

Pennsylvania Land Use Law Update: Appellate Cases from 2018-2020

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- We also serve a wide range of commercial and industrial clients, as well as clients operating in the services industry
- Our lawyer and non-lawyer professionals have diverse occupational and educational backgrounds

Today's Speakers



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Concentrates his practice in real estate with an emphasis on land development. He represents landowners and developers in obtaining municipal approvals for residential, commercial and industrial developments and appears before local planning commissions, governing bodies and zoning hearing boards throughout south central Pennsylvania.

Charlie has successfully challenged municipal land development decisions and zoning hearing board decisions in the Courts of Common Pleas and the Pennsylvania Commonwealth Court. He has also successfully brought and defended procedural challenges to the adoption of municipal zoning ordinances.



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Counsels clients in land use, development and zoning matters. He assists clients in maximizing the value of their real estate holdings by securing the necessary federal, state and local approvals to allow for residential, commercial and industrial developments throughout Pennsylvania. In advocating for his clients' property rights, Ambrose represents clients in land use and zoning appeals and other legal proceedings in the federal and state courts. He also assists clients in obtaining regulatory approvals needed for development from state agencies.

In addition, he has experience in property tax assessment appeals in several Pennsylvania counties.

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Variances

Jefferson Borough v. Zoning Hearing Board of Jefferson Borough, 2018 WL 3554637 (Pa. Cmwlth. 2018) (Unreported)



- Owner widened and paved driveway at a width of 38 feet in violation of Ordinance
- ZHB granted variance allowing driveway to remain at 38 feet
- Court reversed because owner did not present evidence on all elements of variance including unnecessary hardship

Fairview Township v. Fairview Township Zoning Hearing Board, 233 A.3d 958 (Pa. Cmwlt. 2020)



- Telecommunications tower company requested variance for two sites
- ZHB granted variance requests and Township appealed
- Trial Court held new hearing and again granted variances
- Court reverses decision because no showing of unnecessary hardship for property and Telecommunications Act did not require variances to be issued



Milner v. Bristol Township Zoning Hearing Board, 2019 WL 6770388 (Pa. Cmwlth. 2019) (Unreported)

- ZHB granted dimensional variances for 20x40 ft. addition to tavern
- Trial Court reverses and Commonwealth Court affirms
- Business needs for expansion do not justify grant of variances

Victory Gardens, Inc. v. Warrington Township Zoning Hearing Board, 224 A.3d 1110 (Pa. Cmwlth. 2020)

- Mulch supplier claimed that entitled to “variance by estoppel” due to Township actions
- Operation and substantial expenditures made in reliance on Township misrepresentations regarding permissibility of the use



Suburban Realty L.P. v. Stroud Township Zoning Hearing Board, 2020 WL 3866213 (Pa. Cmwlth. 2020) (Unreported)



- 2002 ZHB granted dimensional variance to prior owner to allow retail store with 43 spaces (85 required) with designated “reserve area” for 42 spaces.
- Store and 43 spaces built. Reserved area never improved with parking.
- Township amends ordinance to decrease maximum impervious coverage
- Subsequent owner receives LD and ZHB approvals for medical office with reduced parking of 41 spaces. No mention of reduced parking area.

Suburban Realty L.P. v. Stroud Township Zoning Hearing Board, 2020 WL 3866213 (Pa. Cmwlth. 2020) (Unreported) (cont'd)

- In 2018, Suburban sought to provide extra parking for medical office by paving the area of the 42 reserved spaces under the 2002 ZHB Decision and be grandfathered from impervious coverage amendment
- ZHB denies relief. TC and Commonwealth Court affirm.
- While zoning approval runs with land, it is subject to the plans submitted, which were built
- Right to build 42 reserved spaces runs with 2002 approval, which was superseded by the subsequent filed LD plans and ZHB approvals

Granny N Pops, LLC v. East Lampeter Township Zoning Hearing Board, 2020 WL 11612 (Pa. Cmwlth. 2020)(Unreported)



- Owner purchased property for use as a boarding house
- Failure to check the zoning ordinance to confirm seller's representations
- No evidence establishing a “variance by estoppel”

Granny N Pops, LLC v. East Lampeter Township Zoning Hearing Board, 2020 WL 11612 (Pa. Cmwlth. 2020)(Unreported) (cont'd)

