976 (Pa. Commw. Ct. 2009). The party asserting the occurrence of a legal nonconforming use bears the burden of proving its existence and legality and must do so through the presentation of clear and objective evidence, as opposed to subjective testimony. *Id.* The proof of a nonconforming use is best made by the submission of documentary evidence clearly showing when such a use was established and when the zoning regulations were established or changed that prohibited such activities upon the subject parcel. *See Jones v. N. Huntingdon Twp. ZHB*, 78 Pa. Commw. 505, 467 A.2d 1206 (1983). Moreover a legal nonconforming use must be operated in compliance with the zoning regulations general applicable to such uses when those uses are actually permitted. *See Pennridge Dev. Enterprises, Inc. v. Volovnik*, 154 Pa. Commw. 609, 614, 624 A.2d 674, 677 (1993)("nonconforming use is not entitled to greater rights that those afforded a conforming use").

---

[1] A zoning hearing board is the finder of fact concerning matters before it, and therefore, it is the function of a zoning hearing board to weigh the evidence before it. As such, the zoning hearing board is the sole judge of the credibility of a witness and the weight afforded to his or her testimony. This leaves the zoning hearing board as the ultimate judge of credibility and final arbiter of all conflicts in the evidence. A zoning hearing board is free to reject even uncontradicted testimony it finds lacking in credibility, including expert witness testimony. *Taliaferro v. Darby Twp. ZHB*, 873 A.2d 807, 811 (Pa. Commw. Ct. 2005); *see also, Eichlin v. New Home Borough ZHB*, 671 A.2d 1173(Pa. Commw. Ct. 1996); *Lower Allen Citizens Action Grp., Inc. v. Lower Allen Twp. ZHB*, 500 A.2d 1253 (Pa. Commw. Ct. 1985). In this regard, a zoning hearing board can choose to believe the opinion of one expert over that offered by another. *Berman v. Manchester Twp. ZHB*, 115 Pa.Commw. 339, 540 A.2d 8 (1988). In addition, a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference, as is the municipality's zoning officer's interpretation of the zoning ordinance. *In re Jerrehian*, 155 A.3d 674, 682 (Pa. Commw. Ct. 2017); *McIntyre v. Bd. of Supervisors of Shohola Twp.*, 150 Pa.Commw. 15, 614 A.2d 335, 337 (1992).

At the Hearing, the only objective documentary evidence presented concerning the establishment of the nonconforming nursery use upon the Property were the two deeds concerning the Property submitting conjunction with the Application (Exhibit B-1) and Mr. Taylor's August 18, 2020 letter submitted as Exhibit A-4. While Mr. Linke did testify as to the history of his activities on the Property and as to the establishment of the nursery, landscaping business, and paving business on the Property, he failed to present any documentary evidence supporting this testimony. In particular, he failed to present any sort of permits issued by the Township establishing when these various activities were commenced up on the Property, as well as, confirming that the commencement of these activities was in conformance with the zoning regulations enacted at that time. Moreover, Mr. Sarson testified that he did not remember seeing any permits in the file for the Property when he reviewed that file. On the other hand, Mr. Smith testified that somewhat in support of Mr. Linke's timeline as to the establishment of the nursery upon the Property. While the Board finds that Appellant failed to strictly adhere to the requirements of establishing a proof of the legal nonconforming nursery business upon the Property; neither the Township nor the Intervenors directly challenged this claim during the Hearing. As such, the Board will move forward with its analysis of this Appeal under the assumption that the nursery is a legal nonconforming business upon the Property.

Further complicating matters is the fact that none of the parties presented any evidence clarifying exactly when the Zoning Ordinance was amended to change the regulations concerning an A2 Nursery Use and to prohibit such a use within the VC Zoning District. While Mr. Taylor states in his letter that this zoning change seems to have occurred in 2007; this letter does not go into any detail as to what change in zoning occurred at that time. Moreover, since Mr. Taylor was not called as a witness to further explain what he meant in this letter, this date in his letter is of little evidentiary value. A clear and objective presentation of evidence concerning the date of the zoning amendment, as well as, specifically what the amendment consisted of, is of particular importance since sometime between 1989 and 2021 this amendment removed the permitted accessory landscaping activities from this Nursery Use.

