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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

VICTORY GARDENS, INC. Appellant,	:	NO. 2017-03792
v.	:	
WARRINGTON TOWNSHIP ZONING HEARING BOARD And WARRINGTON TOWNSHIP Appellees	:	Land Use Appeal

BRIEF OF APPELLEE WARRINGTON TOWNSHIP IN SUPPORT OF PREVAILING DECISION OF WARRINGTON TOWNSHIP ZONING HEARING BOARD

I. COUNTER STATEMENT OF THE CASE

ESTABLISHMENT OF THE MULCH MANUFACTURING USE

In 1999 Michael Butler ("Butler) entered into a lease with William H. Garges for an unidentified 2 acre area on the 216 acre Garges Farm on which to conduct a mulch operation. (See Exhibit A-23) (the "Lease"). The Lease consists of 2 pages, is for one year and initially provided for rent of $1500 per month. It contains notations which suggest that in 2001 the leased area was increased to 2.5 acres and the monthly rental was increased to $2,000. Mr. Butler testified that the Victory Gardens operation grew over the years such that he increased the amount of land that he leased from Mr. Garges to five

acres in the early 2000s, then eight acres within the next few years and then approximately ten acres since 2005. (N.T. 7/15/15 p. 28). Later on in his testimony he stated that he currently only leases eight acres and that he never testified to leasing ten acres (N.T. 7/15/15 p. 53). Exhibit A-23 is the only document introduced establishing the lease arrangement between Garges and Butler or Victory Gardens. No other written evidence was provided to the Board as to the location of the leased area, the current amount of the rent or any provisions concerning renewal of the lease term.

Mr. Butler testified that prior to entering into the Lease he spoke with the Warrington Township Zoning Officer who informed him that a mulch operation would only be permitted at Winding Brook Farm (Garges Farm) and Schmucker Farm, as each of them contained nonconforming mulch operations. (N.T. 7/15/15, p. 26). The Zoning Officer was in error as there is no evidence that a mulch operation was ever registered as a nonconforming use on the Garges farm. [FOF 24). The mulch operation began in 1999, but Victory Gardens did not apply for or obtain a zoning permit for the mulch operation prior to commencing the operation or at any other time. (N.T. 7/15/15, p. 25). Victory Gardens never applied for and does not possess a Warrington Township use and occupancy permit for the mulch operation. (N.T. p. 1273). No evidence was presented that Victory Gardens ever made an independent determination that a mulch operation is permitted on the Property or obtained an opinion from legal counsel that the mulch operation is permitted. Although a number of Supervisors stated after the use was established their belief that the mulch operation is permitted, Mr. Butler never obtained any written communication from the Zoning Officer, the Township Solicitor or anyone else having the legal authority to provide an opinion that the use is permitted.

THE ZONING

The Property is zoned RA Residential Agricultural pursuant to the Warrington Township Zoning Ordinance (the "Zoning Ordinance"). Permitted in the RA District are the following: the keeping of livestock on lots of three acres or more, the growing of nursery stock and tilling of the soil. (§402A of the Zoning Ordinance). Greenhouse, nursery, riding academy, and kennels are also permitted in the RA District. (§402B, E, F, and G). Agricultural sales/roadside stands for the seasonal sale of farm or nursery products produced on the premises are also permitted. (§402D).[1] In addition, single family dwellings on 3 acre lots are permitted by right on the Property (which is not subject to an agricultural conservation easement as is the case with a substantial part of the Garges farm).

Industrial uses are not permitted in the RA Zoning District. Instead such uses are permitted in several different Planned Industrial Districts and include "Any manufacturing, wholesale, or distributing use." (§1202). This use includes: "Any manufacturing, compounding, processing or treatment of...wood [among other products]. (§1202 A (1)). Section §1202 A (6) specifically permits "Wholesaling and distributing activities". The mulch operation is a manufacturing, wholesaling and distributing use.

Section 1206 of the Zoning Ordinance provides standards for the conduct of industrial uses. Section 1206(1) requires a 100 feet buffer between residential uses along the boundary of any exiting residence or residential district. Section 1206(3) provides performance requirements which include a prohibition of the emission of dust, dirt, fly ash,

[1] Relevant provisions of the Warrington Township Zoning Ordinance are attached to this Brief as Appendix "A". The Township requests this Honorable Court to take judicial notice of the Zoning Ordinance which was provided with the Return of the Record. See Section 6107 of the Judicial Code, 42 Pa.C.S. § 6107; *Zitelli v. Zoning Hearing Board of Borough of Munhall*, 850 A.2d 769, 771 n. 2 (Pa. Cmwlth. 2004).

fumes, vapors or gases which can cause damage to human health; the emission of odorous gases or matter in quantities that are offensive at any point beyond the property boundary of the industrial use; and noise exceeding limits established therein. §1206 (3)A-D).

In addition, section 916.2 of the Pennsylvania Municipalities Planning Code (53 P.S. §10916.2) (the "MPC") provides a procedure to permit a land owner to secure assurance that a proposed land use is free from challenge: to request a preliminary opinion, which, when obtained, bars others from challenging it after the applicable appeal period has expired. In addition, the Zoning Ordinance provides for the issuance of a Certificate of Use and Occupancy which establishes that a use complies with the Zoning Ordinance. §2404.

Notwithstanding the above, Mr. Butler elected to establish what he grew into a substantial, intensive and injurious industrial mulching operation relying only on a statement of the Township Zoning Officer that a mulch operation is permitted on the Property. (N.T. 7/15/15 p. 26). Neither a permit nor other written confirmation that the mulching operation is a permitted use on the Property was ever requested or given during any time that this operation has been conducted.

THE CONDUCT OF THE USE

The mulch operation consists of wood being brought to the Property and processed through grinders and dying operations to make mulch for sale. Victory Gardens has one horizontal grinder and two to three tub grinders on the Property at any given time. (N.T. 7/15/15 p. 123).

The sources of material include Lower Moreland Township, Upper Gwynned Township, Lower Gwynned Township, Horsham Township and Warminster Township

and occasionally Warrington Township. Victory Gardens also receives material from landscape contractors and homeowners. (N.T. p. 895). Victory Gardens processes about 125,000 cubic yards of mulch at the Property each year. (N.T. p. 906). In addition, Victory Gardens makes and sells animal bedding. During the time of the hearings, Victory Gardens had between 8 and 10 mulch piles on the Property. (N.T. p. 241).

The processed mulch is transported from the Property to various places by vehicles, including, walking floor trailers, roll off trucks, flatbed trailers, cargo trailers, six-wheeler dump trucks, tri-axle dump trucks, pickup trucks and other vehicles. (N.T. 7/15/15 p. 93-110). In addition, Victory Gardens owns and uses two lowboy trailers to haul motors and other equipment and one landscape trailer to pull a lawnmower. (N.T. 7/15/15 p. 110). Victory Gardens also rents vehicles from time to time including specialty log trailers to transport wood to the property and additional walking floor trailers. (N.T. 7/15/15 p. 105).

The walking floor trailers are approximately 45 feet long and twelve and one-half feet high. The dump trailers are about 30 feet long and 10 and one-half feet high. The flatbed trailers are approximately 45 feet long and about 4 feet high and the cargo trailers are about 45 feet long and 13 feet high. The six-wheeler dump trucks are about eight to twelve feet long. The gross weight of the vehicles used by Victory Gardens range from 8,000 to 80,000 pounds. (N.T. 7/15/15 p. 98-100).

Victory Gardens owns and operates other equipment and commercial vehicles that remain on the Property to process the mulch, including, grinders, front-end loaders and a dye machine. It performs off-site grinding operations by transporting equipment from the Property to off-site locations, including locations in other states. (N.T. 7/15/15 p. 31). In addition, it provides heavy transportation services which operate from the Property. This includes hauling of equipment for other businesses and entities. (N.T. 7/15/15 p. 128).

There is a trailer located on the Property that Victory Gardens uses as an office, but the record does not establish that there are any permanent buildings or structures constructed by Victory Gardens on the Property. All of the equipment on the Property is portable and can be moved to a different location.

Victory Gardens delivers mulch and other product form the Property to places outside of Pennsylvania, including, New York, Connecticut, Virginia and Delaware. (N.T. 7/15/15 p. 122). It does not use any mulch for agricultural purposes. All mulch is for sale for use off-site. (N.T. p.376).

NON-COMPLIANCE WITH REGULATORY REQUIREMENTS

A. FIRE CODE

Victory Gardens has had between 8 and 10 mulch piles on the Property. (FOF 102), (N.T. p.241). Between March 25, 2011 and December 19, 2012, the Township responded to three fires at Victory Gardens related to the mulch piles. (FOF 104), (N.T. p. 244-245). In 2014, Victory Gardens was in violation of provisions of the fire code, including: failure to provide the required access for emergency vehicles due to a lack of distance between mulch piles, failure to provide access roads with requisite turning radii, failure to provide an area for fire equipment to turn around, having access roads in excess of 150 feet in length, failure to provide storage sites on level, solid ground or other all-weather surface, and permitting mulch piles to exceed 25 feet in height, mulch piles in excess of 150 feet in width and mulch piles in excess of 250 feet long, failure to maintain a written plan for monitoring, control, and extinguishment of spot fires, and failure to supply said plan to the code official for review and approval.

The Township issued numerous non-traffic citations concerning these violations between March and May of 2014. (FOF 89), (N.T. 7/15/15 p. 19-20). On January 7, 2013,

Warrington Township issued a letter titled Notice of Fire Code and Property Maintenance Code Violations. (N.T. p. 267, Exhibit P-27). The letter details three mulch fires that occurred at the Property on the following dates, March 25, 2011, November 22, 2012 and December 19, 2012. (FOF 116), (N.T. p. 268). The March 25, 2011 fire was the result of a bulldozer mulch loader that caught fire. Two firefighters who responded to the blaze were injured while fighting the fire. (FOF 117), (N.T. p. 270).

Victory Gardens was in violation of six sections of the Fire Code as of January 7, 2013. (N.T. p. 271). Of note, Victory Gardens failed to obtain permits for the storage of mulch, failed to provide for adequate fire lanes, failed to provide a posted address of the Property, exceeded the allowable height of the mulch piles, failed to possess a written emergency plan, failed to possess fire extinguishers, failed to have static pile protection and failed to have documentation concerning compliance with dispensing fuels into vehicles on site. (FOF 118), (N.T. p. 271-73).

On March 11, 2014, the Township Fire Marshall determined that Victory Gardens was still in violation of the Fire Code and issued correspondence to Victory Gardens, related to a violation of the maximum height of the mulch piles, failure to maintain access roads with adequate width and unobstructed vertical clearance, failure to provide access roads that could support fire apparatus and failure to prepare a plan for monitoring, controlling and extinguishing spot fires. (FOF 120), (N.T. p. 290, Exhibit P-30).