- Owner did not research prior to purchase
- Only stated hardship was the economic loss to the owner
- A prior zoning decision regarding the property in 1999 listed the use as a single-family dwelling

Tinicum 15 Industrial Highway, L.P. v. Tinicum Township Zoning Hearing Board, 2020 WL 133035 (Pa. Cmwlth. 2020) (Unreported)

- ZHB grants 7 dimensional variances for redevelopment of church/school site with WAWA store
- Neighboring gas station owner had standing to participate and oppose despite claims of anti-competitive interests
- Trial Court affirms and Commonwealth Court reverses
- Failure of applicant to present evidence showing it attempted to develop the property without variances

Nonconforming Uses

Mercy v. Zoning Hearing Board of Cross Roads Borough, 2018 WL 3028969 (Pa. Cmwlth. 2018)

- ZHB grants special exception for expansion of nonconforming RV storage use
- Prior non-commercial storage of farm equipment was nonconforming use and was sufficiently similar to proposed expansion use
- Special exception standards met for expansion of nonconforming use

425 Property Association of Alpha Chi Rho, Inc. v. State College Zoning Hearing Board, 223 A.3d 300 (Pa. Cmwlth. 2019)



- Existing nonconforming fraternity house
- Ordinance definition amended to require recognition from PSU to be considered a fraternity
- University revokes recognition and Borough issues enforcement notice to shut down use
- Court recognizes that nonconforming use is not subject to new definition
- States that definition would have been found to be an unconstitutional delegation of authority to PSU

329 Prospect Avenue Corporation v. State College Zoning Hearing Board, 2019 WL 6770148 (Pa. Cmwlth. 2019) (Unreported)

- Similar facts to 425 Property Association case
- Fraternity house was constructed on the property pursuant to a special exception granted to the owner but use began under the original zoning ordinance definition of fraternity
- Amended definition rendered the use nonconforming and could not be applied to prevent the continued use

PAJ Ventures, LP v. Zoning Hearing Board of Moore Township, 225 A.3d 891 (Pa. Cmwlt. 2020)



- Denial of zoning permit to re-establish non-conforming picnic grove use
- Evidence of non-use for over 12 months created rebuttable presumption of intent to abandon
- Overgrown weeds, disrepair of property and roads demonstrated actual abandonment as “overt acts” or “failure to act”
- Applicant’s rebuttal testimony of “canned goods still on the shelves” and non-removal of buildings did not rebut presumptions of abandonment
- Allegations of prior owner’s dementia not supported by competent evidence

Conditional Use / Special Exemption Standards

Soland v. Zoning Hearing Board of East Bradford Township, 2020 WL 3980426 (Pa. Cmwlth. 2020) (Unreported)



- Variance request for bed and breakfast in non-historic house
- Ordinance required applicant to provide notice of ZHB hearing to residents within 500 feet. Failure to provide required notice would not invalidate any action by the ZHB
- Applicant did not provide notice to all people.
- ZHB granted variance
- TC reverses for failure to provide notice
- Commonwealth Court reverses
- MPC 908(1) requires notice of hearing “shall be given at such time and in such manner as shall be prescribed by ordinance”

Sluciak v. Cecil Township Board of Supervisors, 223 A.2d 725 (Pa. Cmwlth. 2019)

- Conditional use request to replace and relocate cell tower on same tract
- Prior attempt to relocate required variances, which were opposed by neighbor and denied by Trial Court
- Objector's attempt to incorporate prior testimony (during variance hearing) of adverse effects in conditional use hearing denied
- Conditional use approval affirmed by Commonwealth Court

