LEET TOWNSHIP ZONING HEARING BOARD

IN RE: VARIANCE APPLICATION OF
ROBERT L. AND MARILYN A. WERNICKI

DECISION

The Variance Application of Robert L. and Marilyn A. Wernicki is DENIED.

IMPORTANT NOTICE: APPEALS OF THIS DECISION MUST BE FILED WITHIN 30 DAYS AFTER ENTRY OF THIS DECISION, WITH THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA. ANYONE WISHING TO APPEAL IS URGED TO CONSULT WITH AN ATTORNEY.

LEET TOWNSHIP ZONING HEARING BOARD

By: ______________________________

Vincent J. Restauri, Jr., Solicitor
February 2, 2023

LEET TOWNSHIP ZONING HEARING BOARD

IN RE: VARIANCE APPLICATION OF
ROBERT L. AND MARILYN A. WERNICKI

STATEMENT OF REASONS FOR DECISION

The Findings of Fact and Conclusions of Law are incorporated by reference.

The burden is on the applicant to prove every element required for a variance. *City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh,* 559 A.2d 896 (Pa. 1989); *Valley View Civic Ass'n v. Zoning Bd. of Adjustment,* 501 Pa. 550, 462 A.2d 637 (1983); *Swemley v. Zoning Hearing Bd. of Windsor Tp*., 698 A.2d 160 (Pa. Cmwlth. 1997)

The Ordinance states its objectives and methods. Its objective is to "adopt floodplain management regulations to promote public health, safety, and the general welfare of the citizenry" (Bates# 426, §8-101) and to "comply with federal and state floodplain management regulations" (Bates# 428, §8-201.1.E). The Ordinance states that "[t]he degree of flood protection sought by the provisions of this chapter is considered reasonable for regulatory purposes and is based on accepted methods of engineering methods of study." (Bates# 428, §8-204.1)

Part 5 of the Ordinance establishes Technical Requirements. It states that nothing can be built in a floodway (Bates# 443, §8.502.1). However, a variance is possible under Part 8 (Variances) (Bates# 443, §8.502.1). But Part 8 prohibits a variance if, among other things, the building creates "any" increase in base flood elevation (BFE). (Bates# 456, §8-802.1.A) There is no dispute that it is possible, although difficult and expensive, to construct an accessory building that does not produce any increase in BFE. For example, stilts can be used to elevate the floor off the floodplain.

Part 5 continues that, if a variance is granted under Part 8, then the building nonetheless cannot have a floor of more than 200 square feet. (Bates# 445, §8-502 (1) E.(2)) The Ordinance does not contain a mechanism for a variance from the 200 square foot maximum floor requirement. There is no dispute that the shed has a floor of 670 square feet.

If Mr. Wernicki is arguing that he is entitled as a matter of law to a variance based on *de minimis* dimensional violations, this argument fails. Mr. Wernicki's shed is 470 square feet more than 200 square feet. This is not *de minimis.* "The 9-foot difference amounted to a 60% height increase. ***Such a difference can

hardly be deemed de minimis. The de minimis doctrine is a narrow exception to the heavy burden of proof involved in seeking a variance." *Dunn v. Middletown Twp. Zoning Hearing Bd.*, 143 A.3d 494, 506 (Pa. Cmwlth. 2016)," cited in *Stoltzfus v. West Manchester Zoning Hearinb Board,* Pa. Commw. Ct. 2022 (unreported Op., persuasive value only). Here, the 670 square foot floor is over 300% more than the 200 square foot maximum floor permitted in the Ordinance.

But even if it were *de minimis, Hertzberg* did not create a "free-fire" zone for all dimensional variances, especially those in the grey, hybrid area where public safety concerns are intertwined with the ordinance's dimensional limitations. *Yeager v. Zoning Hearing Board of the City of Allentown,* 779 A.2d 595 (Pa. Cmwlth. 2001); *Zappala Group v. Zoning Hearing Bd.*, 810 A. 2d 708 (Pa. Cmwlth. 2002). In such cases, a limitation of development is not equated with being wholly unable to develop the property, and the owner still must prove that the result will not be adverse to the public welfare. *Zappala.*

