

PATRICK O. and KATHLEEN A. SHAW,	:	IN THE COURT OF COMMON PLEAS OF
Husband and Wife; LOIS McNUTT;	:	LYCOMING COUNTY, PENNSYLVANIA
DAN and MARY DOYAL, Husband and	:	
Wife; DAVE and M.L. SMITH, Husband	:	
and Wife; JAMES COLBURN; CHARLES	:	
and VICTORIA HESS, Husband and Wife;	:	
RICK and JANE UMPSTEAD, Husband	:	
and Wife; JOHN and BARB QUINN,	:	
Husband and Wife,	:	
Appellants	:	
	:	
vs.	:	NO. 01-00,255
	:	
BOROUGH OF MUNCY ZONING,	:	CIVIL ACTION – LAW
HEARING BOARD; and BOROUGH	:	
OF MUNCY,	:	ZONING DECISION AND APPEAL ORDER
Appellees	:	
	:	
THE MUNCY BANK AND TRUST	:	
COMPANY,	:	
Intervenor	:	

**Date: October 31, 2001**

**DECISION AND ORDER**

On January 17, 2001, Appellee Borough of Muncy Zoning Hearing Board (Muncy ZHB), granted Intervenor, The Muncy Bank and Trust Company's (Bank) appeal and reversed a decision of the borough zoning officer which had denied the Bank's request to modify a non-conforming use, thereby permitting the Bank to erect a one-story drive-through bank at the north-east corner of South Main and New Streets in Muncy. Muncy ZHB also granted the Bank's request for a variance to permit the use of this residentially zoned parcel for the drive-in

bank. Appellants Shaw, et al., property owners in the borough, filed this appeal on February 16, 2001.<sup>1</sup> The parties have elected to proceed without introducing new evidence. Argument was held on September 15, 2001. Appellees raise two essential issues –

- A. WHETHER MUNCY ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN GRANTING BANK PERMISSION TO CONTINUE THE NONCONFORMING USE WHICH INVOLVES DEMOLITION OF THE STRUCTURE CURRENTLY EXISTING ON THE SUBJECT PROPERTY FOR CONSTRUCTION OF A COMPLETELY NEW NONCONFORMING USE.
- B. WHETHER MUNCY ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN GRANTING BANK A VARIANCE

*See*, Appellee’s Brief, p. 5. Appellees also contend Muncy abused its discretion and erred as a matter of law in considering its prior ruling on a separate variance application and considering this prior decision as binding.

The Bank as Intervenor raises two procedural challenges to the Appeal. The first challenge is that the landowner, Matthew T. Gibbs, was not served at any time with notice of the Appeal and has not entered an appearance in this matter. The second procedural issue relates to the failure of the Appellants to attach to the notice of the Appeal, a Lycoming County Rule L.1007 Cover Sheet as required by Lycoming County Rule L.1007, which delayed the processing of the Appeal.

For the reasons stated herein the Appeal must be DENIED.

**I. HISTORY AND EVIDENCE PRESENTED TO THE MUNCY ZONING HEARING BOARD.**

Bank, as "Buyer," entered into a written agreement of sale with Matthew T. Gibbs, the owner of the real property situate at 319 South Main Street, Muncy, Pennsylvania. The

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<sup>1</sup> In the transcript of the January 17, 2001, hearing, Appellees “Shaw” were correctly referred to as “Shull.”

agreement was conditioned upon zoning approval of the planned use by the bank. The agreement specifically provided that Muncy would apply for all building, zoning and use permits. On November 9, 2000, Muncy filed an Application for Building, Sign and Use permits with the Zoning Office of Muncy Borough. The request was to demolish the existing nonconforming building and to construct a drive-through banking facility. The application was indexed to No. H1836. The Zoning Officer "rejected" the application on November 21, 2000, and issued a written determination. The basis for denying the application was that a change of nonconforming use, pursuant to §501 of the Muncy Zoning Ordinance, was not permitted due to the Zoning Officer determining that although the change of use would appear to be desirable it would adversely effect traffic and safety. On December 7, Bank requested the Muncy ZHB to 1) reverse the determination of the Zoning Officer; and 2) grant a variance.

