

A P P R O V E D

**SPRINGETTSBURY TOWNSHIP
ZONING HEARING BOARD
AUGUST 3, 2023**

MEMBERS IN

ATTENDANCE: Dale Achenbach, Chairman
David Seiler, Vice Chairman
Mark Bair
Chris Shuttlesworth (via Zoom)
Brian Kauffman (Alternate)

ALSO IN

ATTENDANCE: Timothy Holmes, Zoning Officer
Gavin Markey, Solicitor
Randall Heilman, Director of Community Development
Jill Trostle, Stenographer

1. CALL TO ORDER

A. Pledge of Allegiance

Chairman Achenbach called the meeting to order at 6:00 p.m. and led the Pledge of Allegiance. He introduced the members of the Board and Springgettsbury Township staff.

2. ACTION ON THE MINUTES

A. JUNE 1, 2023

**MR. SEILER MOVED TO ACCEPT THE MINUTES OF JUNE 1, 2023, AS
SUBMITTED, SECONDED BY MR. BAIR. MOTION UNANIMOUSLY CARRIED.**

SWEARING-IN OF TOWNSHIP STAFF

The following Township staff were sworn in: Tim Holmes, Zoning Officer, and Randall Heilman, Director of Community Development. Mr. Holmes confirmed that all cases were properly advertised prior to the meeting.

3. OLD BUSINESS - There was no old business to be presented.

4. NEW BUSINESS

ZHB-2023-0008 - 2331 E. Market Street

Mr. Holmes provided a summary of Case ZHB-2023-0008, which is an appeal to the February 6, 2023 zoning Officer's determination regarding Township Ordinance Section 325-193 that a nonconforming use at 2331 E. Market Street has been abandoned from being vacant in excess of one year. Nadeem Salah and David Bhatti submitted an appeal to continue to use the property for the nonconforming use of warehousing and distribution, which was a permitted nonconforming use prior to being abandoned for several years. The Springgettsbury Township Ordinance states that nonconforming use that has been vacant for longer than a year is considered to be abandoned. Consultation with the Solicitor determined that the Zoning Officer does not have the authority to override the ordinance even if the applicant provides testimony that the property has not been abandoned; and only the Zoning Hearing Board can

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determine anything different than the ordinance states. The applicant is also requesting a variance of Township Ordinance 325-37 to allow a warehouse and distribution use at the property in the event the appeal is not granted. The property is currently zoned T-C Town Center Overlay with the underlying MU Mixed Use district.

All witnesses were sworn in.

Craig Sharnetzka, Esq., CGA Law Firm, 135 N. George Street, York, PA 17401

Mr. Sharnetzka represents the applicants, Mr. Nadeem Salah and David Bhatti. Mr. Kevin Hodge, a realtor with Rock Commercial, was also present and sworn in to provide historical context to understand the previous uses of the property. Rock Commercial has been involved with the property for many decades. Mr. Sharnetzka stated the applicants are presenting an appeal of the zoning officer's determination of abandonment, as well as a variance application as an alternative.

Kevin Hodge, Brokerage Advisor with Rock Commercial

Mr. Sharnetzka called on Kevin Hodge to provide testimony on the history of the property in the case. Thee following is a summary of his testimony:

- Mr. Hodge is familiar with the property at 2331 E. Market Street, serving as the current agent handling the property.
- Rock Commercial has been involved with the property since the formation of Rock, which came out of two brokerage firms, one of which was Rotz who represented the property in 1977.
- The appeal is for suite F of 2331 E. Market Street, currently owned by the estate of Barbara B. Elliott.
- Mr. Hodge was present this evening to represent the estate of the late Barbara Elliott.
- Suite F is currently vacant because it is not currently leased.
- It is Mr. Hodge's opinion that Suite F is not well-suited for retail due its location in the rear of the property, it has no exposure, no store front and has steps leading up to it.
- Suite F was previously built for a dry-cleaning operation and has a dock area.
- Suite F is 3,200 sq. ft. with decrepit offices in a portion of the space, with the rest being raw warehouse space with an exposed ceiling, and some unpainted walls.
- The proposed use by Mr. Salah and Mr. Bhatti is warehousing and distribution.
- Exhibits E1, E2 and E3 were referenced. The Township provided letters confirming that Bucher Inc. a previous tenant of the property, used the property for distribution and warehousing.
- In 1999 a company known as EZ-Grip requested permission from the Township to use Suite F for light assembly and distribution. Subsequent to their use in 2007 the Township issued a certificate of use and occupancy to Window Depot who used the property for warehousing and distribution.
- Mr. Sharnetzka referenced exhibit E-4, which is the certificate of occupancy the Township provided to EZ-Grip. It is believed EZ-Grip occupied Suite F from 2007 to 2012.
- From 2013 to 2016, Suite F was occupied by Health Supplement Wholesales, LLC, which later became Powder City, which also used Suite F for warehousing and distribution.
- Suite F has not been leased since Powder City left the property in 2016.
- Suite F has not been remodeled and would still be suitable for warehousing and distribution.
- Rock has attempted to lease the property as a warehousing and distribution site.
- The current occupants propose to use Suite F for warehousing and distribution, which is consistent with the previous uses.
- The appeal presented before the Zoning Hearing Board this evening applies only to Suite F.

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For the record, it was clarified that a reference in the application to Cupid's Closet was incorrect. Cupid's Closet was not a previous tenant of Suite F.

Questions by the Board

- Mr. Bair confirmed that the applicant is requesting to use Suite F for warehousing and distribution, consistent with the use of previous tenants of Suite F. The new tenants propose to use the property for tobacco and convenience store type items.
- In response to another question, Mr. Hodge does not anticipate adverse effects or issues with surrounding property owners. The proposed use would not produce a lot of traffic as a retail space would, nor would it require the use of tractor trailers or trucks.
- Mr. Kaufman asked how many people would be employed and where they would park. Mr. Hodge responded the building has ample parking and there would be a maximum of four employees.
- Mr. Kaufman asked if the concrete pad was part of the operation. Mr. Hodge responded it is part of the property, but not part of the operation of the applicant.
- Mr. Achenbach asked Mr. Hodge to confirm the property has continued to be used as a warehousing and distribution operation. In response to the ordinance's definition of abandonment, Atty Sharnetzka argued that you have to show some intent to abandon under the law. Rock has continued to market the property, there has been no conforming use in the meantime, and the applicant is interested in the property for the same nonconforming use permitted by previous tenants.

Mr. Achenbach asked the Township staff if they had any objections to the chronology provided by the testimony. Mr. Holmes confirmed that the Township was requested to research previous uses of the property and the letters of occupancy referenced as exhibits were provided by the Township.

Public Comments

Mr. Achenbach provided an opportunity for the audience to provide public comments on the matter before the Zoning Hearing Board. No public comments were provided.

Solicitor's Opinion

As a point of clarification, Mr. Markey confirmed that Zoning Officer Holmes does not have the discretion to operate a fact-finding position on whether or not the property has been abandoned and can only apply the literal term of the ordinance. Mr. Markey stated Mr. Holmes was correct when he suggested the applicant make an appeal to overcome the presumption of abandonment which is created after one year of vacancy. The burden then shifts to the applicant to demonstrate there was no intent to abandon the property. Facts were presented this evening indicating the property has been marketed consistently and it has been consistently used for a warehouse and distribution facility. Mr. Markey recommended the following motion if the Board would be inclined to look favorably upon the non-abandonment. Mr. Markey did not recommend approving a use variance.

Proposed Motion: Overrule the Zoning Officer's determination of a section 325-193 legally mandated non discretionary application of abandonment language and to sustain and uphold the applicant's appeal and find that the applicant has not abandoned the warehouse/distribution use and space at 2331 East Market Street Suite F.