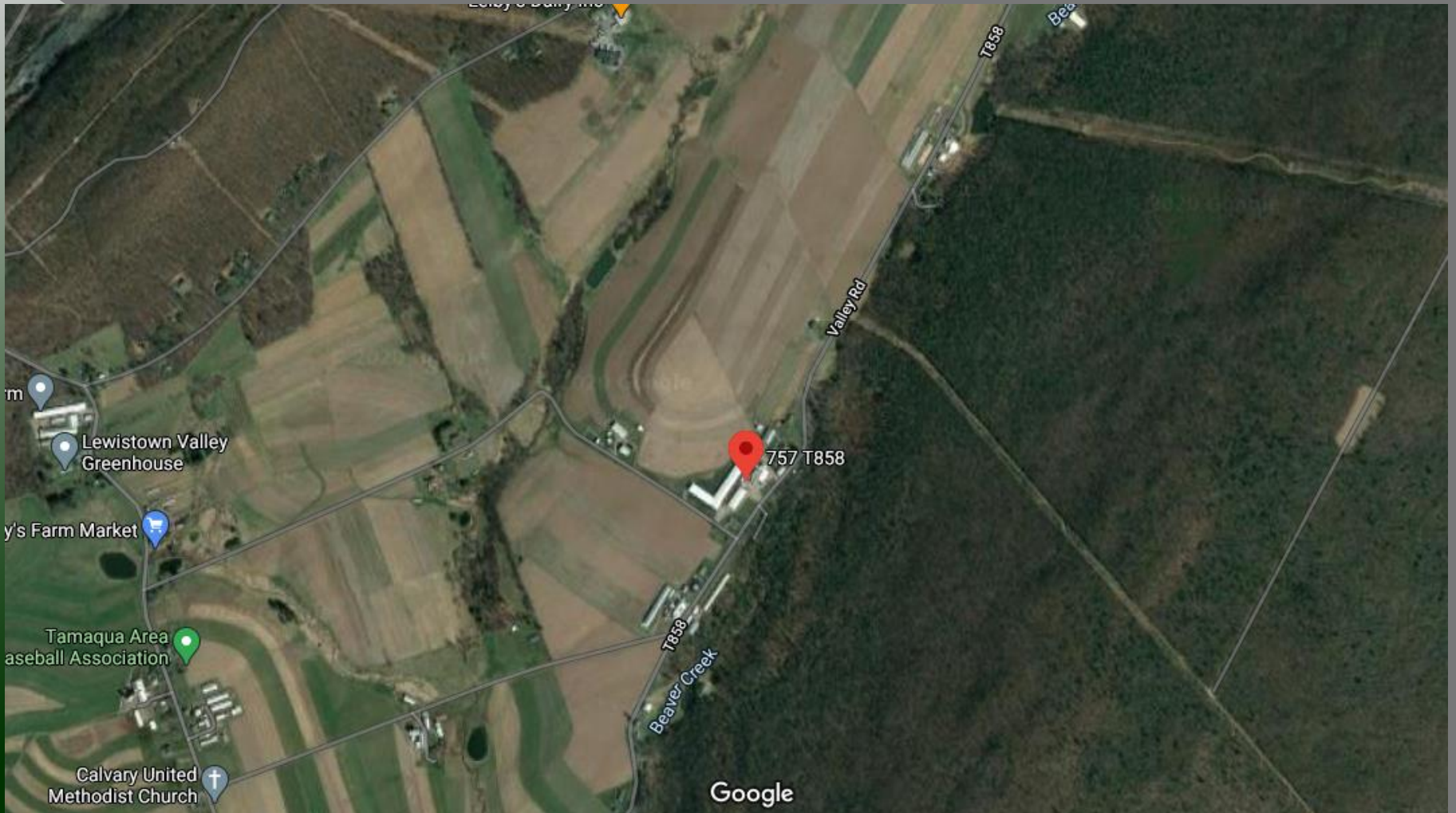
Yingling v. Hanover Borough Zoning Hearing Board, 2019 WL 5152496 (Pa. Cmwlth. 2019) (Unreported)

- Special exception request to demolish building used as physician's office and replace with parking lot for adjacent hospital
- After applicant meets specific standards, objectors need to establish to high degree of probability that parking lot use will significantly increase traffic or otherwise substantially affect the health and safety of community; or
- The proposed use will generate adverse effects greater than those that are normally associated with a parking lot use
- Objector's testimony speculative

Heisler's Egg Farm, Inc. v. Walker Township Zoning Hearing Board, 232 A.3d 1024 (Pa. Cmwlth. 2020)