Mulch piles have the capacity to spontaneously combust resulting in fires due to processed material generating temperatures of 150 to 160 degrees Fahrenheit, with stockpiles of raw and partially processed material generating even higher temperatures. (FOF 121), (N.T. p. 337-38). The BMP [Best Management Practices] Manual written by the Pa. Department of Environmental Protection ("DEP") establishes a maximum height

of 20 feet for raw material piles and 25 feet for double and triple ground mulch piles. (FOF 122), (N.T. p. 339, Exhibit P-33). Taller piles are most likely to develop the high internal temperatures that may result in spontaneous combustion and subsequent risk of fire. (FOF123), (N.T. p. 339). On February 27, 2013 mulch piles on the Property were observed to be between 60 and 70 feet high and on March 20, 2014, mulch piles 60 feet in height were observed. (FOF 103 and 107), (N.T. p. 244, 250, Exhibits P-19 and P-21).

Victory Gardens committed and was convicted of 19 Fire Code Violations in 2014 and 39 Traffic Code Violations in 2014. (FOF 127), (N.T. p. 372). (See Exhibits 38-41).

Clearly, the manner in which Victory Gardens has conducted the mulch operation on the Property poses a risk of injury to others resulting from fire.

B. DEP VIOLATIONS

On February 27, 2013, DEP inspected the Property and observed mulch piles to be between 60 and 70 feet high. Its regulations limit the height of mulch piles to a maximum of 25 feet. DEP also noted multiple violations of the Township Fire Code. (FOF 103), (N.T. p. 244, Exhibit P-19). DEP's February 27, 2013 inspection report also noted that Victory Gardens failed to operate in accordance with best management practices for processing waste from land clearing, grubbing, and excavation activities (LCGE). (FOF 105), (N.T. p. 245).

On February 27, 2013, DEP cited Victory Gardens with operating a municipal waste processing facility without a permit in violation of 25 PA Code §271.101(a) and the Solid Waste Management Act §6018.201(a). (Exhibit P-19). As of August 31, 2015, Victory Gardens had not obtained a required permit to operate the mulch operation. (N.T. p.247).

On March 20, 2014, DEP again inspected the Property and observed mulch pile heights of sixty (60) feet and side slopes on the mulch piles that were near vertical in some locations. (N.T. p. 250, Exhibit P-21). Vertical slope failure can result in engulfing a worker or even a machine operator if there is a collapse of the wall. (N.T. p. 250-51). This type of accident occurred at Victory Gardens and a man and a loader fell down the slope of the mulch pile due to the creation of a vertical wall. (N.T. p. 252).

The DEP in its March 20, 2014 inspection also noted public nuisances, including fires and odors that occurred in the recent past and complaints filed with DEP. (N.T. p. 252, Exhibit P-21). The March 20, 2014 DEP report states that there are a number of safety concerns at the Property concerning storage of material and daily operations. (N.T. p. 253). The report further states that some mulch piles are about 60 feet high, no fire lanes are present and that some mulch piles are undercut to an almost vertical profile risking pile slope failure and engulfment of personnel working near the pile. (N.T. p. 256). The above findings are stated as Findings of Fact Nos. 106-110 in the Board Decision.

ADVERSE IMPACTS OF THE USE

A. HEALTH IMPACTS

The conduct of the mulch operation has had adverse impacts on the health of residents in the vicinity of the Property. One resident, Mr. Frank Ace, has lungs that are vulnerable to dust and other contaminants due to whooping cough and pneumonia he contracted at a younger age. He and his wife, Connie Ace, live adjacent to one of the access drives to the Property. Their residence is 695 feet from the nearest portion of the mulch operation. Mr. Ace's physician, Dr. Martynec testified before the Zoning Hearing Board. It is Dr. Martynec's opinion that Mr. Ace's condition is exacerbated by the airborne particulates that are being produced by the Victory Garden's mulching operation. (Exhibit

P-101). Dr. Martynec provided the further opinion that the operation has had a significant negative effect on Mr. Ace's health and that continued exposure will likely lead to a worsening of his condition. (N.T. p. 1595, Exhibit P-101). The trucks that enter and exit the Property and drive along the Ace's rear property line, cause dust clouds that emanate onto their property. In fact, the dust leaves a black soot-like dust on outdoor furniture. (N.T. p. 932, Exhibits P-57-5 and P-57-13).

Wood particulates are a known carcinogen. (FOF 163), (N.T. p. 1591). Mold spores can travel distances in excess of 200 meters. (N.T. p. 1595). The fact that Mr. Ace can smell something related to the mulch in his house means that he is being exposed to chemical compounds from the operation. (FOF 164), (N.T. p. 1595). The Victory Gardens mulch operation emits mold spores, microbes, wood particulates and other pathogens which pose a significant health threat to the neighbors of Victory Gardens. (FOF 162-165), (N.T. p.1595-96).

B. NOISE IMPACTS

The Victory Gardens operation results in noise due to the activity at the Property. There are specific noises that emanate over the Property line, including, the roar of the mulch grinder, the repeated slapping of the elevator that takes mulch to the top of the mulch piles, the acceleration of the trucks, the roar of mulch moving equipment and a repetitive back up beeping signal when the vehicles are used in reverse. (N.T. p. 933). The beeping noise is audible inside the Ace's home and can be heard at 6:00 AM in their bedroom. (FOF 165), (N.T. p. 933).

Victory Gardens uses front-end loaders with large scoops on the front and at times the mulch sticks inside the scoops and the operator then bounces the bucket to get the stuck mulch out, creating a repetitive banging noise. (N.T. p. 934). The trucks that enter

the Property at times do not have a tailgate that is tight and rattle and bang the entire time they are driving on the Property. (N.T. p. 933). The noises last from 6:00 AM until 9:00 PM. (N.T. p. 933). Research has established that for every 10 decibels of increased noise, there is a corresponding 10% increased risk of stroke. (N.T. p. 935, Exhibit P-52). Mr. Ace has counted 75 trucks going into the Victory Gardens entrance on Folly Road in one day. (N.T. p. 936). Mr. Ace hears the trucks use their jake brakes as they slow down to enter the Property. (See FOF 166-171), (N.T. p. 937).

The experience of Intervenors Paone, Verillo, Hills and McConnell with respect to the noise generated by the mulch operation is substantially the same as that of Intervenors Ace.

C. TRAFFIC IMPACTS

Victory Gardens' truck traffic has resulted in dangerous situations, including a resident and his daughter being almost run off Pickertown Road. (N.T. p. 452, Exhibit A-6a). Exhibit A-34 depicts the inability of a WB 50 truck to exit the Property onto Pickertown Road or Folly Road without either going into oncoming traffic or driving off the cartway and disturbing an adjacent area. The larger vehicles that enter the Property from Folly Road are not capable of making the turn into the Property without entering the oncoming lane of travel. (N.T. p. 937, Exhibit P-53). The large trucks making a right turn into the Property from Folly Road cause both lanes of traffic to have to slow down and stop due to their inability to properly navigate the turn. (N.T. p. 939, p. 1013-15). The large trucks also are incapable of navigating other turns near the Property, including making left turns from Pickertown onto Folly Road. (N.T. p. 941, Exhibit A-33). There is physical evidence of the trucks leaving the road and creating ruts in this area (N.T. p. 941).

NOTICE OF VIOLATION

March 9, 2015, Lee Greenburg, Township Zoning Officer issued to Victory Gardens and the Owner of the property, Garges Family Trust, an Enforcement Notice (hereafter "Notice of Violation" or "NOV") stating as follows:

> Warrington Township has determined that Victory Gardens mulching operations are not a protected agricultural activity.... Rather it is considered an industrial operation since none of the product is used on site and as such is not permitted by Chapter 27 (Zoning) of the Warrington Township Code of Ordinances. The operations of Victory Gardens are located within the RA (Residential Agricultural) Zoning District. Under the applicable code section quoted below this is **NOT** a permitted use. (Enforcement Notice, Exhibit T1[2]).

The NOV then cites §§ 402 and 403 the Zoning Ordinance, which provisions are referenced under the heading "ZONING" above.

On April 7, 2015 Victory Gardens and Garges appealed the NOV to the Warrington Township Zoning Hearing Board, which conducted fifteen (15) hearings over twenty (20) months.

THE ZONING HEARING BOARD DECISION

Following the hearings, the Zoning Hearing Board issued a 2-2 Decision on May 12 2017, a copy of which is attached to the instant appeal.

The Order entered by the Zoning Hearing Board is as follows:

> As the Applicant has failed to obtain an affirmative vote of a quorum of the Hearing Board Membership, or a majority of the Board Members who sat in judgment of this application, the Zoning Hearing Board of Warrington Township hereby DENIES the Applicant's appeal from the Notice of Violation dated March 9, 2015 and DENIES the Applicant's requests for a variance by equitable estoppel, or a variance by estoppel. Further, the Applicant has failed to establish a vested right to continue the VG operation at the Property or its right to a traditional variance. Lastly, the Applicant has

[2] Exhibit T1 was introduced and accepted into the record at the hearing that occurred on May 20, 2015. (N.T. 5/20/15 p.19-23). A review of the Return of Record indicates that this Exhibit was not included with the record of the Zoning Hearing Board Proceedings. A copy of T1 is attached hereto.

not established its right to a continuation or expansion of a nonconforming use.

The two members who voted to deny the Appellant's appeal (the "Prevailing Decision") entered in excess of 225 Findings of Fact citing to specific references in the record in support of their Decision. The two members who voted to grant the appeal also entered Findings of Fact which are stated in the Decision. As the Township will establish, where there is a tie vote, the decision to deny the application is the Prevailing Decision and the Decision of the Zoning Hearing Board. When supported by substantial evidence in the record and the Board committed neither an abuse of discretion nor an error of law in arriving at its Decision, its order must be affirmed.

II. COUNTER STATEMENT OF THE QUESTIONS INVOLVED

A. WHETHER THE STANDARD OF REVIEW FOR A MATTER INVOLVING A 2-2 VOTE REQUIRES THIS COURT TO AFFIRM THE DECISION WHERE THE DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THERE IS NO ABUSE OF DISCRETION OR ERROR OF LAW?

Suggested Answer: Yes.

B. DID THE BOARD CORRECTLY RULE THAT THE MANUFACTURE OF MULCH ON THE PROPERTY IS NOT A PERMITTED USE?

Suggested Answer: Yes.

C. DID THE BOARD CORRECTLY RULE THAT THE MANUFACTURE OF MULCH BY THE APPELLANT ON THE PROPERTY IS NOT THE CONTINUATION OF A LAWFUL NONCONFORMING USE?

Suggested Answer: Yes.

D. DID THE BOARD CORRECTLY RULE THAT THE APPELLANT IS NOT ENTITLED TO A TRADITIONAL VARIANCE?

Suggested Answer: Yes.

E. **DID THE BOARD CORRECTLY RULE THAT THE APPELLANT IS NOT ENTITLED TO A VARIANCE BY ESTOPPEL?**

Suggested Answer: Yes.

F. **DID THE BOARD CORRECTLY RULE THAT THE APPELLANT FAILED TO ESTALISH A VESTED RIGHT TO CONTINUE ITS MULCH OPERATION ON THE PROPERTY?**

Suggested Answer: Yes.