In addition, a variance, whether dimensional or use, is appropriate "only where the property, not the person, is subject to hardship" and the owner must prove more than that the ordinance imposes a burden on his personal desires. *Yeager, supra*, citing *Szmigiel v. Kranker,* 6 Pa.Cmwlth. 632, 298 A.2d 629, 631 (1972). "Variances are warranted "only where the property, not the person, is subject to the hardship." *One Meridian Partners, LLP v. Zoning Bd. of Adjustment of City of Phila.*, 867 A.2d 706, 710 (Pa. Cmwlth. 2005) Here, Mr. Wernicki's reasons for needing the shed to store a vintage car he rarely drives, a lawn tractor, exercise equipment, and holiday decorations—particularly when he already uses the barn for storage—epitomize personal desires, not a hardship arising from the property's limitations. In *Green Townes Financial Corp. v. Zoning Hearing Board of Lower Merion Township*, 157 Pa. Cmwlth. 454, 630 A.2d 492 (1993), the Court found that the property was uniquely affected by the floodplain and yard regulations, but the evidence also proved that a house of adequate size could be built in conformity with the requirements of the zoning ordinance. Here, there is no evidence that a shed that satisfied the Ordinance was inadequate for anyone except Mr. Wernicki due to his personal choices and preferences.

In the Ordinance, the 200 square foot floor limitation is part of a method to regulate flood risks to protect the general public. Under the Statutory Construction Act, *infra*, we cannot disregard the 200 square foot limitation and treat it as if it were subsumed by the prohibition on any BFE increase. See 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."); *Ind. Oil & Gas Assn. v. Bd. of Assessment*, 814 A.2d 180, 183 (Pa. 2002) ("Because the legislature is presumed to have intended to avoid mere surplusage, every word, sentence, and provision of a statute must be given effect.").

The rules of statutory construction are applicable to statutes and ordinances alike. *Glendon Energy Co. v. Borough of Glendon*, 656 A.2d 150 (Pa. Cmwlth.),

petition for allowance of appeal denied, 543 Pa. 705, 670 A.2d 644 (1995); *Board of Supervisors of Richland Township v. Tohickon Creek Associates*, 123 Pa.Cmwlth. 111, 553 A.2d 492 (1989); *Diehl v. McKeesport*, 60 Pa.Cmwlth. 561, 432 A.2d 288 (1981); *Appeal of Neshaminy Auto Villa, Ltd.,* 25 Pa.Cmwlth. 129, 358 A.2d 433 (1976). One of the primary rules of statutory construction is that an ordinance must be construed, if possible, to give effect to all of its provisions. *Mann v. Lower Makefield Township,* 160 Pa. Cmwlth. 208, 634 A.2d 768 (1993). An interpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction. *Glendon Energy*. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. Statutory Construction Act of 1972, 1 Pa.C.S. § 1921. Undefined terms used in an ordinance must be given their common and approved usage. *Glendon Energy; Spahr-Alder Group v. Zoning Board of Adjustment of City of Pittsburgh*, 135 Pa.Cmwlth. 561, 581 A.2d 1002 (1990).

"Any" has a plain and ordinary meaning in the context of managing flood risks. "Any" does not mean "negligible." In context, "any" means absolutely no risk, while "negligible" means some risk but a very small one. These terms are not equivalent. The word "negligible" does not appear in the Ordinance.

Mr. Wernicki's engineer, Graham Ferry, testified that the shed violates the Ordinance literally. Mr. Wernicki seeks to have us ignore the plain, ordinary meaning in a search for the spirit of the ordinance. The Statutory Construction Act does not allow us to do so. We cannot substitute our judgment for that of the Township Commissioners, by deciding in a variance case that a tiny increased risk of flooding should be allowed, when the Commissioners who enacted the Ordinance decided to allow absolutely no increased risk of flooding. This is particularly so when the record reflects, as it does here, that FEMA and PEMA are concerned about the cumulative impact of multiple, negligible increases in BFE over time in a floodplain—and those cumulative effects create flood insurance implications. Whether these Ordinance constraints on new construction in the floodplain encourage or discourage desirable development in the Township, is a policy decision already made by the Township Commissioners.