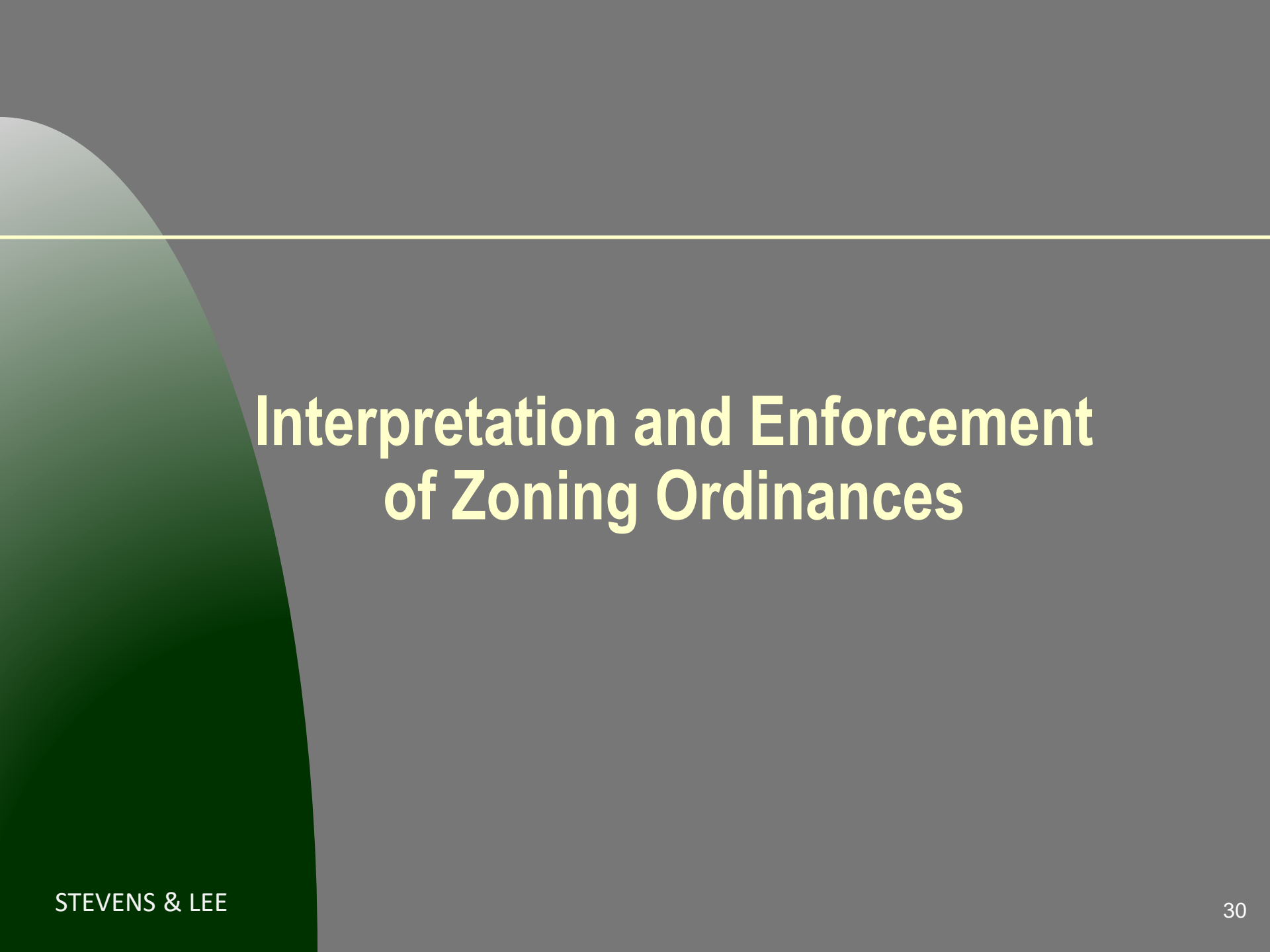
- Egg farm owner applied for special exception to expand farm
- Applicant alleged that the Board could not deny the use because its requirements relating to egg washing, odors and flies was preempted by Nutrient Management Act
- There was no conflict shown between the NMA and the provisions upon which ZHB relied in denying the use,
- Evidence did not establish that there were adequate utilities to serve the use
- Dissent would have held that the Board failed to hold timely hearing and the application was deemed approved



Spot Zoning and Substantive Validity Challenges

Allen Distribution v. West Pennsboro Township Zoning Hearing Board, 231 A.3d 90 (Pa. Cmwlth. 2020)

- Developer sought rezoning of 2 lots (total 125 acres) High Density Residential to Industrial
- Validity challenge by neighbors alleging spot zoning
- Singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit or detriment of the owner of the lot



Interpretation and Enforcement of Zoning Ordinances

Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board, 227 A.3d 37 (Pa. Cmwlth. 2020)