G. **DID THE BOARD CORRECTLY RULE THAT THE APPELLANT IS NOT ENTITLED TO A VARIANCE BY EQUITABLE ESTOPPEL?**

Suggested Answer: Yes.

III. ARGUMENT

A. THE STANDARD OF REVIEW WHERE THE BOARD DENIED APPELLANT'S APPLICATION BY A 2-2 VOTE IS THAT THIS HONORABLE COURT MUST AFFIRM THE DECISION OF THE BOARD WHEN THE DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND THERE WAS NO ABUSE OF DISCRETION OR ERROR OF LAW.

The standard of review for a Court of Common Pleas when reviewing a 2-2 decision by a zoning hearing board was succinctly stated by the Trial Court and affirmed by the Commonwealth Court in *Lamar Advantage GP Co. v. Zoning Hearing Board,* 997 A.2d 423 (2010):

> It is well established in this Commonwealth that a tie vote of a governmental body constitutes a negative decision rather than the absence of a decision.
>
> Because Ms. Mitinger's decision was the prevailing decision, upholding the status quo, it is entitled to the same deference as any other majority decision and therefore the decision rendered by the [ZBA], including the findings of fact and conclusions of law, constitutes a decision required by Section 908(9) of [the Pennsylvania Municipalities Planning Code (MPC)].... Therefore, the standard of review to be employed by this Court is whether the [ZBA's] prevailing decision constituted an abuse of discretion or an error of law. *Id.* at 432. [Ms. Mitinger was one of 2 zoning hearing board members of a 3 member board].[3]

[3] Status quo in not defined in the MPC and the Township has found no land use decision addressing that term in an enforcement action. Status quo in the context of an equity action has been defined to mean: "the condition that existed before the acts complained of". *Anchel v. Shea*, 762 A.2d (Pa. Super. 2007).

In *Lamar*, the Commonwealth Court went on to affirm the Trial Court's determination: "[t]he trial court acted appropriately here in reviewing Mitinger's decision for abuse of discretion or error of law. *Id.* at 435.

The *Lamar* decision cited with approval the conclusion reached in *Danwell Corp v. Zoning Hearing Board of Plymouth Twp.,* 115 Pa. Cmwlth. 174, 540 A.2d 588 (1988):

> We conclude that the denial decision rendered by the board, including its findings of fact and conclusions of law, constituted the decision required by section 908(9) of the MPC. The trial judge acted correctly in limiting his review of the board's decision to a determination of whether the board abused its discretion or committed an error of law. *Danwell, 540 A.2d at 591. Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh,* 997 A.2d 423, 435 (Pa. Cmwlth. 2010).

Appellant's sole basis for its argument that the Court must enter its own findings of fact and undertake a *de novo* review of the record is an observation made in a treatise on zoning law concerning a 1988 revision to § 1005-A of the MPC (53 P.S. §1105-A) which added the words "by the board" after the words "finding of fact". *Ryan's Pennsylvania Zoning Law and Practice §9.5.10 (2017)*. Appellant adopts the argument made in the treatise that findings by two members of a four member board cannot be findings "by the board."

What Appellant and the treatise overlook is that appellate court decisions both before and **after** the revision state that a tie decision is a decision **by the board** pursuant to the provisions of §909(9) of the MPC (53 P. S. §10909(9). See, *Danwell Corp. v Zoning Hearing Board of Plymouth Township,* 115 Pa. Cmwlth 174, 540 A.2d 588 (1988); *Giant Food Stores, Inc. v. Zoning Hearing Bd of Whitehall Twp.*, 93 Pa. Cmwlth. 437, 501 A. 2d 353 (1986); *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh,* 997 A.2d 423, 435 (Pa. Cmwlth. 2010).

It is notable that the *Lamar Advantage* opinion was issued in 2010—22 years after the 1988 amendment to which Appellant refers. Surely if the Commonwealth Court viewed the amendment to have the meaning assigned by Appellant and the treatise cited, it would have remanded the case to the Trial Court to enter findings of fact and a *de novo* determination. The Commonwealth Court did not do so because the law is clear: "It is well established in this Commonwealth that a tie vote of a governmental body constitutes a negative decision rather than the absence of a decision.... Therefore, the standard of review to be employed by this Court is whether the [ZBA's] prevailing decision constituted an abuse of discretion or an error of law. *Lamar Advantage GP Co. v. Zoning Hearing Board,* 997 A.2d 423, 432 (2010).

The fact that the two members who would have sustained the appeal entered their own findings is irrelevant. All of the Court decisions addressing this issue hold that when there is a tie vote, the denial decision rendered by the board, including its findings of facts and conclusions of law, constitute the decision required by section 908(9) of the MPC.

The rationale for the determination that a split decision operates as a denial of the appeal was well stated in *Giant Food Stores , Inc. v. Zoning Hearing Bd of Whitehall Twp.*, 93 Pa. Cmwlth 437, 501 A.2d. 353 (1985) which cited with approval the reasoning of the Trial Court:

> The Commonwealth Court most certainly did not intend to create a situation whereby, if an applicant appeared before a Zoning Hearing Board with outrageous violations of the Zoning Ordinance, these outrageous violations would be deemed to be approved if there was an evenly split vote. *Id.* at 441.

In the present case, the two members who supported denial of the appeal, entered in excess of 225 findings of fact - all supported by specific references to the record made before the Board. The findings included credibility findings concerning the witnesses who

testified and reflect a careful review of the testimony they heard during 15 hearings held in this matter. It would be an impossible burden for this Honorable Court to sift through thousands of pages of testimony and hundreds of exhibits, develop its own findings of fact and then render a *de novo* decision. Furthermore, the Court would have no basis on which to make credibility findings, as did the Board in its Decision. Credibility findings are crucial to resolving conflicting testimony presented to the Board.

The standard stated in the cases cited above is a reasonable one: the Court must determine whether the Prevailing Decision by the Board is supported by substantial evidence and whether the decision entered was free of errors of law. That is the standard that must be applied in the current appeal.

B. THE BOARD CORRECTLY RULED THAT THE MANUFACTURE OF MULCH ON THE PROPERTY IS NOT A PERMITTED USE.

Simply stated, the manufacture of mulch by Victory Gardens on the Property is not a permitted use. Any suggestion otherwise is based on the misperception that as Garges may have produced mulch as part of his farming operation on the 216 acre farm, Victory Gardens can now operate a standalone mulch operation which is wholly separate from any agricultural production.

The manufacture of mulch is not listed as a permitted use in the RA Zoning District where the Property is located (See Section 402 of the Zoning Ordinance attached to this Brief as Appendix "A"). As to Victory Garden's use of the Property, the record is clear that the production of mulch is not in any way connected to an agricultural use as listed in Section 402. (FOF nos. 48, 128, 277, N.T. 376, 895).

The case of *Lower Mount Bethel Township v Stine*, 686 A.2d 426 (Pa. Cmwlth. 1996) is instructive. The Court observed concerning the activities on the Stine property that was zoned agricultural:

> Mr. Stine testified that he and his son run businesses on the property, that some of the wood chips are sold to Agway, that some of them are sold to New Jersey landscapers and Christmas tree growers and that the trucking of the wood chips, firewood and soil has nothing to do with the agricultural crops on the property. (R.R. 114a, 115–116a, 118a.) Also, he testified that, although they mix some woodchips with lime and spread the mixture over shaley knobs prior to planting corn, they sell the majority of the chips. (R.R. 90–91a.). *Id.* at 430.

Based upon the recited facts the Court held:

> Accordingly, we conclude that the trial court's findings that the Stines' use of their property exceeded any farming use and that they were conducting a commercial woodchipping operation there in contravention of the law is supported by competent, credible evidence. Mr. Stine's testimony provides ample support for the trial court's findings in that regard. *Id.* at 430.

The same is true of the mulching operation by Victory Gardens on the Property in the present case. The mulch operation consists of wood being brought to the Property and processed through grinders and dying operations to make mulch for sale. Victory Gardens has one horizontal grinder and two to three tub grinders on the Property at any given time. (N.T. 7/15/15 p. 123). The processed mulch is transported from the Property to various places by vehicles. (N.T. 7/15/15 p. 93-110). Victory Gardens delivers mulch and other product from the Property to places outside of Pennsylvania, including, New York, Connecticut, Virginia and Delaware. (N.T. 7/15/15 p. 122). It does not use any mulch for agricultural purposes. All mulch is for sale for use off-site. (N.T. p. 376). The Zoning Hearing Board's findings provide ample support for the conclusion that the mulching operation is not an agricultural use.

Appellant cites at page 23 of its Brief the testimony of a land planner, one Charles Guttenplan, in support of its argument that the mulch operation is a permitted agricultural

use. The Board properly ignored the testimony of Mr. Guttenplan as his testimony (to which the Township objected) called for him to give a legal opinion.

> It is well-settled that an expert is not permitted to give an opinion on a question of law. *McCormick On Evidence* § 12 at 62 (6th ed. 2006). This means that an expert witness may not be offered to testify "as to the governing law" or "what the law required." *United States v. Leo*, 941 F.2d 181, 196–197 (3rd Cir. 1991). See also *Browne v. Department of Transportation*, 843 A.2d 429, 433 (Pa. Cmwlth. 2004) (explaining that an expert's legal opinion testimony, such as whether a party has violated an ordinance, is not admissible); *Kosey v. City of Washington Police Pension Board*, 73 Pa. Cmwlth. 564, 459 A.2d 432, 434 (1983) (stating that an expert witness may not testify as to issues of law, which are for a court to decide). "In short, the testimony of an expert in statutory law, such as Mr. Nast, should not have been allowed. The law is evidence of itself, and it is up to the courts, not a witness, to draw conclusions as to its meaning. *Waters v. State Employees' Ret. BD.* 955 A. 2d 488, FN 7 at 471.

It was the province of the Zoning Hearing Board to interpret the Township Zoning Ordinance. "A ZHB's interpretation of its own ordinance is entitled to great deference and weight." *Arter v. Phila. Zoning Bd. Of Adjustment,* 916 A.2d 1222 (Pa. Cmwlth. 2007), *appeal denied*, 594 Pa. 692, 934 A.2d 75 (Pa. 2007). The Prevailing Decision of the Zoning Hearing Board determined that under the Zoning Ordinance the mulch operation is not a permitted use. The prevailing Decision of the Zoning Hearing Board concluded as follows:

> 9. Pursuant to Section 402 of the Warrington Township Zoning Ordinance, a mulching operation of the size and character of the VG operation is not permitted by right. It does not qualify as an agricultural use or an "agricultural sales/roadside stands for seasonal sale of farm product" use.
>
> 12. The VG operation, like the operations in Stine, Nowicki and Clout lacks any connection to or utilization of the land itself by VG to obtain the mulch or for use of the mulch following production.
>
> 13. Therefore, like the operations in Stine, Nowicki and Clout, the VG operation is not an Agricultural Use. (Conclusions of Law Nos. 9, 12, and 13).