"While it is true that zoning ordinances are to be liberally construed to allow the broadest possible use of land, it is also true that zoning ordinances are to be construed in accordance with the plain and ordinary meaning of their words." *Phillips v. Zoning Hearing Board of Montour Township,* 776 A.2d 341 (Pa.Cmwlth.2001). "Where, as here, the language of the ordinance is clear and free from any ambiguity, the ZHB's interpretation of its own ordinance is entitled to great weight and deference. "*City of Hope v. Sadsbury Twp. Zoning Hearing Bd.*, 890 A.2d 1137, 1143 (Pa. Cmwlth. 2006).

Section 805 of the Ordinance does permit an increase in flood elevation for structures that create a danger to human life. The characteristics of those

structures are itemized. No evidence was offered to suggest that the Wernicki shed qualifies as one of those structures.

In re Brandywine Realty Trust, 857 A.2d 714, 718 (Pa. Cmwlth. 2004), is particular helpful in our analysis:

> [I]t does not require an expert in statutory construction to read the clear intent of the two sections of the Ordinance. Section 905.IV.E.1.(a) does not inject any ambiguity when it prohibits a variance that will cause any increase in the 100 year flood levels in the floodplain in question. Section 905.IV.E.1(a) is the “other ordinance” contemplated by Section 905.IV.E.1. The only way to view any ambiguity in the Ordinance is through the distorted prism of Brandywine’s analysis. A plain reading of the Ordinance unambiguously prohibits the result Brandywine seeks.

Mr. Wernicki appears to be arguing, in addition, that the Ordinance violates his right to substantive due process. He contends, in effect, that the Ordinance sections cited above do not have a rational nexus to flood risk management, or do not represent a reasonable balancing between his interests and the public interest, or otherwise shock the conscience. *C & M Developers v. Bedminster Township Zoning Hearing Board*, 573 Pa. 2, 820 A.2d 143 (2002); *Delchester Developers, LP v. Zoning Hearing Board of Township of London Grove,* 161 A.3d 1081 (Pa. Cmwlth. 2017); *Levin v. Upper Makefield Township,* 90 Fed. App. 653 (3rd Cir. 2004): *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3rd Cir. 2004). We disagree.

In *Delchester Developers, LP v. Zoning Hearing Board of Township of London Grove*, 161 A.3d 1081 (Pa. Cmwlth. 2017), the Court observed:

> [W]hether or not there were other means to achieve the same ends as the Township has here is of no moment; such considerations are squarely within the judgment of the governing body. Instead, our review is limited to whether enactment of the "net out" provision was substantially related to the Township's authority to protect the public health, safety and welfare. To put it another way, a substantive due process analysis asks whether the entity exercising authority has the power to act towards a particular end and if so, does the means further that end or is it so divorced from the end that the connection to a valid exercise of authority is severed. In the instant matter, the evidence presented before the ZHB demonstrated that the "net out" provision is substantially related to the Township's power to protect the public health, safety, and welfare and an outgrowth of the specific challenges presented by the location of the two lots; moreover, the evidence showed that the provision relies upon best practices within the engineering field, rather than an arbitrary view of how best to manage the infiltration of stormwater.

The *Dorchester* Court also applied a takings analysis as to whether a "nexus" and "rough proportionality" existed between the property that the Township restricted and the social costs to the public if the project proceeded without those restrictions. The Court found that the stormwater management provisions furthered the Township's legitimate interests and contained a nexus and rough proportionality to the impact of the proposed development and was therefore constitutional.

Mr. Wernicki offered no evidence that it is irrational for this Ordinance to prohibit "any" increased risk of flooding, instead of allowing a "negligible" risk. He offered no evidence that there is no nexus, or only an irrational one, between prohibiting any additional flood risk and sound flood management. Similarly, Mr. Wernicki offered no evidence that it is irrational for floors for new accessory structures like storage sheds to be limited to 200 square feet in a floodplain. On the other hand, the Township offered evidence that 200 square feet is one of several standard sizes of residential storage sheds. On the state of this record, we cannot conclude that the Ordinance lacks a rational nexus to flood management.