A hearing was held on January 11, 2001. A decision hearing was announced on January 17, 2001. At that time the Muncy ZHB orally decided in favor of the Applicant by a three (3) to zero (0) vote. The written decision was subsequently distributed on February 21, 2001. Muncy ZHB in their decision statement held that the new proposed use of the property will be less objectionable than the current non-conforming commercial use. Muncy ZHB further held that a variance is needed because the property in question cannot be developed in conformity with the provisions of the Muncy Zoning Ordinance.

Appellants filed their Appeal with this Court on February 16, 2001. Appellants are residents and owners of property located on South Main or New Street in Muncy. The Borough of Muncy and the Attorney for the Bank received a Notice of Appeal on February 22, 2001. Matthew T. Gibbs, the landowner, was not served with a Notice of Appeal. The Bank

filed a Notice of Intervention pursuant to Section 1004A of the Municipal Planning Code (53 P.S. 11004A).

The Bank's Zoning Application No. H1836, requested a permit to erect a one-story brick building and canopy for the purpose of a drive through banking (*See*, Transcript, Lines 21-24, at 2). Construction of the structure proposed by the Bank would involve the complete demolition of the currently existing structure. (*See*, Transcript, p. 21, Lines 22-23) ("Q - Does the bank plan on demolishing the building? A -Yes, we do."). The new bank facility will have four (4) window/lanes and one automatic teller machine lane. The proposed building would not be open to walk-in customers. The plan indicates there would be three (3) parking stalls to serve the employees working at the facility. Each lane could accommodate seven (7) waiting cars, more than the anticipated maximum use. The planned building, sign, and drive-through canopy are colonial in design to conform to the character of Muncy Borough. Curbs and sidewalks are planned to improve the safety of the corner lot. PennDOT has approved the entrance and exit designs. The parcel design includes areas of grass and landscaping for the facility, as well as the lighting, intended to improve the aesthetics of the area and protect the residential area.

The subject property is located in an R-2 Zone. (*See*, Transcript, at 3, Lines 16-17). Pursuant to the Borough of Muncy Zoning Ordinance, the intent of the R2 Zone is ". ..to provide an area for one- and two-family dwellings while preserving the character of the areas included in the district." (*See*, Borough of Muncy Zoning Ordinance, §303, at 267). A drive through banking facility is not a permitted use within an R-2 Zone. (*Id.*)

The structure currently located on the subject property was existing prior to the enactment of zoning in Muncy, having been built in the 1930's or prior thereto. (*See*, Transcript, p. 3, Lines 23-25, 91, 109). It was originally utilized as a commercial structure for auto sales, but has also been used as a wire manufacturing plant, for heating oil distribution, a garage and most recently in the early 1990's as a car dealership. This structure has remained virtually unchanged physically since prior to the enactment of zoning in Muncy. Accordingly, at the time of enactment of zoning in the Appellee Borough of Muncy, the structure currently located on the subject property was nonconforming.

The building occupies most of the parcel with a rear yard of one (1') foot on Green Street, a side yard on New Street of three (3') feet and a front yard on South Main Street of twenty-three (23') feet. No curbs are in existence and the street rights-of-way are used for parking and an entrance area.

The property is vacant but until the Agreement of Sale between the owner and the Bank, it was on the market for sale and was listed with real estate brokers as a commercial property. In 1996, the zoning board granted a variance to allow the building of a loading dock in connection with a proposed commercial use by a prospective buyer. That purchase did not occur and the property remained vacant. The building is currently in very poor condition to the extent that the Zoning Officer characterized its condition as "terrible." The borough health officer wrote a letter to the zoning application (Exhibit 5) stating that the building had been "condemned", was not fit for "human habitation" and "it is the opinion of this officer that demolition of this deteriorated structure is the only effective abatement of any and all hazards and realized dangers." *See*, Hearing Exhibit 5.