As recited above, there is substantial evidence in the record to support the Board's conclusions of law and there is substantial legal authority for its interpretation. Therefore

the Board committed neither an error of law nor an abuse of discretion in concluding that the mulch operation is not a permitted use under the Township Zoning Ordinance.

Even under the arguably more expansive definition of "normal agricultural operation" as defined in the Right to Farm Act and the Agriculture Code, (3 Pa.C.S. §312 and 313(a)) the result is no different. Under the Right to Farm Act "normal agricultural operation" is defined as:

> The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities.... The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry.

Under the Right to Farm Act, the general rule is that a local ordinance (including a zoning ordinance) that prohibits or limits a normal agricultural operation is unenforceable as an "unauthorized local ordinance" under §313(a) of the Agriculture Code. (3 Pa. C. S. §313(a)).

The Commonwealth Court interpreted these provisions as they apply to a mulch operation in *Tinicum Twp. v. Nowicki*, 99 A.3d 586 (Pa. Cmwlth. 2014). In the *Nowicki* case, the court found that the landowner

> ... hauls raw materials, including tree stumps, yard waste, and logs to the Property; some similar materials are brought to the Property by landscapers. River Road processes these materials into mulch using a tub grinder. Pennswood then hauls the finished mulch off the Property to buyers. (Trial Ct. Op. at 1–2; Board Decision, Findings of Fact (FOF) ¶ 11, 18.). *Id.* at 588.

After a thorough discussion comparing the Right to Farm Act definition of normal agricultural operation and the definition of agriculture contained at Section 107 of the MPC, the Court observed:

> As with Section 107's definition of "agricultural activity," we believe that this definition of "normal agricultural operation" necessarily requires some connection between the use at issue and the employment of the property in question for the production of an agricultural, agronomic, horticultural, silvicultural, or aquacultural crop or commodity. *Id.* at 593.

It then held with respect to the mulching activities engaged in by Nowicki, which are virtually identical to the activities engaged in by Victory Gardens:

> Because none of the raw materials from the mulching operation are produced on the Property and none of the resulting mulch is used for the production of livestock, crops, or agricultural commodities on the Property, the mulching operation is not a "normal agricultural operation" as defined by Section 2 of the Right to Farm Act. *Id.* at 593.[4]

In the present case, none of the plant materials used to manufacture mulch are grown on the property (N.T. 895); none of the mulch produced is used in agricultural operations conducted on the property (N.T. 376) and all of the mulch produced is sold and delivered to customers off the Property (N.T. p. 376). Therefore, there is absolutely no basis to determine as a matter of law that the mulching operation is an agricultural use.

C. THE BOARD CORRECTLY RULED THAT THE MANUFACTURE OF MULCH ON THE PROPERTY BY THE APPELLANT IS NOT THE CONTINUATION OF A LAWFUL NONCONFORMING USE.

There is scant evidence in the record that the use conducted by Victory Gardens on the Property is the continuation of a lawful pre-existing non-conforming use. At best the record establishes that Garges conducted a mulch operation on the 216 acre farm that includes the Property as a part of his farm activities. He used some of the mulch in the production of crops and sold an undetermined amount of mulch for use off the farm.

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[4] Even when Nowicki combined the 3 acre property under review in *Tinicum v. Nowicki*, supra. with an adjoining 56 acre parcel, the Court reached the same result. See *Tinicum Township v. Nowicki*, Cmwlth Ct. 2016 WL 1276158, an unreported decision addressing the same issues.

(N.T. p. 1523). Indeed, the record suggests that Garges still uses and sells mulch as part of his operation of the 216 acre farm. (N.T. p. 1523). There is no testimony establishing on what area of the farm mulch was produced before the lease to Victory Gardens, how big that area was and what quantity of mulch was produced. What is clear from the record is that Victory Gardens in 1999 established an entirely new, independent and separate operation from the farm activities engaged in by Garges. (N.T. p. 1523). Victory Gardens then proceeded to expand that operation into an intensive industrial operation involving multiple grinders, front end loaders, trucks and trailers of various sizes hauling trees and other raw material to the site and shipping 125,000 cubic yards of mulch to locations as far away as Connecticut, New York, and Virginia. (N.T. 7/15/15 P. 120-123, 906).

Any use established by Garges with respect to a mulch operation was at best an accessory use to the farm operation, not a separate industrial land use. Furthermore, to the extent the Court could determine that a lawful non-conforming use was established by Garges, there is no basis to make the further determination that the Victory Gardens operation is an expansion of that use.

The Commonwealth Court addressed expansion of a nonconforming use in *Kelly Twp. v. Zoning Hearing Bd of Kelly Twp.*, 36 Pa. Cmwlth. 509, 388 A.2d 347. Citing the opinion of Judge Blatt in *B & B Shoe Products Co. v. Zoning Hearing Board,* 228 Pa. Cmwlth. 475, 479-480 the Court observed:

> (A) property owner has a constitutional right to expand a lawful nonconforming use to meet natural business expansion so long as the health, safety, and welfare of the community is not jeopardized. *Thayer v. Lower Milford Township*, 16 Pa.Cmwlth. 124, 343 A.2d 92 (1974). However, it is also the policy of the law to restrict closely such nonconforming uses and to construe strictly provisions in zoning ordinances which provide for their continuance. *Hauser v. Zoning Hearing Board*, 20 Pa.Cmwlth. 313, 341 A.2d 566 (1975).

The decision in *Kelly* further determined:

> Thus, any expansion must be reasonable, it must not lead to the creation of a new nonconforming use, it must only be that which is absolutely necessary, and it must not be inconsistent with the public interest. *Thayer v. Lower Milford Township, supra.* At the same time, the mere adoption of more modern instrumentalities in a business will not be prohibited, provided they are reasonably adapted to conducting the existing business. *Cheswick Borough v. Bechman*, 352 Pa. 79, 42 A.2d 60 (1945).

Applying the above principles to the present case, it is clear that what has occurred is not the natural expansion of an existing lawful nonconforming use, but the creation of a new illegal use engaged in by a different entity that utilizes equipment and procedures that are both qualitatively and quantitatively different from anything that the Garges farm operation ever did. Victory Gardens utilizes a horizontal grinder and two or three tub grinders to manufacture the mulch (N.T. 7/15/15 p. 123). It also conducts a dying operation. (N.T. 7/15/15 p. 123). It employs multiple large vehicles to transport the mulch off the Property and to deliver material to the Property. (N.T. 7/15.15 p. 98-100). Victory Gardens delivers the mulch to customers as far away as Connecticut, New York and Virginia. (N.T. 7/15/16 p.122). Furthermore, as the record establishes, Garges still engages in the sale of mulch from the farm (N.T. p. 1523). Therefore, there is no basis for concluding that the Victory Gardens mulch operation is the continuation of any use established by Garges. The mulch operation conducted by Victory Gardens on the Property is a different and separate use by any standard.

D. THE BOARD CORRECTLY RULED THAT THE APPELLANT IS NOT ENTITLED TO A TRADITIONAL VARIANCE.

The elements which a landowner seeking a traditional variance must establish are as follows:

1. An unnecessary hardship stemming from unique physical circumstances or conditions of the property will result if the variance is denied;

2. Because of such physical characteristics or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the ordinance;

3. The hardship has not been created by the applicant;

4. Granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and

5. The variance sought is the minimum variance that will afford relief.

Oxford Corp. v. Zoning Hearing Bd. of Borough of Oxford, 34 A.3d 286, 295 (Pa. Cmwlth. 2011); 53 P.S. §910.2.

"The party seeking a variance bears a heavy burden because the reasons for granting a variance must be substantial, serious and compelling." *Valley View Civic Association v. Zoning Bd. of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983); *Catholic Social Services Housing Corporation v. Zoning Hearing Board of Edwardsville Borough*, 18 A.3d 404 (Pa. Cmwlth. 2011).

To prove unnecessary hardship an applicant for a use variance must show that:

> (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property is valueless for any purpose permitted by the zoning ordinance. The applicant must show the hardship is unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district. Mere evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance. *Catholic Social Services Housing Corporation v. Zoning Hearing Board of Edwardsville Borough*, 18 A.3d 404, 407-08 (Pa. Cmwlth. 2011).

The Property is part of the 216 acre Garges farm. In no way can it be stated that the Garges farm is practically valueless without the Victory Gardens mulch operation. It is an active farm. (N.T. p. 1522-23). Accessory farm activities such as farm festivals, haunted rides and the like are conducted at the farm. (N.T. p. 1523). In addition, as can be seen from Exhibits A-27 and A-28, there are multiple residences on the Garges farm. The mulch operation is but one of multiple uses conducted on the farm.

In addition, §402 of the Zoning Ordinance permits the following uses by right in the RA District where the farm is located: the keeping of livestock on lots of three acres or more, the growing of nursery stock and tilling of the soil. Greenhouse, nursery, riding academy, and kennels are also permitted. There is absolutely no evidence in the record that the Garges farm cannot be used for any of the uses permitted by the Zoning Ordinance.

It is disingenuous to focus on only the relatively small part of the much larger Garges farm for the claim of entitlement to a variance. But even focusing on the Victory Gardens leased Property, there has been no demonstration that the Property cannot be used for any of the enumerated permitted uses.

In addition, Appellants cannot establish another critical element for entitlement to a variance: that granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare. To the contrary, granting a use variance to allow the Victory Gardens mulch operation will result in a continued alteration of the essential character of the neighborhood and will be detrimental to the public welfare.

This neighborhood was once a quiet, rural residential neighborhood with farmland viewscapes. As testified to by Mr. McConnell, when he moved in 2001 to his Trellis Drive address, Winding Brook Farm was quiet and there was little activity at the farm. (N.T. p. 1096). Theresa Paone testified that she and her husband moved to the Folly Road address in 2006 because they were seeking a quiet and peaceful place and their investigation of this location revealed it to be just that. (N.T. p. 991). As documented above, the Victory Gardens operation has changed the neighborhood dramatically and

has proven to be detrimental to the public welfare. The neighborhood now has far more noise, large trucks, odors and dust as a result of the Victory Gardens operation.[5]

The final element to establish when seeking a variance, is that the variance sought is the minimum variance that will afford relief. *Oxford Corp. v. Zoning Hearing Bd. of Borough of Oxford*, 34 A.3d 286, 295 (Pa. Cmwlth. 2011). The variance sought here is to allow a large scale industrial mulch operation in a zoning district where such an operation is not permitted. The operation has grown exponentially over the years and Mr. Butler has not made appropriate efforts to reduce the size and impacts of the operation.

For the above reasons, the Board properly concluded that Victory Gardens is not entitled to a use variance to conduct the mulch operation on the Property.