- Vertical expansion of landfill
- Zoning Officer preliminary Opinion under MPC 916.2 – landfill not a “building” subject to “maximum building height”
- ZHB has no jurisdiction to review merits of preliminary opinion in objector’s appeal as it is not a zoning officer “determination”
- Favorable preliminary opinion under MPC 916.2 does not give the landowner a substantive land use approval
- Appeal is limited to substantive validity of the ordinance

Martin v. Zoning Hearing Board of West Vincent, 230 A.3d 540 (Pa. Cmwlt. 2020)

- Notice of violation
- Extension of time period for filing a notice of appeal by solicitor
- ZHB lacked jurisdiction since landowner failed to appeal the notice of violation within statutory time period

Sabatini v. Zoning Hearing Board of Fayette County, 230 A.3d 514 (Pa. Cmwlth. 2020)



- Chickens can be pets
- NOV for homeowner having 18 pet chickens as “keeping of agricultural animals on property that is zoned residential”
- Agriculture defined as “the commercial production and preparation for market of crops, livestock and livestock products...” Excluded are the raising and care of lions, tigers and bears.

Villanova University v. Radnor Township Zoning Hearing Board, 2020 WL 2026108 (Pa. Cmwlth. 2020) (Unreported)

- Appeal from determination by zoning officer that constructing an air-supported dome for soccer field was not permitted (alternative relief of variance)
- Trial court reversed on grounds that height restrictions did not apply to structure
- Court found that definitions of height applied to structures and limited the height of all structures to 38 feet





Land Development Approvals and Conditions

Geerling Florist, Inc. v. Board of Supervisors of Warrington Township, 226 A.3d 670 (Pa. Cmwlth. 2020)



- Proposed cluster development of 49 single family homes
- Wanted to increase number of permissible lots in the subdivision by transferring development rights (TDRs) to Township as allowed by conditional use
- Determination of the required number of TDRs to qualify for program calculated using the total number of permitted units (base line) minus proposed units
- Cluster development plan could not be used to determine base line because plan did not comply with Ordinance

In re: Smith, 231 A.3d 59 (Pa. Cmwlth. 2020)

- Land development plan approved in 1997 to convert an existing building into an office building including a potential addition, not appealed
- Owner applied for and received building permit for addition in 2017 and objectors appealed
- No evidence that conditional use approval obtained to allow conversion
- Permit not issued in error because plan would not have been finally approved if it did not comply with zoning

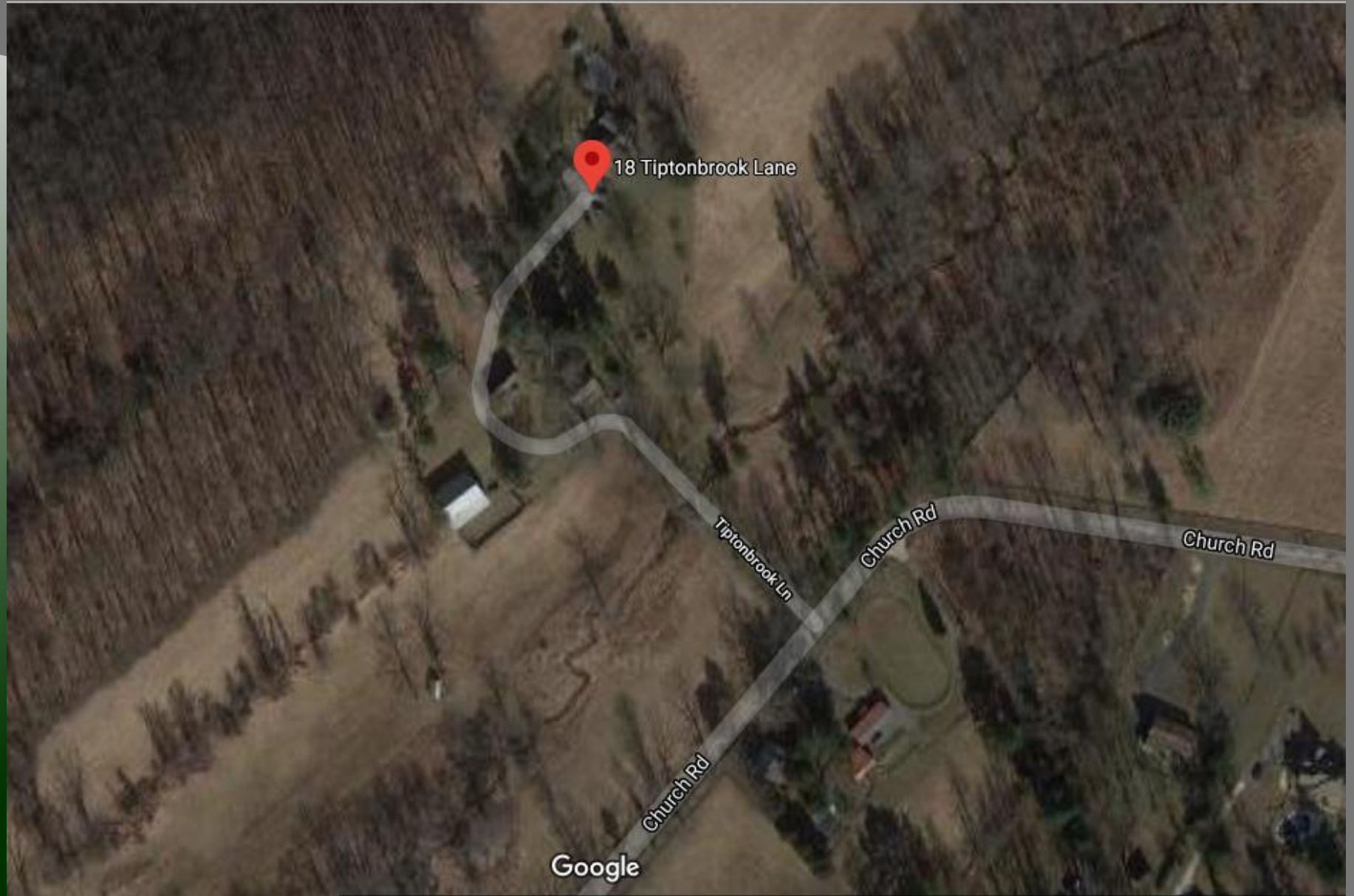
Baribault v. Zoning Hearing Board of Haverford Township, __ A.3d __ (Pa. Cmwlt. 2020)