MR. BAIR MOVED IN THE CASE ZHB-2023-0008 TO OVERRULE THE ZONING OFFICER'S DETERMINATION OF A SECTION 325-193 LEGALLY MANDATED NON DISCRETIONARY APPLICATION OF ABANDONMENT LANGUAGE AND TO SUSTAIN AND UPHOLD THE APPLICANT'S APPEAL AND FIND THAT THE APPLICANT HAS NOT ABANDONED THE WAREHOUSE/DISTRIBUTION USE AND SPACE AT 2331 EAST MARKET STREET SUITE F. MR. SEILER SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY.

Mr. Markey recommended that the request for a use variance be officially withdrawn. Attorney Sharnetzka accepted the withdrawal of the use variance as it is no longer needed.

MR. SEILER MOVED TO ACCEPT THE APPLICANT'S WITHDRAWAL OF A USE VARIANCE, SECONDED BY MR. BAIR. MOTION PASSED UNANIMOUSLY.

ZHB-2023-0009 3883 E. Market Street, York PA

Mr. Holmes provided a summary of the application for appeal filed by Adam Whalen on behalf of East Market Developers, LLC for the location of some accessory structures on a corner lot at 3883 E. Market Street. The property is a three-sided lot surrounded by East Market, Yorklyn Gate and Stuart Drive. It is the site of the former York Valley Inn and has some apartment building construction in progress approved by a land development plan. There are accompanying variances: one for the location of the accessory structures if the appeal is not granted; and one for the lot coverage because they are at the maximum 50% and the accessory structures would go over the 50% lot coverage. Present zoning for the property is F-O, Flexible Development Overlay with the underlying F-D Flexible Development district.

Mr. Achenbach asked for the source of the original determination which is now being appealed. Mr. Holmes spoke with Solicitor Rausch asking if there was case law where there is conflict between the front yard and the rear yard and he responded with Exhibit A designating the rear yard and front yard, stating a variance would be needed to locate the accessory structures in the front yard. Mr. Achenbach asked Solicitor Markey to summarize the factors which are critical to the decision in this case. Mr. Markey responded that an appeal from the Zoning Officer's determination has been provided to the Zoning Hearing Board, which was supported by Township Solicitor Rausch. The second issue is a variance to allow the lot coverage to exceed 50%. As an alternative, a variance was submitted to allow the proposed location of the accessory structures in the front yard.

Joe Eisenhauer, Vice President of Development for Inch & Co.

Mr. Eisenhauer was sworn in. Mr. Eisenhauer stated Inch & Co. is the owner of East Market Developers LLC of 2950 Lewisberry Road, York, PA 17404. Mr. Seiler asked about Adam Whalen, whose name appears on the application. Mr. Eisenhauer responded he is the Director of Entitlements for Inch & Co. Several exhibits were provided. The applicant wishes to appeal the determination of the zoning officer regarding the designation of the front yard, and in the alternative, seek a variance for placement of accessory structures in the front yard, and an additional variance for relief of the maximum lot coverage in the flexible development district. The property is located at 3883 East Market Street. The site is currently under construction and development as Fall Brook Flats, located on East Market Street west of Yorklyn Gate Road, south of Stuart Drive. The site area is 7.29 acres or 317,743 sq. ft. Subject property is currently an active construction site being improved consistent with approved and recorded land development plan known as East Market Street Apartments, recorded in the York County Recorder of Deeds on August 31, 2022, plan book 2746, page 2231. The approved plan proposed the construction of five multi-family apartment buildings totaling 148 units, associated stormwater management facilities,

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off-street parking, and a recreational area identified as a dog park. Inch & Co plans to complete the remaining improvements and construct two accessory structures in the dog park area: a pergola and a shade sail. Exhibit D shows a photo of the pergola. The shade sail has yet to be ordered, pending the Zoning Board's action this evening. Exhibit B is the utility plan which outlines the location of the pergola and the shade sail, as well as an additional concrete sidewalk and concrete pad that represent the additional impervious coverage.