E. THE BOARD CORRECTLY RULED THAT THE APPELLANT IS NOT ENTITLED TO A VARIANCE BY ESTOPPEL.

Skarvelis v. Zoning Hearing Bd. of Borough of Dormont, 679 A.2d 278, 281 (Pa. Cmwlth. 1996), cited by Appellant at page 13 of its Brief, provides an excellent summary of the theory of variance by estoppel:

> Initially, we note that **variance by estoppel is an unusual remedy under the law and is granted only in the most extraordinary of circumstances**. (emphasis added). See *Moses v. Zoning Hearing Board of the Borough of Dormont*, 87 Pa.Cmwlth. 443, 487 A.2d 481 (1985); *Camaron Apts., Inc. v. Zoning Board of Adjustment of the City of Philadelphia*, 14 Pa.Cmwlth. 571, 324 A.2d 805 (1974). In *Mucy v. Fallowfield Township Zoning Hearing Board of Washington County*, 147 Pa.Cmwlth. 644, 609 A.2d 591, 592 (1992) (citing *Appeal of Crawford*, 110 Pa.Cmwlth. 51, 531 A.2d 865 (1987), cross petitions for allowance of appeal denied, 518 Pa. 656, 544 A.2d 1343 (1988)), we summarized the factors to be considered when determining whether to grant a variance by estoppel as follows:
>
> 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**. However, a mere showing that a municipality has failed to enforce the law for a long period of time is insufficient in itself to support the grant of a variance. (Emphasis added by Court.)

[5] See further documentation of the adverse impacts at pp. 10-12 and 28-31 of this Brief.

2. Whether the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceedings. **But in assessing whether a landowner's reliance upon municipal inaction is reasonable, a landowner is duty bound to check the property's zoning status before purchase.** (Emphasis added by the Court.)

3. Whether the landowner has made substantial expenditures in reliance upon his belief that his use was permitted.

4. Whether the denial of the variance would impose an unnecessary hardship on the applicant, such as the cost to demolish an existing building.[6]

In addition, there is a fifth element which Court decisions have held must be considered.

5. Whether the use is a threat to the public interest or public health safety or morals. *Greene Townes Financial Corp. v. Zoning Hearing Bd. of Lower Merion Twp.*, 157 Pa. Cmwlth. 454, 461, 630 A.2d 492, 495 (Pa. Cmwlth. 1993) (citing *Crawford's Appeal*, 110 Pa .Commonwealth Ct. 51, 531 A.2d 865 1987); *Hafner v. Zoning Hearing Bd. of Allen Twp.* 974 A.2d 1204, 1212 (Pa. Cmwlth. 2009).

Furthermore: "These factors must be established by clear, precise and unequivocal evidence." *Adsmart Outdoor Advert., Inc. v. Lower Merion Twp. Zoning Hearing Bd.*, No. 173 C.D. 2012, 2012 WL 8666773, at *4 (Pa. Cmwlth. Dec. 5, 2012).

Victory Gardens has failed to establish by clear, precise and unequivocal evidence that it is entitled to a variance by estoppel. As demonstrated below, Victory Gardens has failed to establish its good faith reliance on the validity of the use, that the denial of the variance will cause unnecessary hardship or that the use as conducted by Victory Gardens is not a threat to health and safety.

[6] Other cases note that the type of hardship is the same as is required for the grant of a traditional variance. See discussion below.

Victory Gardens' conduct of the mulch operation is adverse to public health and safety. The serious impacts that the conduct of the mulch operation has had on public health and safety is stated in detail at pages 10-12 and below. The Findings of Fact cite the substantial evidence in the record of these impacts. See for example Findings 108-118, 120-123, and 127-129 which further document these adverse impacts, a summary of which follows.

For many years Victory Gardens operated without adequate safe site distance from its egress points onto Pickertown Road and Folly Roads. (Exhibit P-13). This is especially dangerous because the larger trucks are unable to properly navigate the turns out of these exit points. (N.T. 7/15/15 p. 148-149). Exhibit A-34 depicts the inability of a WB 50 truck from exiting the Property onto Pickertown Road or Folly Road without either going into oncoming traffic or driving off the cartway and disturbing an area of the Property.

The mulch piles at the Victory Gardens site, repeatedly have been in excess of the 20 foot regulated height for raw materials and 25 foot height for processed material. DEP inspected the property on multiple occasions and observed mulch piles to be between 60 and 70 feet high and that the piles were nearly vertical. DEP also noted multiple violations of the Township Fire Code. (N.T. p. 244, 250. Exhibit P-19 and P-21). DEP issued a report stating that some mulch piles are about 60 feet high, no fire lanes are present and that some mulch piles are undercut to an almost vertical profile risking pile slope failure and engulfment of personnel working near the pile. Victory Gardens experienced a collapse of a mulch wall that involved an employee who fell down the mulch wall in his loader. (N.T. p. 250-52).

Between March 25, 2011 and December 19, 2012, the Township responded to three fires at Victory Gardens. (N.T. p. 244 – 245). Fire firefighters who responded to a fire that occurred on March 25, 2011 were injured during their battling of the fire. (N.T. p. 270).

The fumes, dust and odors emitted from the mulch operation have serious health impacts on residents in the vicinity of the Property. With respect to noise, Gary R. Brown determined the sound levels of the different vehicles and equipment being utilized at Victory Gardens as received on the Ace's property. The trucks and bulldozers produced decibel levels far in excess of what is permitted by the zoning ordinance. (N.T. p. 1281-82, Exhibit P-91). There are specific noises that emanate over the property lines, including, the roar of the mulch grinder, the banging of front-end loader buckets, the repeated slapping of the elevator that takes mulch to the top of the mulch piles, the acceleration of the trucks, the banging and rattling of trucks that have loose tailgates, the use of jake brakes, open exhaust systems, the roar of mulch moving equipment and a repetitive back up beeping signal when the vehicles are used in reverse. (N.T. p. 933-34, 1064, 1163). The beeping noise is audible as early as 6:00 a.m. to neighboring property owners. (N.T. p. 933). The noises last from 6:00 a.m. until 9:00 p.m. (N.T. p. 933).

Aside from noise, truck traffic as a result of the Victory Gardens operation has substantially increased in the general vicinity of the operation and changed the essential character of the neighborhood. As an example, on May 22, 2014, 89 Victory Gardens' trucks were observed using Pickertown Road or Folly Road in the vicinity of Victory Gardens from 6:00 a.m. to 5:37 p.m., which results in an average of 7.7 trucks per hour or one truck every 7.8 minutes. (N.T. p. 1005, Exhibit P-60). Similarly, on May 23, 2014,

118 Victory Gardens' trucks were observed using Pickertown Road or Folly Road in the vicinity of Victory Gardens from 6:17 a.m. to 6:17 p.m., which results in an average of 9.67 trucks per hour or one truck every 6 minutes. (N.T. p. 1005, Exhibit P-61). On May 24, 2014, 79 Victory Gardens' trucks were observed using Pickertown Road or Folly Road in the vicinity of Victory Gardens which results in an average of 7.1 trucks per hour or one truck every 8.5 minutes. (N.T. p. 1006).

In addition to noise and truck traffic, odors and dust from the Victory Gardens operation have changed the essential character of the neighborhood. Residents who once enjoyed gardening outside, entertaining outside or just enjoying outdoor spaces no longer do so. The dust has resulted in neighbors and other local residents not being able to use the outdoor spaces on their properties. (N.T. p. 932, Exhibit P-57-5 and P-57-13, p. 1160). Certain residents are not able to even open their windows due to the dust produced by the Victory Gardens operation. (N.T. p. 1020).

The odors have also resulted in neighbors and other local residents not being able to use the outdoor spaces on their properties. Mr. McConnell has a pool in his backyard that is not useable at times due to the odor of the mulch from Victory Gardens. (N.T. p. 1097-98). The odor of mulch prevents him from entertaining at times. (N.T. p. 1097). At times the odors from Victory Gardens are strong enough to make individuals feel ill. (N.T. p. 1150). It is even sometimes difficult to breath due to the odors being emanated from Victory Gardens. (N.T. p. 1169).

The adverse health impacts as enumerated above and in the Prevailing Decision demonstrate that there is substantial evidence in the record to support the Board's conclusion that the mulch operation has an adverse impact on public health and safety

and that Appellant has failed to meet its burden with respect to this element of a variance by estoppel.

VG will not suffer unnecessary hardship if the variance is denied. "In order to establish unnecessary hardship, an applicant must show more than a mere economic or personal hardship." *Dormont.* To accomplish this, '[t]he applicant must prove that the hardship is unique to the property, and that *the zoning restriction sought to be overcome renders the property practically valueless.*" *Pietropaolo v. Zoning Hearing Bd. Of Lower Merion Twp.* 979 A.2d 969, 980 (Pa. Cmwlth. 2009) citing *Borough of Durmont v. Zoning Hearing Bd. Of Borough of Dormont*, 850 A.2d 826, 828 (Pa. Cmwlth. 2004) (Emphasis in original).

The type of hardship to which the Court decisions are referring is the same type of hardship required for a traditional variance. (See discussion under Traditional Variance above). To establish unnecessary hardship, an applicant must show more than a mere economic or personal hardship. *Dormont*. To accomplish this, "[t]he applicant must prove that the hardship is unique to the property, and that the zoning restriction sought to be overcome renders the property practically valueless." *Id.* at 828." *Hafner,* supra 974 A.2d at 1213. See also *Greene Townes Financial Corp.*, supra. 630 A.2d at 495. As established above, there has been no demonstration that the Property (or more properly, the Garges Farm of which it is a part) cannot be used for any of those uses permitted by §402 of the Zoning Ordinance. Those uses include the following: the keeping of livestock on lots of three acres or more, the growing of nursery stock and tilling of the soil. Greenhouse, nursery, riding academy, and kennels are also permitted.

Victory Gardens did not demonstrate that it acted in good faith and innocently relied on the validity of the use. Court decisions have repeatedly held that

satisfying this criteria requires evidence that the landowner made an independent inquiry to determine the zoning status of the property involved. See *Hosage v. Philadelphia Bd. of Adjustment*, 515 Pa. 31, 202 A.2d 61 (1964); *Hafner v. Zoning Hearing Bd. of Allen Twp.*, 974 A.2d 1204 (Pa. Cmwlth. 2009); *Mucy v. Fallowfield Twp. Zoning Hearing Bd.* 147 Pa. Cmwlth. 644, 609 A.2d 591 (Pa. Cmwlth. 1992); *Appeal of Crawford*, 110 Pa. Cmwlth. 51, 531 A.2d 865 (1987).

The analysis of our Supreme Court in *Hosage* is instructive. It involved the purchaser of a building that had been converted by a previous owner from a single family residence to apartments without approval over a decade prior to the Code Official discovering the violation during a routine inspection. In an appeal from a notice of violation, the applicants argued that they purchased the property thinking multiple-family dwellings were permitted and that, acting on that belief, spent $36,000 on its purchase. *Hosage,* 515 Pa. at 33, 202 A.2d at 62. Justice Eagen responded to this argument as follows:

> The answer to this is that they were duty bound to check the zoning status of the property before purchase, and could have required a certificate of such from the seller under the Act of July 27, 1955, P.L. 288, § 1, as amended by P.L. 1532, No. 652, § 1, 21 P.S. § 611 (1963 Supp.). If the records had been searched, it would have been immediately revealed that the zoning board had refused to permit multiple dwellings within a few years before title to the property was purchased. The applicant's negligence in this respect cannot now be advanced in support of the grant of the variance. *Id.* at 64.