- Enforcement action in 1993 alleging using properties for student housing
- Landowner argued nonconforming status and special exception in alternative.
- ZHB denied appeal. Landowner appeals to trial court
- Case sits for 25 years with the court with stay allowing student housing
- In 2018 attorneys work out settlement terms
- Commissioners refuse to sign off
- Commonwealth Court rules that enforceable contract in place due to attorney communications and representations

Joos v. Board of Supervisors of Charlestown Township, ___ A.3d ___ (Pa. Cmwlth. 2020)

- Owners submitted a plan to shift property line between parcels A and B which shared a common driveway across parcel A
- Township approved but imposed condition preventing construction of a driveway from parcel B to public road
- Parcel B owner objected to driveway condition
- Condition was not based on any provision of the SALDO as the cited section regarding driveway design standards had no relation to the proposed lot line revision



Duty of Good Faith

Links at Gettysburg Land Company v. Board of Supervisors of Mount Joy Township, 2020 WL 3455807 (Pa. Cmwlth. 2020) (Unreported) (Links I) and Links at Gettysburg Land Company v. Board of Supervisors of Mount Joy Township, 2020 WL 3455803 (Pa. Cmwlth. 2020) (Unreported) (Links II)

- Conditional use approval in 2015 for expansion of planned gold community with units, hotel and conference center. Two relevant conditions:
 - Submit a subdivision plan within 2 years or the CU approval expires
 - Update the traffic study within 3 years of decision and every three years thereafter.
- LD plan submitted within 2 year period
- In 2018 while LD plans under review, applicant submits letter from traffic engineer affirming original study as development not built, no new development or improvements in area so prior study remains valid and unchanged

Links at Gettysburg Land Company v. Board of Supervisors of Mount Joy Township, 2020 WL 3455807 (Pa. Cmwlt. 2020) (Unreported) (Links I) and Links at Gettysburg Land Company v. Board of Supervisors of Mount Joy Township, 2020 WL 3455803 (Pa. Cmwlt. 2020) (Unreported) (Links II) (cont'd)

- Board determines CU approval expired due to deficient traffic study, and then denies LD plans based on expired CU approval and outstanding engineering comments
- Trial Court denies developer's appeal
- Commonwealth Court reverses and remands
- Improper decision by Board to void CU approval absent enforcement action by zoning officer
- Board acted in bad faith by denying LD plans based on CU expiration, and failure to allow developer to address outstanding comments

Questions?