The record shows that the Ordinance creates a reasonable balancing of private landowner interest with the public interest. Ideally, no new construction will be allowed—this is flood risk management in its purest form. But the Ordinance compromises purity to allows a variance provided the building does not produce any increase in BFE *using engineering calculations that have a* margin of error *built in.* Then the Ordinance says that the size of the building can be as big as a small, standard storage shed, but no larger. Thus, the Ordinance makes reasonable adjustments to balance private and public interests.

And nothing about this shocks the conscience. The fact that Mr. Wernicki cannot expand his house and the fact that his lot development has limitations, does not mean that he cannot build a shed with a 200 square foot floor, elevated on stilts or otherwise built so that it does not increase BFE within the engineering calculation. It does not mean he cannot have a shed that will hold some but not all of the what he would ideally like to store there—the vintage car that he rarely drives, exercise equipment and holiday decorations. And he already has one other shed, the barn, to store his things. As a result, our conscience is not shocked by the Ordinance generally or by its application to Mr. Wernicki's shed in particular. Because we find a rational nexus, a reasonable balancing of interests, and nothing that shocks the conscience, it is our opinion that there is no substantive due process violation here.

Nor is Mr. Wernicki entitled to a variance by estoppel. *DiPaolo v. Zoning Hearing Bd. of Bensalem Twp.*, 2018 WL 3447525 (Pa. Cmwlth. Jul. 18, 2018) (variance by estoppel applies to floodplain ordinances); *Mucy v. Fallowfield Township Zoning Hearing Board*, 147 Pa. Commonwealth Ct. 644, 609 A.2d 591 (1992)*Stratford Arms, Inc. v. Zoning Board of Adjustment*, 429 Pa. 132 , 239 A.2d 325 (1968); *Board of Supervisors of Montgomery Township v. Wellington*

Federal Development Corp., 145 Pa. Commonwealth Ct. 15, 602 A.2d 425 (1992); *Butch v. East Lackawannock Township Zoning Appeal Board,* 75 Pa. Commonwealth Ct. 33, 460 A.2d 923 (1983); *Caporali v. Ward*, 89 Pa. Commonwealth Ct. 625, 493 A.2d 791 (1985). There is no evidence that the Township actively misled him or the Amish workers who erected the shed on September 11, 2020, into believing that a permit had been granted or would be granted for the shed or, put another way, that the shed in this floodplain obviously complied with all ordinance requirements.

In fact, Mr. Wernicki testified that he believed the Township's alleged lack of responsiveness to his phone calls and visits was due to the COVID pandemic. It is undisputed that within hours of the shed being erected, Township representatives directed him to undertake the process of complying with Township ordinances. In addition, Mr. Wernicki testified that it was not until well after the concrete pad was poured that he decided to use it as the floor for the shed. Nor were we offered testimony that the Township knew about the drain pipe from the pad to the stream at any time prior to September 11, 2020. Therefore, Mr. Wernicki did not reasonably rely on any active misrepresentation by the Township over a prolonged period of time. As a result, he is not entitled to a variance by estoppel.

In addition a variance by estoppel does not arise from a misunderstanding created by Owner's failures to exhaust due diligence in his investigation:

> It is argued that the applicants purchased the property thinking multiple-family dwelling was permissible, and, acting on such belief, made an investment of approximately $36,000. 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 dwelling 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." *Hasage v. Philadelphia Zoning Board*, 415 Pa. 31, 202 A.2d 61 (1964).

Here, Mr. Wernicki admitted he had not searched the Township's online ordinances and had received no information, one way or the other, from the Township during the COVID pandemic. For these reasons too, Mr. Wernicki is not entitled to receive a variance by estoppel.

In light of the above analysis, we do not reach and decide the other issues raised in this case.

We have no authority to decide or enforce a remedy for violation of the floodplain ordinance. We are limited to granting or denying the variance. *In re Leopardi,* 532 A.2d 311, 313 (Pa. 1987); 53 P.S. §10617.

For all these reasons, the variance application filed by Robert and Marilyn Wernicki is DENIED.