In the present case there were two procedures available to Victory Gardens to obtain a definitive determination as to whether use of the Property for a mulch operation is permitted and, if so, under what circumstances: to request a preliminary opinion, pursuant to section 916.2 of the MPC (53 P. §10916.2) (the "MPC") which, when obtained, bars others from challenging it after the applicable

appeal period has expired; or it could have applied for a Certificate of Use and Occupancy which establishes that a use complies with the Zoning Ordinance. (§2404 of the Zoning Ordinance). Victory Gardens did neither.

Instead, Victory Gardens argues that its verbal inquiry to the Code Official prior to entering into the lease for the Property and that statements made by individual Supervisors during the time it engaged in the use, bars the Township from enforcing its Zoning Ordinance.

These arguments have been answered by other Court decisions involving claims of variance by estoppel. *Hafner v. Zoning Hearing Bd. of Allen Twp.*, supra. is on point. In *Hafner* the Applicant's father testified that he twice inquired of township officials whether his intended use of the property was permitted. *Hafner*, 974 A.2d at 1212. He also testified that the zoning officer who issued a building permit knew the purpose of the construction was to house a business use not permitted in the residential district where the property is located. *Id.* at 1209. The Court held: "These inquiries are not sufficient to establish good faith reliance where Applicant never reviewed the relevant zoning ordinances". *Id.* at 1212. The Court concluded: "Thus, the ZHB did not err in concluding Applicant did not act in good faith relying on the validity of his use of the property." *Id.*

In Springfield Twp. v. Kim, 792 A.2d 717 (Pa. Cmwlth. 2002), the Court held that Owners must do more than undertake a general inquiry as to whether a particular use is permitted; it must investigate under what circumstance it is permitted. *Id.* at 722. In *Kim,* the owners argued that if they had conducted an investigation they would have found that use of a recreational vehicle park was permitted. However, their use of the park included permitting occupants of mobile homes to reside there year round. An investigation by owners would have revealed that such occupancy is not permitted. The Court held: "The

purchaser's duty to inquire is not limited to whether a particular use is permitted but, by implication, must also encompass an inquiry into the limitations placed on the manner in which the property may be used...." *Id.* at 722.

In the present case, before entering into a lease for the Property, Mr. Butler did no more than make a casual inquiry as to where in the Township a mulch operation could be established. He testified that the Zoning Officer at the time indicated that mulch operations were conducted on the Schumuker farm and the Garges farm as non-conforming uses. (N.T. 7/15/15 p. 28). That inquiry falls short of the good faith reliance standard as discussed above. There is nothing in the record to suggest that Mr. Butler checked zoning records for the Garges Farm. Had he checked Township records, he likely would have found that no occupancy permit had been issued for a mulch operation. And there is nothing in the record to suggest that Mr. Butler described in any detail the type of mulch operation that would be conducted or inquired as to the type of operation Garges conducted or, importantly, whether his mulch operation was in conjunction with the farm operation.

It is important to note, that throughout these proceedings no one in authority provided a written determination that the mulch operation is permitted. No Use and Occupancy permit was applied for or issued. No preliminary opinion was requested pursuant to section 916.2 of the MPC. (53 P. §10916.2). There is no evidence in the record that the Township Solicitor provided an opinion that the use is permitted. Furthermore, Victory Gardens has been represented by the law firm of Fox Rothschild, an experienced land use law firm, throughout these proceedings. Yet, there is no suggestion that Victory Gardens obtained a legal opinion from his own counsel before commencing the mulch operation that the use is permitted. It is a fair inference that,

instead of innocently relying on any determination made concerning the lawfulness of the use, it instead engaged in purposeful neglect as to whether the mulch operation could be lawfully conducted on the Property. *Hitz v. Zoning Hearing Bd. Of South Annville Twp.*, 734 A.2d 60 (Pa. Cmwlth. 1999) (expansion of a business without seeking Township approval is lack of good faith). Such neglect to determine whether the use is permitted defeats any claim of good faith on the part of Victory Gardens.

Victory Gardens is required to establish that it has met all five of the criteria stated above to be entitled to a variance by estoppel. The Township has shown above that it does not meet three of those criteria, which is sufficient to defeat that claim. The Township contends that Victory Gardens cannot prevail on the other criteria as well, but will only briefly touch on the arguments made in support of its position regarding those criteria.

Municipal inaction alone is insufficient; there must also be some affirmative act on the part of the municipality that would justifiably cause the landowner to rely on the township's acquiescence. *Pietropaolo*, 979 A.2d 969 at 981. Issuance of a permit for the use has been determined to demonstrate active acquiescence. See *Knake v. Zoning Hearing Bd. Of Dormont*, 459 A.2d 1331 (1983), *Three Rivers Youth v. Zoning Bd. of Adjustment of City of Pittsburgh*, 437 A.2d 1064 (1981), *Twp. Of Haverford v. Spica*, 328 A.2d 878 (1974). Erroneous oral statements by a supervisor or even a zoning officer that the use is permitted is not sufficient. *Hafner,* 974 A.2d 1204 at 1212. Purchases by the Township of products illegally produced on the property is not sufficient. *Mucy*, supra., 609 A.2d 591 at 593.

Victory Gardens argues that permitting the operation to continue for nearly 20 years without issuing a notice of violation is sufficient to meet the "municipal

acquiescence" criteria. However, Court decisions have ruled otherwise. See, *Skarvelis,* supra., *Lennox v. Zoning Board of Adjustment*, 447 A.2d 1049 (Pa. Cmwlth. 1982), *Lewis v. Zoning Hearing Board of Lower Gwynedd Twp.*, 357 A.2d 725 (Pa. Cmwlth. 1976).

Victory Gardens cites to the MOU approved by the Board as sufficient to establish active acquiescence. Admittedly, the Board agreed with a proposal worked out with Victory Gardens to regulate traffic and hours of operation. **However, nowhere in the MOU is anything stated to the effect that if you comply with these conditions, we will permit the use to continue**. There is simply no written document anywhere in the record whereby the Township approved the mulch operation as a permitted use. Furthermore, Victory Gardens continuously violated the MOU with respect to traffic routes trucks would use and hours of operation. (FOF 97-100). These actions hardly constitute a good faith compliance with any purported agreement to permit the use to continue.

Victory Gardens claims it has made substantial expenditures in reliance on its belief that the use was permitted. It lists the following: $72,000 annually on rent; $1,000,000 on advertising; $1,142,000 on the purchase and operation of a separate retail operation; $719,000 on equipment; $42,000 on legal expenses; $61,432 on engineering studies; $2,500 on a decibel study; $12,000 for on-site inspections and $118,500 for on site improvements. (See p. 17-18 of Victory Gardens' brief). However, the expenditures listed are incidental to the operation of the use, not investments in buildings or permanent improvements that cannot be recovered. See *Knake* and *Vaughn*, where the Court cited as an example of the type of expense that qualified including repairs to a building and construction of a retaining wall which would cost more to remove than the cost of installing it. *Knake v. Zoning Hearing Bd. Of Dormont*, 459 A.2d 1331 (1983), *Vaughn v. Zoning Hearing Board of Twp of Shaler*, 947 A.2d 218. Advertising, rent and similar expenses

were incurred in the ordinary course of the operation. Those expenses were recovered by the substantial income Victory Gardens derived from the operation. None of the equipment Victory Gardens purchased is permanently installed at the Property. The equipment is mobile and can be transported to another location. The site improvements and studies incident to those improvements were necessary for the safe operation of the use. Legal fees did not result from the reliance on the use but were the result of defending the claims that the use is lawful. Finally, funds expended on a separate retail location which can be supplied from other mulch facilities operated by Victory Gardens and which can operate independently of the mulch manufacturing use on the Property can hardly be classified as an expenditure incurred in reliance on a belief that a mulch manufacturing facility is permitted.

Whether or not the Court agrees that some portion of these costs meet the test of costs incurred in reliance on the use being permitted, or that there was some element of active acquiescence on the part of the Township, the Township has established that Victory Gardens fails to meet at least three of the elements required for a variance by estoppel and on those grounds alone the Prevailing Decision of the Zoning Hearing Board must be affirmed.

F. THE BOARD CORRECTLY RULED THAT THE APPELLANT FAILED TO ESTABLISH A VESTED RIGHT TO CONTINUE ITS MULCH OPERATION ON THE PROPERTY.

To be entitled to relief based on a vested rights claim five elements must be established:

1. Due diligence in attempting to comply with the law
2. Good faith throughout the proceedings
3. The expenditure of substantial unrecoverable funds

4. The expiration without appeal of the period within which an appeal could have been taken from the issuance of the permit; and

5. The insufficiency of the evidence to prove that the individual property rights or the public health, safety, or welfare would be adversely affected by the use of the permit.

Petrosky v. Zoning Hearing Bd. of the Twp. of Upper Chichester, 402 A.2d 1385 (Pa. 1979); *Department of Environmental Resources v. Flynn*, 21 Pa. Cmwlth. 264, 344 A.2d 720 (1975).

In *Petrosky*, building and use permits were issued by the Township authorizing construction of a garage to house trucks, a permitted use in the light industrial district where the property was located. In reliance on the permits, Appellants expended $15,000 to construct the garage in the location shown on its permit which was inspected during construction. Only after the garage was occupied did the Township cite the Appellants for violation of setback requirements. *Petrosky,* 402 A.2d at 1387. Our Supreme Court determined that the Appellants had a vested right to maintain the garage in the location approved by the permit issued by the Township. *Id. at 1387-1388.*

By contrast, **Victory Gardens never applied for and thus never obtained a permit authorizing the mulch operation.** Therefore, there was no permit from which any objector could have appealed or from which an appeal period could expire. Victory Gardens has failed to satisfy the most fundamental element required for a vested right claim. See *Ferguson Twp. v. Zoning Hearing Bd. of Ferguson Twp.*, 82 Pa. Cmwlth. 296, 475 A.2d 910 (1984).

Victory Gardens has failed to establish a number of other elements as well.

The failure of Victory Gardens to make any effort to acquire proper permits or to conduct an independent determination concerning its intended use of the Property establishes its lack of due diligence to comply with the law and its lack of good faith. See

Hafner v. Zoning Hearing Bd. of Allen Twp., 974 A. 2d 1204 (Pa. Cmwlth. 2009) and related cases discussed above. The MPC provides every landowner with a bullet proof procedure to obtain a determination that its intended use of a property is permitted: to request a preliminary opinion, which, when obtained, bars others from challenging it after the applicable appeal period has expired. 53 P. S. §10916.2. Its failure to avail itself of the procedure not only demonstrates a lack of due diligence, it is also evidence of its lack of good faith.