Inch & Co. representatives reached out to the Township on June 2 to enquire about permits for the proposed structures and was informed by the Zoning Officer that they are not permitted in the front yard, which was determined based on the location of Stuart Drive. It was also determined that the proposed walkway would exceed the permitted coverage in the district which is 50% impervious coverage by .01%.

Inch & Co. is appealing the zoning officer's decision regarding the accessory structures in the front yard. Section 325-5 of the zoning ordinance defines a front yard as "an open unoccupied space on the same lot with the building between the front line of the building and the street projected to the side lines of the lot. Each yard that abuts a street on a corner lot shall be considered a front yard." Section 325-134.b governs the placement of accessory structures as follows: "An accessory building or structure must be located to the rear of the principal building or structure. The rear setback shall be ten feet. All required side setbacks shall be maintained." Mr. Eisenhauer stated it is critically important that words and accordingly omitted words need to be noted when interpreting an ordinance. The definition of a front yard in section 325-5 speaks only to the front line of the building, not the general facade of the building or the side of the building. Exhibit E shows current building plans. The proposed buildings only have access on one side, which is the front of the building—identified on Exhibit E as "front exterior elevation." Exhibits A & B are used to orient the front of the building directly towards the parking lot and the East Market Street frontage of the lot, therefore, making the facade of the building facing Stuart Drive the rear of the lot. Mr. Eisenhauer noted the ordinance does speak to corner lots and requires that each yard abutting a street on a corner lot shall be considered a front yard; however, he noted the definition of corner lots in section 325-5 addresses only those lots with two adjacent sides abutting streets. The subject property abuts three streets and accordingly does not meet the standard definition of a corner lot. Mr. Eisenhauer is appealing the determination that the area in question is the rear of building A and Stuart Drive as the front yard. They are also appealing the determination that accessory structures are not permitted in a front yard because section 325-134.b restricts the placement of accessory structures as follows: "An accessory building or structure must be located to the rear of the principal building or structure." Mr. Eisenhauer noted there is no prohibition or specific mention of a yard or front yard, only that the structure be to the rear of the principal building.

It is Mr. Eisenhauer's opinion that the proposed structures do not represent a threat to the promotion of the public health, safety, comforts, convenience and general welfare, nor are they in conflict with the standards as written in the ordinance; therefore, Inch & Co. is appealing the determination of the zoning officer.

In lieu of a denial of the appeal, Inch & Co. seeks a variance of section 325-134b to place an accessory structure in a front yard. They are also seeking a variance of section 325-91c2 regarding lot coverage in the F-D Flexible Development district to exceed the permitted lot coverage of 50% by 464 sq. ft. or .01%. They acknowledge the need for compliance with the general standards set forth for a variance in the ordinance section 325-190f3 and their variance request is not contrary to the public interest and the property is subject to unnecessary hardship unique to the property. As burden of proof, addressing section 325-190f3a, there are unique physical circumstances, including irregularities associated with the property: that the property abuts three public streets and is subject to three front yards, which is a

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hardship that exceeds any considerate reason provided in the existing ordinance, which does not address corner lots with three front yards.

Specific to the impervious coverage variance request, stormwater management facilities have been sufficiently designed, as demonstrated on Exhibit C. It is the applicant's opinion that the additional 464 sq. ft. of impervious surface would not adversely affect the functionality of the system as it represents only .01% of an increase. Due to the unique physical circumstances and conditions of the property, there is no possibility that the property could be developed or improved consistent with the approved recorded land development plan without seeking relief. It is the applicant's belief the requested relief is necessary for reasonable use of the property, and the unnecessary hardship has not been created by the applicant, as the three street frontages existed before the property was acquired. The variance, if authorized, would not alter the essential character of the neighborhood, nor would it substantially or permanently impair the appropriate use of the adjacent properties or be detrimental to the public welfare. The area in question was identified on the approved and recorded land development plan as a dog park and neither the proposed accessory structures or the additional impervious coverage will alter or detrimentally impact the zone or neighborhood. The variance, if authorized, represents the minimum variance that will afford relief and would represent the least amount of modification necessary of the regulations in order to construct the dog park as contemplated on the approved and recorded land development plans. Inch & Co. agrees to comply with any reasonable conditions and safeguards.