The Board also heard testimony concerning the nature of the landscaping, screening and lighting the Bank proposed in order to minimize its impact upon adjoining residential parcels. (*See*, for example Transcript, pp. 11, 14, 17, 18, 39.)

The significant area of inquiry in the testimony received by Muncy ZHB centered on traffic and safety concerns. Testimony was presented that the Bank expected an average of 180 cars a day to visit the Bank. (*See* Transcript, p. 26.) The Bank's plans include appropriate sidewalks, curbs, entranceways and markings in order to satisfy PennDOT, including accommodating 28 cars in line at any one time without interfering with highway traffic, was also part of the evidence. (*See*, Transcript, pp. 26, 27-29, 32-33, 79.) PennDOT had approved the preliminary plans for traffic control and driveway exits and entrances. PennDOT regarded this driveway as low volume. PennDOT would need to give final approval to the plans.

Many of the Appellants presented testimony relating to their concerns as to increased traffic flows because of the nature of this business. They gave testimony of their views as to the impact of this traffic upon the intersection of South Main and New Street, which appeared to have high use by school children and also the impact upon the general flow of traffic within the neighborhood. (*See*, Transcript, pp. 24-28, 39-40, 47-52, 120, 162.) The testimony included concerns that increased traffic would be a hazard to school children and other pedestrians, particularly to those crossing Main Street. Testimony of the Appellants also indicated the children would face increased danger as they walked easterly along New Street and crossed Green Street at the east end of the lot where the drive-in structure was to be built. Appellants also had concerns that pulling from their driveways onto New Street would be

hampered by more congestion at the New Street, Main Street intersection caused by the traffic exiting the Bank. There was testimony supporting the fact that if traffic were allowed to travel north on Green Street it would impact adversely on the neighbors that utilized that street.

Other testimony was presented to Muncy ZHB that prior uses also created traffic concerns and safety problems at the property. Those traffic hazards were attributed to the nature of the use of the property, the lack of appropriate pull-off areas, and the lack of sidewalks and curbs, if not necessarily actual numbers of vehicles. (*See*, Transcript, pp. 88-89, 93-95.) Testimony was given that even the current situation, with the property being unoccupied, presents a hazard for school children who walk past the building on New Street due to the proximity of the building to the street lines. (*See*, Transcript, p. 95.) Traffic in this area as in other areas of Muncy was a major concern for all planning purposes. (*See*, Transcript, p. 120.) A borough councilman also testified that increased traffic on Main Street in Muncy would inevitably be a problem regardless of the Bank's development, because of business changes and increased traffic flows relating to developments that were occurring outside of the Borough of Muncy.

The Muncy ZHB also heard testimony that the condition of the property is, as it presently exists, a law enforcement problem from the Muncy Chief of Police. (*See*, Testimony, p 86.) He also noted the danger the building currently presented to school children and other pedestrians because of its close proximity to the street traffic lines without any separation by curb or sidewalk. This problem had been more severe when the present building was used previously as an automobile dealership. When the building was used as a car dealership, the

police had problems with inappropriate parking by customers' cars and also large trucks stopping and blocking traffic on the streets.

The Chief of Police also testified the use of reduced speed zones and increased traffic controls would be able to be implemented if Appellants' traffic flow concerns became a reality. Also, if necessary, he stated school crossing guards could be provided at the intersection.

The current structure was generally regarded as an eyesore (*see*, Transcript, pp., 57, and 98). It is also subject to vandalism. It generally is regarded as intruding into and being inconsistent with the historical character of much of the main street Muncy area (*see*, Transcript pp. 104-108.) Although some testimony was offered that the Bank's colonial style of architecture, of its drive-through facility, would also be an intrusion of the architectural integrity of the area, there was also testimony to the style of the structure that would improve the neighborhood from an appearance and environmental point of view and be less an intrusion into the historical integrity of the area. (*See*, Transcript, pp. 172-174.) There was also testimony that the prior automobile businesses often illuminated the property with bright lights late into the night.