Appellant presented, as Exhibit A-1, the 1989 reprinting of the 1983 Hilltown Zoning Ordinance. Appellant averred that this Zoning Ordinance was the ordinance in place when Mr. Linke purchased the 2112 Hilltown Pike parcel and established his nursery business upon this parcel of land. In this 1983 Zoning Ordinance, the A-2 Nursery Use was described as follows:

> Nursery Uses, including the growing of trees, or ornamentals, shrubs, flowers, vegetables, with or without retail sales or greenhouses. A landscape business will be permitted as a secondary and incidental use to the Nursery. Not more than three (3) percent of the total lot area shall be in impervious surfaces.

This Use contained no further requirements other than those concerning parking, which is not germane to this current Appeal. The current zoning regulations concerning the A2 Use no longer allow a landscaping business to be "permitted as a secondary and incidental use to the Nursery" and contain many additional provisions.

In his challenge to the Enforcement Notice, Appellant claims that the contracting, manufacturing, and storage activities currently occurring upon the Property constitute a natural

expansion of the accessory landscaping business he established as part of his nursery back in the late 1980s. The doctrine of natural expansion provides that a legal nonconforming use must be allowed to grow and expand so as to incorporate new technology and techniques to keep pace with other similar businesses. This doctrine, however, does not allow a legal nonconforming use to morph into or establish an entirely new and different use. *Pietropaolo*, 979 A.2d at 977 ("there is no constitutionally protected right to change a nonconforming use to another use not allowed by the zoning ordinance, nor may an additional nonconforming use be appended to an existing nonconformity.") Additionally, any expansion of a legal nonconforming use cannot be detrimental to the public health, safety, and welfare. *Id.* While Mr. Linke did present some evidence at the Hearing of other landscapers in the area that conducted paving and/or excavating activities, the Board did not find this evidence very relevant or very compelling. Moreover, as with the Nursery Use in general, Mr. Linke failed to present any objective evidence as to when exactly he established this accessory landscaping businesses as a part of his nursery or as when he started undertaking paving, excavating, or topsoil processing activities as a part of his businesses. Perhaps most importantly, Mr. Linke failed to present any evidence showing how these new activities do not constitute new principal uses of the Property as opposed to merely the natural expansion of the existing accessory landscaping use. *Id.*

At the Hearing, the Intervenors presented evidence showing that, in terms of dollars, nursery business only constituted 10% of the overall business upon the Property, while the paving activities constituted 50% and the topsoil activities constituted 40%. Mr. Linke confirmed that he provided these figures to the Hilltown Township Planning Commission and confirmed that these figures are generally correct. Moreover, evidence presented at the Hearing showed that paving jobs and topsoil jobs were conducted by Appellant completely separate and distinct from any nursery activities or landscaping activities. Furthermore, Mr. Smith provided testimony and evidence of the tremendous detrimental impact the contracting, manufacturing, and storage activities have on his neighboring property. Lastly, the photographic evidence provided at the Hearing illustrates that the scope of the topsoil operation, as well as the excavating and paving operation, dwarfs any nursery or landscaping activities upon the Property.

Assuming that Appellant has properly established a legal nonconforming nursery use with an accessory landscaping business upon the Property, Appellant failed to provide sufficient evidence at the Hearing that the current contracting, manufacturing, and storage activities upon the Property are a permitted natural expansion of these established nonconforming nursery and landscaping uses. Under the 1983 Zoning Ordinance, the "landscaping business" was specifically limited to being "secondary and incidental" to the nursery. No evidence was presented at the Hearing supporting any argument that the contracting, manufacturing, and storage activities upon the Property are still secondary and incidental to the nursery activities that are currently occurring upon the Property. By Mr. Linke's own admission, the dollars generated by the paving and topsoil activities dwarf the income generated by the nursery business. Moreover, the massive negative impact of these contracting, manufacturing, and storage activities upon the Property also overshadows any impact the nursery has upon the neighboring properties. Based on the evidence presented at the Hearing, the Board concludes that the contracting, manufacturing, and storage activities occurring upon the Property all constitute new principal uses of the Property and in no way constitute a natural expansion of the original nursery and landscaping business that Mr. Linke had established upon the Property. *See Pietropaolo, supra.* As such, the Enforcement Notice was

properly issued and such issuance is not disturbed by the fact that the nursery and landscaping uses upon the Property are possibly legal nonconforming uses.