Public Comments

Members of the public were sworn in to provide comments.

Greg Shive, 3835 Stuart Drive

Mr. Shive stated he lives to the rear of the apartment building. Mr. Shive stated a pad was installed with a pergola over it, and asked if this request applies to an additional building or for the one already constructed. Mr. Eisenhauer responded that the request applies to the pad and pergola already constructed. Mr. Shive does not have an issue with the pergola, but is concerned about an increase in traffic on Yorklyn Gate and Market Street when the apartments open.

Scott Neff, 386 Stuart Drive

Mr. Neff shared concerns regarding the retention ponds which have not been drained for the last few months. The retention ponds are attracting mosquitos, which are attracting geese and creating waste on surrounding properties. Mr. Neff stated he did contact the Township and received no response. He feels the water needs to be drained and EPA notified. He is also concerned about the water in the retention ponds overflowing to other properties. Mr. Holmes shared that the situation is currently being inspected by the Township Engineer. Mr. Markey stated that the status of the retention ponds are beyond the purview of the hearing this evening and not within the jurisdiction of the Zoning Hearing Board. Mr. Markey recommended that Mr. Neff file an official complaint with the Board of Supervisors.

Mr. Heilman responded that the Township Engineer has been responsive to all documented complaints from Township residents and has visited the site numerous times. While Mr. Heilman could not confirm that Mr. Neff filed a complaint, the Township in general has responded to complaints received from the local community.

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Mr. Eisenhauer responded that the retention ponds are not in final form and will retain water until construction is completed. Upon completion of construction, the ponds will be converted to final form and will hold water for a certain amount of hours following a storm and will drain away.

Tanya Snyder, 3812 Stuart Drive

Ms. Snyder asked if the appeal is about a dog park. Mr. Achenbach responded it is about positioning of accessory structures within the dog park. Ms. Snyder noted she would have liked to have seen a photo of the shade sail. Mr. Markey demonstrated on the exhibit where the proposed sail would be located. Ms. Snyder asked if the dog park would be fenced in, to which Mr. Eisenhauer confirmed it would be fenced.

Jason Knaub, 150 Throne Avenue

Mr. Knaub is concerned about the retention pond and the geese problem, which is interfering with traffic up and down Market Street. Mr. Knaub does not support the building of additional structures which will create additional water in the retention pond that is already an issue. Mr. Knaub has not observed any activity on the site recently, and is concerned about the timeliness of the completed project which will prolong the concerns surrounding the retention ponds, mosquitos and geese excrement.

Mr. Achenbach stated the Zoning Hearing Board understands the concerns expressed through public comments this evening, which are now on record, and encouraged the public to file grievances with the Township Board of Supervisors.

Other Comments

Mr. Shive, who was previously sworn in, stated that he heard Inch & Co. has filed for bankruptcy protection and questioned why they would be requesting a variance if the project would not be completed due to bankruptcy. Mr. Eisenhauer responded that the bankruptcy claim is not true.

Solicitor's Comments and Recommendations

Mr. Markey presented three motions for consideration:

Proposed Motion #1: Motion to sustain and uphold the Zoning Officer's determination and findings that per section 325-134b and related sections and definitions, that the proposed location of the accessory structures is prohibited absent a variance from the Zoning Hearing Board.

IN THE CASE ZHB-2023-0009 MR. BAIR MOVED TO SUSTAIN AND UPHOLD THE ZONING OFFICER'S DETERMINATION AND FINDINGS PER SECTION 325-134B AND RELATED SECTIONS AND DEFINITIONS, THAT THE PROPOSED LOCATION OF THE ACCESSORY STRUCTURES IS PROHIBITED ABSENT A VARIANCE FROM THE ZONING HEARING BOARD. MR. SEILER SECONDED THE MOTION. MOTION PASSED UNANIMOUSLY. THE REQUEST FOR APPEAL WAS THEREFORE DENIED.