LEET TOWNSHIP ZONING HEARING BOARD

By: ______________________________

Vincent J. Restauri, Jr., Solicitor
February 2, 2023

LEET TOWNSHIP ZONING HEARING BOARD

IN RE: VARIANCE APPLICATION OF
ROBERT L. AND MARILYN A. WERNICKI

FINDINGS OF FACT

The Leet Township Zoning Hearing Board finds the following facts:

1. Robert and Marilyn Wernicki own a residence located at 133 Neely Street, Leet Township. They filed a variance application with the Leet Township Zoning Hearing Board for an accessory use storage shed that has a 670 square foot floor. The storage shed is located in a designated floodplain.

2. Mr. Wernicki understands that there is no dispute that the shed is in violation of the dimensional limitations for the floodplain. (Bates# 183) His house and entire neighborhood have flooded once before. (Bates# 197) He began living on the property in 2004 (Bates# 175).

3. The home itself is the primary structure. It cannot be expanded due to the setback requirements and the fact that it is a non-conforming use. (Bates# 39-40)

4. Well before 2020, Mr. Wernicki had built a shed on the property, referred to as the “barn.” The barn is still standing and in use on the Wernicki property.

5. On September 11, 2020, another shed—situated behind the home, between the home and the barn (Bates# 52-55)—was assembled on the Wernicki property by Amish workers (“shed”). This pre-fabricated shed is the subject of the variance application.

6. Although originally the Township was concerned that the shed violated the setback requirements, additional surveying has satisfied the Township that the shed compiles with them. (Bates #6)

7. The shed is an accessory structure that was constructed within a floodplain without any floodplain permit (Bates# 20, 33, 34, 35) on September 11, 2020.

8. There is no dispute that the Wernicki property is located in the In A Area/District.

9. No dispute was raised concerning the calculation methodology used by testifying engineers Ferry and Mitrovich.

10. The shed's floor is 670 square feet. (Bates# 48).

11. Mr. Wernicki's engineer, Graham Ferry, testified that the shed's 670 foot floor will increase the BFE by close to one-half inch, mathematically. (Bates# 100)

12. Engineer Ferry concluded that the one-half inch increase will be "negligible in its impact and within the margin of error of the calculable ability of the software itself and will not endanger human life." (Bates# 100-101)

13. Engineer Ferry testified that he is aware of many instances of negligible increases in BFE (Bates# 124) but he did not testify that municipalities, FEMA or PEMW have used "any" interchangeably with "negligible" in connection with BFE increases.

14. Leet's floodplain ordinance does not contain the word "negligible."

15. No evidence was offered that the word "negligible" appears—or does not appear—in PEMA's or FEMA's regulations or guidelines.

16. No evidence was offered that the BFE methodology referred to above contains—or does not contain—a category of results called "negligible."

17. In his substantial experience with Pennsylvania municipal floodplain ordinances, Leet Township Engineer Ned Mitrovich has never seen one in which the term "negligible" increase in BFE has been used interchangeably with "any" increase in BFE. (Bates# 397).

18. According to engineer Mitrovich, "negligible" does not have a numerical value. "Half inch is negligible?Three inches is negligible? Five inch?What's negligible?" (Bates# 398)

19. According to engineer Mitrovich, in 2013 PEMA and FEMA promulgated minimum uniform flood standards for all Pennsylvania municipalities. (Bates# 334-335)

20. One of the stipulations that FEMA/PEMA imposed on all municipalities was that a lack of compliance with their minimum, uniform flood standards

could jeopardize flood insurance ratings and eligibility for all the residents. (Bates# 332, 336)

21. The purpose of those standards was to reduce flooding, break the cycle of flooding, destruction, rebuild, more flooding, and destruction. (Bates# 338)

22. In the floodplain, it is possible to build a structure that will create no BFE increase, depending on a number of variables, including location (Bates## 110, 111, 121), and this can be confirmed by actual calculations (Bates# 123). According to engineer Ferry, it is very unlikely—but there is a very small likelihood—that a structure could be built without ***any*** increase in BFE. (Bates## 130, 132, 140).

23. Mr. Ferry testified that over 1.5 feet above the FEMA standard endangers human life. (Bates# 125)

24. According to engineer Ferry, the shed violates the Township ordinance, read literally (Bates# 128). He has seen ordinances this strictly written once before. (Bates# 128).