In addition to his arguments regarding nonconforming uses on the Property, Appellant also challenges the issuance of the Enforcement Notice as violative of equitable principals. Equitable principals do apply under zoning, and there are generally three different types, although all three are basically just different varieties of the same fruit. *In re Appeal of Kreider*, 808 A.2d 340, 343 (Pa. Commw. Ct. 2002). The courts of this Commonwealth have described these equitable principals as vested rights, equitable estoppel, and a variance by estoppel. Vested rights do not come into play in this Appeal because such a claim was not raised by Appellant and because there is no permit involved in this Appeal, when such a permit is an essential feature of a claim of vested rights. *See Id.*

In its closing argument to the Board, Appellant did raise a claim of equitable estoppel. Equitable estoppel, however, is an unusual remedy that should be granted only in extraordinary circumstances. *Victory Gardens, Inc. v. Warrington Twp. ZHB*, 224 A.3d 1110, 1115 (Pa. Commw. Ct. 2020). In order to set forth a claim for equitable estoppel, an applicant must prove the following:

1. That the municipality intentionally or negligently misrepresented its position concerning the issue at hand;
2. That the municipality had reason to know that the applicant would rely upon such misrepresentation;
3. That the applicant relied to his or her determinant;
4. That such reliance was based on innocent belief that the use is permitted; and
5. That the enforcement of the ordinance will result in hardship to the applicant.

Id. Moreover, the applicant must prove each of these elements by clear, precise, and unequivocal evidence. *Id.*

In this matter, Appellant failed to make out a claim of equitable estoppel because he failed to meet any of these elements with clear, precise, and unequivocal evidence. Appellant failed to show that the Township intentionally or negligently misrepresented any position regarding his activities upon the Property or that such position was made knowing that Appellant would rely on this misrepresentation. In addition, any evidence concerning Appellant's good faith reliance, the detriment caused by his reliance, any substantial expenditures on his part, or any belief that these activities were permitted was not clear, precise, or unequivocal. In fact, the only possible evidence of any sort of misrepresentation would have been Mr. Taylor's 2020 letter. In which case, there was no evidence presented that Mr. Linke ever received this letter prior to the issuance of the Enforcement Notice or that he relied upon this letter in any way. As such, Appellant's arguments concerning equitable estoppel fail and such arguments have no impact upon the validity of the issuance of the Enforcement Notice. *See generally*, *Victory Gardens*, *supra*.

While Appellant made arguments concerning equitable estoppel at the Hearing, he raised the issue of variance by estoppel in his written Appeal. (Exhibit B-1). When reviewing a claim of variance by estoppel, a zoning hearing board should consider the following factors:

> Such variances are appropriate when a use does not conform to the zoning ordinance and the...[applicant]...establishes all of the following: (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use; (2) the...[applicant]...acted in good faith and relied innocently upon the validity of the use throughout the proceeding; (3) the...[applicant]...has made substantial expenditures in reliance upon his belief that his use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the applicant.

Pietropaolo, 979 A.2d at 980. As with a claim of equitable estoppel, any claim for a variance by estoppel must be proven by clear, precise, and unequivocal evidence. *Id.*

Similar to his claim concerning equitable estoppel, Appellant's claims for a variance by estoppel fails due to the lack of clear, precise and unequivocal evidence supporting such a claim. Appellant failed to show any type of active acquiescence by the Township concerning the challenged contracting, manufacturing, and storage activities upon the Property. To prove active acquiescence, an applicant must show that the municipality undertook some of affirmative action, such as issuing a permit, regarding the activities in question. Mere failure to issue a citation or a notice that such activities are in violation of a zoning ordinance does not rise to the level of active acquiescence. *Id.* at 981. In this matter, Appellant failed to produce any evidence that the Township undertook any sort of affirmative act in support of or approving the contracting, manufacturing, and/or storage activities occurring on the Property.