Mr. Markey stated the Zoning Hearing Board has seen multiple occasions on issues related to multiple front yards and has consistently been sympathetic to that issue from a land use planning perspective. The applicants also walked through the criteria for the granting of a variance and provided rationale to support their case. Therefore, Mr. Markey recommended approval of the variance with the following motion:

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Proposed Motion #2: Motion to approve the applicant's variance request for the proposed location of the accessory structures.

IN THE CASE ZHB-2023-0009 MR. BAIR MOVED TO APPROVE THE APPLICANT'S VARIANCE REQUEST FROM TOWNSHIP ORDINANCE 325-134 ON THE PROPOSED LOCATION OF ACCESSORY STRUCTURES IN THE FRONT YARD. MR. SEILER SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY.

Mr. Markey commented on the applicant's variance request concerning lot coverage. The zoning ordinance mandates a maximum of 50% lot coverage. The applicant is requesting a variance to increase the lot coverage to 50.01% which could be considered a de minimis variance and a matter of discretion for the Zoning Hearing Board to determine whether or not the deviation is so slight that it does not justify the strict application of the variance criteria. Mr. Markey recommended the following motion:

Proposed Motion #3: Motion to approve section 325-91 lot coverage variance of 50% coverage mandated maximum and approve the 50.01 proposed coverage, the same as de minimis in nature and/or is a justified variance legally.

Mr. Bair shared he feels the members of the public that provided comments this evening about the retention ponds have legitimate concerns and asked Solicitor Markey if there is anything the Board can do to have Inch & Co. take action to mitigate the problem before the Zoning Hearing Board allows the additional lot coverage. Mr. Markey responded that the questions and concerns on the retention ponds are beyond the jurisdiction of the Zoning Hearing Board, and Chairman Achenbach has suggested that the public contact the Zoning and Enforcement Department to follow up on their concerns. As Mr. Heilman indicated, the Township Engineer is already reviewing it. Mr. Markey believes it would be difficult not to defend the variance request to ordinance 325-91 due to its de minimis nature. Chairman Achenbach asked the Solicitor if it would be possible to add a condition that acceptance of the variance request be supported by a continuing commitment to not exceed coverage approved. Mr. Markey responded that the point is made clear in the motion. If the applicant wants to add additional impervious coverage in the future, they would have to come before the Zoning Hearing Board. Mr. Eisenhauer referred to Exhibit C which provides a breakdown of their stormwater calculation analysis and noted there is available capacity in the basins on site. Inch & Co. is beholden to the York County Conservation District and PA DEP for their NPDES permit and cannot close the permit until the retention pond is converted to its final form. Therefore, it is a high priority for Inch & Co. to convert the pond to get off the permit. Since the stormwater design has additional capacity, the additional lot coverage requested would not exceed design capacity. Mr. Achenbach summarized the current discussion, noting the applicant is aware of the issues and concerns shared this evening and is expected to take those concerns into account; however, if the project does not proceed as quickly as the public would prefer, that is beyond the authority of the Zoning Hearing Board.

IN THE CASE ZHB-2023-0009, MR. SEILER MOVED TO APPROVE SECTION 325-91 LOT COVERAGE VARIANCE OF 50% COVERAGE MANDATED MAXIMUM AND APPROVE THE 50.01% PROPOSED COVERAGE, THE SAME AS DE MINIMIS IN NATURE. MR. BAIR SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY.

Chairman Achenbach thanked the public for attending and asked if there was any other business to come before the Board. Hearing none, he entertained a motion to adjourn.

5. ADJOURNMENT

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MR. BAIR MOVED TO ADJOURN THE MEETING, SECONDED BY MR. SEILER. THE MEETING ADJOURNED AT 7:17 PM.

Respectfully submitted,

Secretary
/jht