25. According to Township engineer Mitrovich, Bell Acres Borough has the same floodplain variance provisions and limitations that appear in Leet's ordinance. This is not unreasonable in his opinion as an engineer.(352-54)

26. Engineer Mitrovich does not know where the 200 square-foot dimension came from in Leet's and Bell Acres' Ordinances, but it could have been taken from the standard size of a small shed, 10 x 20. (Bates## 340, 414). The Ordinances comply with the FEMA guidelines that were issued and the options that were available to the adopters of the ordinance. (Bates# 341)

27. Under PEMA/FEMA guidelines, maximum square foot floor dimensions are discretionary with the municipality. The dimensions can take into account the proximity of the populated areas to the waterway, whether the waterway is regulated by locks and dams (*e.g.*, Ohio River), and other factors. (Bates# 346-47)

28. It was a requirement, not an option, in the PEMA guidelines that no variance can be granted for any rise in BFE. (Bates# 349)

29. Although no variance can be granted that will create any increase in the BFE, other floodplain variances can be granted by ZHB for *design criteria* itemized in the ordinance. (Bates## 348-49, 0445)

30. Construction on stilts is one method to have no BFE increase. Elevated structures are not uncommon. (Bates# 349) A building on stilts is a building that "would be out of the floodway." (Bates# 350)

31. Engineer Mitrovich and his firm (LSS) have produced nothing to indicate that the shed contributes essentially no positive or negative impact to the floodplain and that its presence can be treated as a negligible entity. (Bates## 374-75) He has no evidence that the shed will—or will not—actually harm public safety or endanger human life. (Bates## 390-392).

32. But the shed absolutely creates some additional risk to public safety and human life (Bates# 393), and that risk could materialize tomorrow (Bates# 397) or in a thousand years (Bates## 393-94), within a margin of error (Bates# 394).

33. A 100-year flood, on which the BFE is measured, means there is a 1% chance that this flood could happen every year (Bates## 389-90)

34. The cumulative effect is something that this ordinance was meant to prevent. The cumulative effect of all these changes can have a "dire" effect on the flood elevation or substantial change in the elevation. "The regulations were intended to slow down or stop this propagation of errors, so to speak." (Bates# 368)

35. "So a tenth here, a quarter here, four inches here, next thing you know you have a one foot change in elevation from the base flood." (Bates# 339)

36. According to engineer Mitrovich, the cumulative effect is "the very challenging aspect. It's referenced in documents and intended to stop these cumulative effects from occurring." (Bates# 414)

37. The cumulative effect could increase the actual floodplain itself. "The cumulative effect could potentially bring homes that are not currently in the floodplain, within the floodplain, forcing those people to have to get flood insurance or face the risk of not having their damage covered by insurance." (Bates# 415)

38. In the months leading up to September 11, 2020, the nation was in the grips of the COVID pandemic. (Bates# 150) Beginning in April 2020, Mr. Wernicki made multiple phone calls to the Township looking for direction about obtaining required permitting for the shed but he stopped doing so in July due to COVID. (Bates# 152-53) He also visited the Township Building looking for such direction. (Bates##148-149)

39. He believed that the Township's alleged lack of responsiveness resulted from scheduling difficulties due to COVID. (Bates# 148. 161-62) He did not search the Township's website for a review of its ordinances.(Bates# 188)

40. When he was making inquiry to the Township, he did not have a drawing that showed the land, his house, the barn or the proposed shed. (Bates# 193)

41. Mr. Wernicki knew that one of his neighbors who wanted to build a permanent fence had similar but not identical problem in obtaining information from the Township about zoning. That neighbor did not install the permanent fence until after he actually received a permit from the Township. (Bates## 151-52)

42. Prior to September 11, 2020, Mr. Wernicki told the Amish supplier of the shed that it could not be erected because he [Mr. Wernicki] had not yet obtained permitting from the Township. (Bates# 177)

43. "All of a sudden" on September 11 at 6:30 AM, the Amish workers showed up and put up the accessory building.(Bates# 153) They didn't even knock at his door when they arrived. They just started putting up the shed. (Bates# 177). There was no urgency that required it to be constructed without permitting—the Amish sellers just wanted to do it that way, because they felt they had waited long enough. They did not threaten to cancel and keep his money. (Bates## 198-200)

44. There is no evidence that the Amish sellers or workers ever communicated with—or attempted to communicate with—the Township before they decided, without notice to Mr. Wernicki, to put up the shed on September 11, 2020.