Victory Gardens' efforts to address concerns with respect to the adverse effects of the mulch operation after it was established can hardly be said to be an effort to comply with the law. These efforts were designed to convince the Board to permit it to continue an illegal use. The same is true with respect to the MOU approved by the Board. Nowhere in the MOU is there a statement that the operation will be a permitted use if the terms of the MOU are complied with. In fact Victory Gardens did not comply with its terms. Its failure to do so is further evidence of its lack of good faith.

There is abundant evidence in this case establishing that permitting the use (for which no permit was ever issued) will adversely affect individual rights and the health and safety of the public. That evidence is discussed at length elsewhere in this Brief and will not be repeated here. (See pages 10-12 and 28-31).

Victory Gardens having failed to establish at least four of the five elements necessary to a claim of vested rights, it has no basis to continue its mulch operation on the Property in reliance on that claim.

G. APPELLANT IS NOT ENTITLED TO A VARIANCE BY EQUITABLE ESTOPPEL.

Variance by estoppel, vested rights and equitable estoppel are related theories, with overlapping elements. See *Bernie Enterprises v. Hilltown Twp. Zoning Hearing Bd.*, 657 A.2d 1364 at 1367 (Pa. Cmwlth. 1995); *Dorothy E. Coleman Revocable Trust v. Zoning Hearing Board* 2015 WL 512462 (Cmwlth. Ct. 2015) (Unreported Decision cited for its persuasive value, not as binding precedent.) These theories are sometimes confused. As an example Victory Gardens cites in its brief *Skarvelis v. Zoning Hearing Bd. of Borough of Dormont*, 679 A.2d 278, Pa. Cmwlth. 1996 in support of its variance by equitable estoppel argument. (See Appellant's Brief, p. 13.) However, the Commonwealth Court clearly stated:

> The sole issue on appeal is whether the court of common pleas erred in concluding that the property owner is entitled to a **variance by estoppel**. For the reasons enumerated below, we hold that Skarvelis did not establish the necessary facts which would entitle him to the relief of variance by estoppel. Therefore, the decision of the trial court must be reversed. *Id.* at 281. (Emphasis added).

The Township respectfully submits it has established Victory Gardens is not entitled to a variance by estoppel under Argument E. above. Therefore, we will not repeat the reasons herein.

The only other case cited by Victory Gardens in support of its equitable estoppel argument is *Strunk v. Zoning Hearing Bd. of Upper Milford Tp.*, 684 A.2d 682 (Pa. Cmwlth. Ct. 1996). The Court stated the elements for applying equitable estoppel as follows:

> (1) intentional or negligent misrepresentation of some material fact, (2) which was made with knowledge or reason to know that the other party would rely upon it, and (3) inducement of the other party to act to his or her detriment because of justifiable reliance upon the misrepresentation. *Id.* at 685.

However, the Court went on to deny the appeal because the Owners failed to meet another element that must be met for equitable estoppel to apply: "To invoke the doctrine

of equitable estoppel, Owners must also show 'clean hands', which they have not done." *Id.* at 685. The facts as recited in *Strunk* establish that the Owners failed to inquire as to whether the current Sewage Enforcement Officer would re-certify the adequacy of the sewage disposal system for a fifth apartment for which a special exception had been granted. Both the Township Solicitor and the Zoning Officer had advised the Owners before they purchased the property that the special exception was transferrable. However, because the Owners failed to make the further inquiry before commencing construction, the Court found the Owners did not have "clean hands" and that the building permit applied for after construction commenced was properly denied. *Id. at 686.*

The Township contends that "clean hands' is essentially the same standard as acting in good faith and innocently relying upon the validity of the use throughout the proceedings as stated in *Skarvelis v. Zoning Hearing Bd. of Borough of Dormont*, 679 A. 2d 278, (Pa. Cmwlth. 1996) and discussed at length under Variance by Estoppel. To establish a variance by estoppel—or equitable estoppel—Victory Gardens must establish more than it made a casual inquiry to the zoning officer as to where in the Township a mulch operation is permitted and upon learning that a mulch operation was occurring on the Garges farm as a non-conforming use, proceeding to rent an area of the farm and to establish the intensive use described above.

Victory Gardens has not established it meets the standard of "clean hands" or that it meets the standards stated in the *Skarvelis* case—which it recites in support of its variance by equitable estoppel claim. Therefore, it has failed to establish it has a right to a variance by equitable estoppel.

IV. CONCLUSION

Appellee, the Warrington Township Board of Supervisors, for the reasons stated herein, respectfully requests this Honorable Court to affirm the Prevailing Decision of the Zoning Hearing Board denying Victory Gardens' appeal of the Notice of Violation and the relief requested under the various arguments it advanced in support of its appeal.

Specifically, it is requested that the Court determine that the Decision is supported by substantial evidence in the record, that the Board committed neither an error of law nor an abuse of discretion in arriving at its Decision. For those reasons it is requested that the Court determine that the mulch operation is not a use permitted by right in the RA Zoning District and that Victory Gardens is not entitled to a variance by equitable estoppel, a variance by estoppel or a vested right to continue the mulch operation on the Property. Additionally it is requested that the Court determine that Victory Gardens is not entitled to a traditional variance and has not established a right to continue the mulch operation as the continuation or expansion of a nonconforming use.

Respectfully submitted

Terry W. Clemons

Chapter 27. Zoning

Part 4. RA RESIDENTIAL AGRICULTURAL AND RA-A RESIDENTIAL AGRICULTURAL-AIRFIELD DISTRICTS

Article A.. RA Residential Agricultural District.

§ 402. Permitted Uses.

[Ord. 85-2, 3/5/1985, § 402; as amended by Ord. 92-8, 7/14/1992; by Ord. 94-15A, 10/25/1994, § 2; by Ord. 96-1, 1/9/1996, § I(B) and (C); and by Ord. 02-06, 7/9/2002, § 2]
The following uses may be permitted as a use by right:

A. Agricultural uses, including the keeping of livestock on lots of three acres or more. Agricultural uses include the growing of nursery stock and tilling of the soil shall be limited to one head of livestock, or 10 fowl per 40,000 square feet of lot area. Any building or area used for the keeping or raising of livestock or fowl shall be situated not less than 100 feet from any street line, property line or dwelling other than the owner's dwelling.

B. Greenhouse as principal or an accessory use to any permitted or conditional use within this district; provided:

   (1) The minimum site area for such use shall be five acres.

   (2) The maximum permitted impervious surface ratio of the site shall be 20%.

   (3) Parking. No less than one off-street parking space per two employees.

C. Municipal use.

D. Agricultural sales/roadside stands for the seasonal sale of farm or nursery products produced on the premises; provided:

   (1) Only farm produce or nursery material may be sold.

   (2) Farm produce and nursery material shall be limited to crops harvested from plants and plant material.

   (3) At least 50% of the produce or plant material must be grown or raised on the premises or in the immediate region.

   (4) Access/exit to the tract must be controlled by two points. Access/exit points shall be no more than 24 feet wide.

   (5) Sales building or stands shall be setback a minimum of 50 feet from the ultimate right-of-way.

(6) Parking. No less than one off-street parking space for each 200 square feet of building floor area or a minimum of four spaces, whichever is greater. All parking shall be behind the legal right-of-way.

E. Kennel. The keeping of more than six dogs that are more than six months old for breeding, training, selling or boarding for a fee is permitted, provided the following conditions are met:

(1) Minimum lot size shall be 10 acres.

(2) No animal shelter or runway shall be located closer than 300 feet from any residential building other than the owner's.

(3) The total number of dogs on the property shall not exceed 25.

(4) Parking. No less than one off-street parking space for each employee plus one space for each eight animals in capacity except for training where one space shall be provided for each three animals.

F. Riding Academy. Riding academy, livery or boarding stable, subject to the following provisions:

(1) A lot area of not less than 10 acres shall be required.

(2) Dwellings and accessory farm buildings shall be permitted in accordance with the regulations for agriculture and horticulture, use A-1.

(3) No more than one horse per acre shall be permitted.

(4) Horse shows shall be permitted only by approval of the Township Park and Recreation Board and shall be limited to a specified number each year for each riding academy.

(5) Parking. No less than one off-street parking space shall be provided for every three persons present at such facilities when they are used to capacity.

G. Nursery. The outdoor raising of plants, shrubs and trees for sale and transplantation. Such material may be field grown or grown within a greenhouse, provided the following conditions are met:

(1) The minimum lot size shall be five acres.

(2) Any building or structure shall meet the yard, lot width and setback requirements for the applicable zoning district for use B-1 single-family detached dwelling.

(3) Contracting for landscape contracting is permitted as an accessory use to a nursery operation, including outdoor storage of landscape building supplies, provided that, it does not exceed 20% of the area of the total nursery operation or one acre, whichever is less.

(4) There shall be a planted buffer with a minimum width of 25 feet that surrounds all greenhouses and the area of any storage of landscape building supplies from any adjoining property.

(5) Agricultural sales/roadside stands may be permitted as an accessory use.

(6) A garden center may be permitted as an accessory use only within applicable commercial or industrial districts.

H. Single-family detached dwelling providing that the following standards are met:

(1) Such use shall be permitted only with approved water and sewage disposal systems.

(2) The location of the lot shall not be placed where it will interfere with the farm field operations or otherwise interfere with the operation of existing or future agriculture uses.

(3) The dimensional standards shall be in accordance with § 405(1).

l. No-impact home occupation.
[Added by Ord. 2012-O-09, 7/24/2012]

Chapter 27. Zoning

Part 12. PI-1 PLANNED INDUSTRIAL DISTRICT

§ 1202. Permitted Uses.

[Ord. 85-2, 3/5/1985, § 1202; as amended by Ord. 92-4, 4/14/1992]
The specific uses permitted in this district shall be the erection, construction, alteration, or use of buildings on premises for the following uses and no other:

A. Any manufacturing, wholesale, or distributing use which meets the provisions of § 1006, Performance Requirements, as follows:

(1) Any manufacturing, compounding, processing, packaging, or treatment of the following previously prepared materials: bone, cork, feathers, cellophane, ceramics, felt, fur, glass, hair, horn, paper, pharmaceutical, plastics, shells, iron and steel, aluminum, leather, plaster, metals, precious and/or semiprecious stones, wood, yarns, containers or novelties from paper or cardboard, natural or synthetic rubber, tobacco, textile or textile products, and perfumes.

(2) The manufacture of musical instruments, toys, novelties, electrical or electronic devices; home, commercial and industrial appliances and instruments, including the manufacture of accessory parts or assemblies; dental and medical equipment; watches and clocks; optical goods, drafting equipment, and canvas products.

(3) Storage buildings and warehouses; parking garages and lots.

(4) Laboratories; experimental, research or testing.

(5) Carpet or rug cleaning; laundry, cleaning and dyeing plant.

(6) Wholesaling and distributing activities.

(7) Light metal processing as follows: cleaning, finishing, grinding, heat treating, plating, polishing, rustproofing, and sharpening; metal stamping and extrusion of small products; similar metal working processes.