As for the other necessary elements for a variance by estoppel, in order to prove an unnecessary hardship, an applicant must show more than a mere economic or personal hardship; it must prove the hardship is unique to the property and the challenge zoning regulations render the property practically valueless. *Id.* at 980. At the Hearing, Mr. Linke testified that the upholding of the Enforcement Notice would result in economic loss to him, but he failed to present any evidence that any hardship caused by the upholding of this Notice would go beyond personal or economic hardship or would render the Property practically valueless. As such, Appellant failed to meet this necessary element. In addition, the Board finds that Appellant did not present any evidence on how long the Township failed to properly enforce the zoning regulations against him or that such length of time would be long enough to meet the requirements for the granting of a variance by estoppel. Likewise, the Board finds that Appellant failed to act in good faith and rely innocently upon the belief that these contracting, manufacturing, and storage uses were allowed under the Zoning Ordinance. Finally, while Mr. Linke did testify as to expenditures he has made to expand his business, such evidence does not rise to the necessary standard of being clear, precise and unequivocal. Mr. Linke failed to provide actual details as to the explicit amount of these expenditures, when these expenditures occurred, and what these expenditures were actually spent on. As such, Appellant's argument that he should be granted a variance by estoppel also fails. *See Pietropaolo, supra*; *Kreider, supra.*

CONCLUSIONS OF LAW

1. The Township made out a prima facie case that the Enforcement Notice was appropriately issued and that Appellant is violating the Zoning Ordinance by operating a G-5 Contracting Use, an H-1 Manufacturing Use, and a H-9 Outdoor Storage Use upon the Property.

2. Appellant's paving and excavating activities constitute a G-5 Contracting Use upon the Property, which use is not permitted within either the RR or VC Zoning Districts.

3. Appellant's topsoil screening and processing activities constitute an H-1 Manufacturing Use upon the Property, which use is not permitted within either the RR or VC Zoning Districts.

4. Appellant's storage piles of soils, asphalt, millings, and other materials constitute an H-9 Outdoor Storage Use upon the Property, which use is not permitted within either the RR or VC Zoning Districts.

5. Under the 1983 Zoning Ordinance a landscaping business was allowed as a secondary and incidental use to a A2 Nursery Use.

6. Appellant failed to prove his nursery activities upon the Property constitute a legal nonconforming use by the presentation of objective evidence as to the precise extent, nature, time of creation, and continuation of these activities.

7. Appellant failed to prove his landscaping activities upon the Property constitute a legal nonconforming use by the presentation of objective evidence as to the precise extent, nature, time of creation, and continuation of these activities.

8. Appellant failed to meet his burden of proof as to exactly when his nursery use or landscaping business activities were established on the Property.

9. Appellant failed to properly prove as to when exactly its nursery and landscaping activities became illegal under a subsequent amendment to the Township's Zoning Ordinance.

10. The doctrine of natural expansion does not permit a legal nonconforming accessory use to grow and expand into a principal use of the subject property.

11. Appellant's paving, excavating, topsoil processing, and storage activities upon the Property cited in the Enforcement Notice do not constitute the natural expansion of either the preexisting nursery or landscaping uses upon the Property.

12. Appellant failed to properly prove as to when he established his excavating, paving, topsoil processing, and storage activities, which are the subject of the Enforcement Notice, upon the Property.

13. Appellant failed to properly prove as to what activities occur on what portions of the Property, in particular showing what activities occur in the VC Zoning District and what activities occur in the RR Zoning District.

14. Appellant failed to make out a claim for equitable estoppel with clear, precise, and unequivocal evidence.

15. Appellant failed to make out a claim for a variance by estoppel with clear, precise, and unequivocal evidence.

16. Appellant failed to present any proper defense to the Enforcement Notice and therefore such Notice was properly issued and should be enforced.

17. Applicant's paving, excavating, topsoil processing, and storage activities which are the subject of the Enforcement Notice are not permitted under the Zoning Ordinance and thus are illegal.

18. The Board finds Mr. Sarson's testimony to be credible.

BEFORE THE ZONING HEARING BOARD
OF HILLTOWN TOWNSHIP

APPEAL OF THOMAS LINKE

ORDER

AND NOW, this 2nd day of December, 2021, after due deliberation and discussion, and at a public hearing, the Hilltown Township Zoning Hearing Board hereby denies and dismisses Thomas Linke's Appeal of the September 7, 2021 Enforcement Notice concerning contracting, manufacturing, and storage activities occurring on the property located at 2112 and 2118 Hilltown Pike pursuant to the Findings of Fact, Discussion, and Conclusions of Law set forth in the attached Adjudication.

HILLTOWN TOWNSHIP
ZONING HEARING BOARD

By: _____
John Snyder, Chairman

By: _____
David Hersh, Vice-Chairman

By: _____
Stephen Yates, Member

Date of Mailing: December 31, 2021