45. There is no evidence that Mr. Wernicki told them to stop (Bates# 200) over the 6 hours it took to erect the shed. (Bates# 194)

46. On September 11, immediately after the shed went up, representatives from the Township came to the site. The chief of police and building inspector sent Mr. Wernicki to the Township Building to apply for a permit. (Bates# 157)

47. The Township refused to take his permit application. He alleges that nobody at Township Building would help him. (Bates# 158)

48. Mr. Wernicki "believes" that he did receive a permit for the previous shed [the "barn"], possibly around 2012 (Bates## 161, 167-168). This barn had floor dimensions of roughly 12 x 16 [192 square feet]. (Bates## 169,195) It

is undisputed that the barn was not torn down to make way for the shed. The barn continues to stand on the property along with the house and the shed.

49. Prior to September 11, and possibly well before the pandemic (Bates #178), Mr. Wernicki had a 20 x 30 concrete pad poured for purposes having nothing to do with the shed. The pad was probably poured in 2016. (Bates# 209) There is no evidence that the Township should have, or did, take action against the pad before the shed was built on top of it. The pad was left vacant for a time (Bates# 164), but Mr. Wernicki soon decided (Bates# 178) for aesthetic reasons to put the shed on the pad with a floor that matched the pad's dimensions. (Bates# 164) Mr. Wernicki has not alleged that, as a result of this sequence of events involving the pad, he believes the Township had previously approved the dimensions of the floor for a storage shed.

50. Amish pre-fabricated sheds are available in many different kinds and sizes (Bates# 180)

51. 20 x 30 (600 square feet floor) was not the smallest Amish pre-fabricated shed available (Bates# 198).

52. Mr. Wernicki wanted the shed to have garage doors for easy access. (Bates# 208). The Amish sellers decided the shed's 9 foot height (Bates# 197) based on size of a garage door. (Bates# 196) There is no evidence that the Amish sellers (or any other sellers) do not offer for sale a prefabricated shed that uses one or two garage doors while still having a floor of 200 square feet or less.

53. In the shed, Mr. Wernicki stores, from time to time, a vintage car that he rarely drives (Bates# 169-70), a John Deere tractor, a pressure washer, a couple of lawn mowers, some old furniture, Halloween and Christmas decorations, a treadmill and an elliptical exercise machine (Bates# 171-72). He also stores personal items in the barn that sits next to the shed on the property.

54. No evidence was offered that the barn, coupled with a shed having a 200 square foot floor, would be insufficient storage space for any owner, except Mr. Wernicki.

55. No evidence was offered that even without the barn, a shed having a 200 square foot floor would be insufficient storage space for any owner, except Mr. Wernicki.

56. The evidence presented shows that, due to Mr. Wernicki's personal preferences, **he** needed more storage space than the house, the barn and a 200 square foot shed.

57. There is no evidence that the shed is being used or will be used in a manner that is dangerous to human life under the Ordinance.

58. To the extent that the engineers have offered conflicting factual testimony and expert opinions, we are persuaded by engineer Mitrovich.

59. We find that there is no neighborhood consensus as to whether the shed is, or is not, harmful to the neighborhood. The opinion seems to be more or less evenly split.

60. We find that Objector Melodini has suffered and will continue to suffer an increased risk of flooding as a result of the large floor size of the shed and the placement of her basement windows. We further find that the height of the shed, over the entire span of the floor dimensions, creates a negative visual impact to her enjoyment of her own property that would be materially less intrusive if the floor were 200 square feet or less.

LEET TOWNSHIP ZONING HEARING BOARD

By:

Vincent J. Restauri, Jr., Solicitor
February 2, 2023

LEET TOWNSHIP ZONING HEARING BOARD

IN RE: VARIANCE APPLICATION OF
ROBERT L. AND MARILYN A. WERNICKI

CONCLUSIONS OF LAW

1. The subject shed is prohibited in the floodplain, unless a variance is granted.

2. To receive a variance, the shed must not create any increase in the base flood elevation (BFE) under Part 8 of the Ordinance.