(8) Job printing, newspaper or book publishing, electronics and small parts assembly or manufacture.

(9) Baking and food processing.

(10) Electronics and small parts assembly or manufacture.

(11) Manufacture and/or storage of construction materials and equipment.

B.

Dwelling quarters for watchmen or caretakers employed on the premises shall be permitted in connection with any industrial establishment.

C. Miniwarehouses.

D. Commercial uses clearly intended to service the employees of establishments on the site. Customary accessory uses and structures which are clearly incidental to permitted main uses and structures.

E. Commercial recreational facilities.

F. Professional and business office facilities.

G. Food preparation and serving areas an accessory use to uses specified in this section.

H. Signs, in accordance with Part 22.

I. Accessory retail sales use to a commercial business may be allowed provided the retail sales portion of the business is less than 15% of the annual gross receipts. A letter of certification shall be filed with the Township certifying the percentage of retail sales for the previous year.

§ 1206. Standards.

[Ord. 85-2, 3/5/1985, § 1206]

1. Screening and Buffering. Along each side or rear property line which adjoins an existing residence or residential district, a buffer of 100 feet including therein and planting of not less than 30 feet in depth shall be provided. Along each street line a 15 feet in depth buffer planting shall be provided including sidewalks and accessways. For buffer requirements see Warrington Township Subdivision and Land Development Ordinance [Chapter 22].

2. Prohibited Activity and/or Materials.

   A. No highly flammable or explosive or toxic liquids, solids or gases shall be stored in bulk above ground, except tanks or drums of fuel directly connecting with energy devices, heating devices, or appliances located and operated on the same lot as the tanks or drums of fuel.

   B. All outdoor storage facilities for fuel, raw materials and products, and all fuel, raw materials and products stored outdoors shall be enclosed by an approved safety fence and visual screen and shall conform to all yard requirements imposed upon the main buildings in his district.

   C. No materials or wastes shall be deposited upon a lot in such form or manner that they may be transferred off the lot by natural causes or forces, nor shall any substance which can contaminate a stream or watercourse or otherwise render such stream or watercourse undesirable as a source of water supply or recreation, or which will destroy aquatic life, be allowed to enter any stream or watercourse. A description of the methods to be used for the treatment of disposal sewage and industrial wastes shall be provided by the applicant.

   D. All materials or wastes which might cause fumes or dust or which constitute a fire or environmental hazard or which may be edible or otherwise attractive to rodents shall be stored outdoors only if enclosed in containers which are adequate to eliminate such hazards.

   E.

All applicable state and county regulations pertaining to sanitary landfills must be complied with.

3. Performance Requirements.

A. Smoke. No smoke shall be emitted from any chimney or other source visible gray greater than No. 1 of the Ringelmann Smoke Chart as published by the U.S. Bureau of Mines, except that smoke of a shade not darker than No. 2 on the Ringelmann Chart may be emitted for not more than four minutes in any thirty-minute period. These provisions applicable to visible gray smoke shall also apply to visible smoke of any other color, with an equivalent apparent opacity.

B. Dust and Dirt, Fumes, Vapors and Gases.

(1) The emission of dust, dirt, fly ash, fumes, vapors or gases which can cause any damage to human health, to animals or vegetation or to other forms of property, or which can cause any soiling or staining of persons or property at any point beyond the lot line of the use creating the emission is herewith prohibited.

(2) No emission of liquid or solid particles from any chimney or otherwise shall exceed 0.3 grain per cubic foot of the covering gas at any point beyond the lot line of the use creating the emission. For measurement of the amount of particles in gases resulting from combustion, standard correction shall be applied to a stack temperature of 500° F. and 50% excess air in stack at full load.

C. Noise. The sound pressure level of any operation shall not exceed, at any point on the boundary of a nonindustrial district, the decibel levels in the designated octave band shown below, except for emergency alarm signals, and subject to the following corrections; subtract five decibels for pulsating or periodic noise, and five decibels for noise sources operating less than 20% of any one hour:

SOUND LEVELS
Maximum Permitted Sound Level
Decibels = 10 log. P-1 where P-2 = 0.0002

Octave Band Cycles Per Second	Decibels Along Agricultural or Residential District Boundaries	Decibels Along Any Other District Boundaries
0 to 600	50	55
600 to 2400	38	40
2400 to 4800	35	38
Above 4800	32	38

D. Odors. There shall be no emission of odorous gases or other odorous matter in such quantities as to be offensive at any point on or beyond the lot boundary line within which the industrial operation is situated. Any process which may involve the creation or emission of any odors shall be provided with a secondary safeguard system in order that control will be maintained if the primary safeguard system should fail, hereby established as a guide in determining such quantities of offensive odors is Table 111 (Odor Thresholds) in Chapter 5, "Air Pollution Abatement Manual," copyright 1951 by Manufacturing Chemists Association; the numerical average value for all authorities listed may be used.

E. Glare and Heat. No industrial use shall carry on an operation that would produce heat or glare beyond the property line of a lot on which the industrial operation is situated.

F. Vibration. Machines or operations which cause vibrations shall be permitted, but in no case shall any such vibrations be perceptible along the boundary line of any nonindustrial district.

G. Radioactivity, Electrical or Radio Disturbance, EMF and RFI Emission. There shall be no activities which emit dangerous radioactivity disturbance (except from domestic household appliances) adversely affecting the operation at any point of any equipment other than that of the creator of such disturbance.

Warrington Township

852 EASTON ROAD, WARRINGTON, PA 18976
215-343-9350 ■ FAX 215-343-5944
www.warringtontownship.org

Enforcement Notice
March 9, 2015

Name of Owner and/or person action is against

Gargas Family Trust (Land Owner) 3014 Bristol Rd. Warrington Pa 18976
Victory Gardens Inc., Mike Butler President (Tenant) 357 West Street Road Warminster Pa. 18976

Location of the Property in Violation **Tax Parcel # 50-010-066**

2951 Pickertown Road Warrington Pa 18976
A portion of The Winding Brook Farm

Violation and Applicable Provision of the Ordinance

Warrington Township has determined that Victory Gardens mulching operations are not a protected agricultural activity under the Commonwealth's ACRE (Agriculture, Communities, and Rural Environment). Rather it is considered an industrial operation since none of the product is used on site and as such is not permitted by Chapter 27 (Zoning) of the Warrington Township Code of Ordinances. The operations of Victory Gardens are located within the RA (Residential Agricultural) Zoning District. Under the applicable code section below this is **NOT** a permitted use.

RA RESIDENTIAL AGRICULTURAL
A. RA Residential Agricultural District.
§ 401. Purpose. [Ord. 85-2, 3/5/1985, § 401; as amended by Ord. 92-8, 7/14/1992]
The purpose of the RA Residential Agricultural District is to provide areas within the Township where a low-density residential atmosphere is preserved; to provide area where continued agricultural use of the land is feasible, particularly where prime agricultural soils have been identified; to discourage higher intensity uses which would make agricultural preservation and a rural residential atmosphere impossible; to discourage higher densities of development in areas where public utilities, particularly sewer and water, are neither available nor anticipated to be provided within the time period shown in the Comprehensive Year 2000; and to otherwise achieve the goals and objectives of the Township as set forth in the adopted Comprehensive Plan for Growth Management in Warrington Township, Pennsylvania.
§ 402. Permitted Uses. [Ord. 85-2, 3/5/1985, § 402; as amended by Ord. 92-8, 7/14/1992; by Ord. 94-15A, 10/25/1994, § 2; by Ord. 96-1, 1/9/1996, § I(B) and (C); by

ALL-STATE LEGAL®
EXHIBIT
"B"

Ord. 02-06, 7/9/2002, § 2; and by Ord. 2012-O-09, 7/24/2012]
The following uses may be permitted as a use by right:
A. Agricultural uses, including the keeping of livestock on lots of three acres or more. Agricultural uses include the growing of nursery stock and tilling of the soil shall be limited to one head of livestock, or 10 fowl per 40,000 square feet of lot area. Any building or area used for the keeping or raising of livestock or fowl shall be situated not less than 100 feet from any street line, property line or dwelling other than the owner's dwelling.
D. Agricultural sales/roadside stands for the seasonal sale of farm or nursery products produced on the premises; provided:
(1) Only farm produce or nursery material may be sold.
(2) Farm produce and nursery material shall be limited to crops harvested from plants and plant material.
(3) At least 50% of the produce or plant material must be grown or raised on the premises or in the immediate region.
(4) Access/exit to the tract must be controlled by two points. Access/exit points shall be no more than 24 feet wide.
(5) Sales building or stands shall be setback a minimum of 50 feet from the ultimate right-of-way.
(6) Parking. No less than one off-street parking space for each 200 square feet of building floor area or a minimum of four spaces, whichever is greater. All parking shall be behind the legal right-of-way.

Compliance Date

The violation should be cured as soon as possible and be completed by April 9, 2015

Right to Appeal Clause

You have the right to make a timely appeal to the Warrington Township Zoning Hearing Board. In order to be considered timely, a complete application for appeal to the Warrington Township Zoning Hearing Board must be made within thirty calendar days of receipt of this letter.

Failure to correct the violations or appeal to the Warrington Township Zoning Hearing Board within the time specified in this notice constitutes violation of the township code and will result in the filings of a non-traffic summary offence citation against you with the district justice. The district justice, after hearing the complaint may find you guilty of the violations at which time the District Justice may impose a fine of not more than five hundred dollars ($500.00) plus court costs for each violation, as set forth in the code, specifically, chapter 27, part 24 Section 2405.4, which states any person, firm of corporation which has violated or permitted the violation of the provisions of this chapter, shall, upon being found liable therefor in a civil enforcement proceeding commenced by Warrington Township, pay a judgment of not more than five hundred dollars ($500.00) plus all court costs including reasonable attorney fees incurred by Warrington Township as a result thereof...Each day that a violation continues shall constitute a separate violation. (Ord. 85-2, 3/5/1985, as amended by ord. 89-8 ___/___/1989.

Failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with the possible sanctions clearly described.

In any appeal of an enforcement notice to the zoning hearing board the municipality shall have the responsibility of presenting the evidence first.

Any filing fees paid by the party to appeal an enforcement notice to the zoning hearing board shall be returned to the appealing party by the municipality if the zoning hearing board, or any other court in a subsequent appeal, rules in the appealing party's favor.

Respectfully Submitted,

Warrington Township Code Enforcement

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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

VICTORY GARDENS, INC. Appellant, v. WARRINGTON TOWNSHIP ZONING HEARING BOARD And WARRINGTON TOWNSHIP Appellees	:	NO. 2017-03792 Land Use Appeal

CERTIFICATE OF SERVICE

I, Terry W. Clemons, Esquire, do hereby certify that on February 1, 2018 a true and correct copy of the Brief of Appellee, Warrington Township, was served via first class mail, postage prepaid, upon the following parties:

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Dated: February 1, 2018

By: _____
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