3. It is not illusory to require no increase in BFE, because it is possible to build an accessory structure that does not increase BFE.

4. The shed does increase the BFE and therefore may not receive a variance under Part 8 of the Ordinance.

5. Even if the shed does not increase the BFE, the Ordinance does not permit its floor to exceed 200 square feet under Part 5 of the Ordinance.

6. Because the shed floor exceeds 200 square feet, the shed may not receive a variance under the Ordinance.

7. The Ordinance does not permit a variance to be granted from the 200 square foot maximum floor requirement. Part 5 expressly prohibits a Part 8 variance for a structure that exceeds a 200 square foot floor.

8. Mr. Wernicki is not entitled as a matter of law to a dimensional variance from the 200 square foot maximum floor because under *Hertzberg* and its progeny, the shed is 470 square feet larger than 200 square feet, which is not de minimis, and *Hertzberg* did not create a “fire-free” zone for all dimensional violations, particularly in grey, or hybrid, areas such as this one, where the dimensional requirements are intertwined with public safety concerns.

9. The plain, ordinary meaning of "any" in context in Part 8 means absolutely no increase in BFE. It does not mean a "negligible" or very small increase in BFE or risk of increase in BFE.

10. The Statutory Construction Act does not permit the ZHB to ignore the plain, ordinary meaning of "any" in context , and replace it with "negligible," in an effort to ascertain the spirit of the Ordinance.

11. The Wernicki shed is not a structure that possesses the characteristics itemized in §805 of the Ordinance and is not permitted to cause an increase in flood elevation. (Bates# 456, §8-802.1.B; Bates## 448-49, §8-504)

12. As applied to the shed, the Ordinance does not violate substantive due process. There is a rational nexus between the variance requirements and limitations, and the express objectives of the Ordinance. The Ordinance reveals a reasonable balancing between private landowner interests and the public interest. The Ordinance does not shock the conscience.

13. Mr. Wernicki is not entitled to a variance by estoppel, because there is no evidence that he was actively misled by the Township for a prolonged period of time, upon which he reasonably relied to his detriment in building this shed in the floodplain without a permit.

LEET TOWNSHIP ZONING HEARING BOARD

By: ___________________________________
Vincent J. Restauri, Jr., Solicitor
February 2, 2023

LEET TOWNSHIP ZONING HEARING BOARD

IN RE: VARIANCE APPLICATION OF
ROBERT L. AND MARILYN A. WERNICKI

BRIEF NOTICE OF DECISION

On February 2, 2023, the Leet Township Zoning Hearing Board DENIED, in writing, Robert L. and Marilyn A. Wernicki's variance application for a shed located in a floodplain (Decision) at 133 Neely Street.

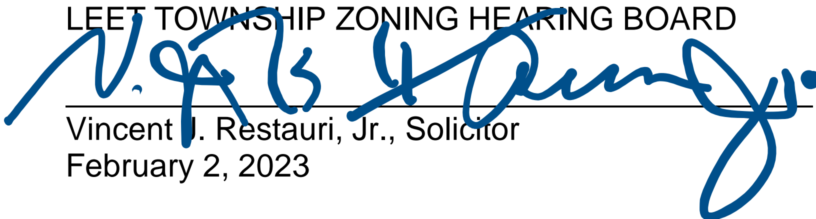
The full Decision may be examined as follows:

1. At the Leet Township Manager's Office, Leet Township Municipal Complex, 194 Ambridge Avenue, Fair Oaks, PA 15003, during regular business hours on regular business days, and

2. On the Leet Township website. https://leettownship.org/

IMPORTANT NOTICE: APPEALS OF THE DECISION MUST BE FILED WITHIN 30 DAYS AFTER ENTRY OF THE DECISION. THE APPEAL MUST BE FILED WITH THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA. ANYONE WISHING TO APPEAL IS URGED TO CONSULT WITH AN ATTORNEY.

LEET TOWNSHIP ZONING HEARING BOARD



Vincent J. Restauri, Jr., Solicitor
February 2, 2023