Finally, one witness testified suggesting that the building might be able to be continued in use as a warehouse with a lesser amount of traffic visiting the premises under normal warehouse use statistics.



## **II. DISCUSSION**

The parties are in agreement as to the standard of review, which this Court must apply in determining the issues, presented by this Appeal.

...If the record below includes findings of fact made by the ... board ... whose decision or action is brought up for review and the court does not take additional evidence ... the findings of the ... board ... shall not be disturbed by the court if supported by substantial evidence. Municipalities Planning Code §1005-A, 53 P.S. §11005-A.

Therefore, we must review the board's decision to see whether the board committed a manifest abuse of discretion or an error of law. An "abuse" of discretion can be found only if the board's findings are not supported by substantial evidence, which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550,462 A.2d 637 (1983).

Where a court does not receive evidence, it reviews a decision of a zoning hearing board to ascertain whether the board committed an abuse of discretion or an error of law. An abuse of discretion can be found only where the board's findings are not supported by substantial evidence. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249,721 A.2d 43 (1998). An abuse of discretion occurs when necessary findings of fact are not supported by substantive evidence. *See, Otto v. Zoning Hearing Board of Hampden Township*, 686 A.2d 36, 38 (Pa. Cmwlth. 1997). Where a lower court does not receive evidence, it cannot weigh the evidence or determine arguable questions or credibility. Instead, it reviews the findings of the board to see whether they are supported by substantial evidence. *Appeal of deBotton*, 81 Pa. Commonwealth Ct. 513, 474 A.2d 706 (1984).

Having carefully reviewed and considered the record below, this Court must conclude there was no abuse of discretion or error of law committed by the Muncy ZHB. The Appeal must be denied and the decision of the Muncy ZHB upheld. This is because this Court is satisfied, regardless as to how the Court might have resolved the credibility and the weight of evidence introduced on the issues presented to the Muncy ZHB, that the Muncy ZHB's decision as to granting the Bank's application for a change of use is supported by substantive and significant evidence on the record as well as by the procedures and standards applicable in the Zoning Code.

**Change Of The Non-Conforming Use**

The parties agree that the controlling and governing provision of the Muncy Zoning Ordinance concerning the change in use of a nonconforming use is §501., 1., at p. 301, which reads as follows:

2. Except as otherwise provided in this section, a nonconforming use of a structure may be continued and may be changed to another nonconforming use of the same or of a more restricted nature, provided no structural alterations are made other than those ordered by an authorized public office to assure the safety of the structure, and provided further that such continuance of or change of nonconforming use does not displace any residence use in a residence district established by the Chapter. In addition, a nonconforming use of a structure may be changed to another nonconforming use provided that the applicant shows that the proposed change will be the same or less objectionable in external effects than the existing use with respect to:

- A. Traffic generation and congestion including truck, passenger car and pedestrian traffic.
- B. Noise, smoke, dust, fumes, vapors, gases, heat, odor, glare, or vibration.
- C. Storage and waste disposal.

- D. Appearance.
- E. Character of the area.
- F. Health, safety, and welfare of the area in which the non-conforming use is in question.

If the Zoning Officer is satisfied that the proposed change in use (is...sic) the same or more restrictive and that the applicant has shown that the proposed nonconforming use is the same or less objectionable than the existing use, a permit may be issued.

Appellants also rely on §501(6):

. . .[A] nonconforming structure may be maintained, but shall not be enlarged, expanded, or extended; no structural alterations shall be made other than those ordered by an authorized public officer to assure the safety of the structure.

Borough of Muncy Zoning Ordinance, §501.,6., p. 303.

It is significant to remember that the Muncy ZHB's interpretation of the Muncy Zoning Ordinance is entitled to great weight and deference by this Court. (*See, Smith v. Zoning Hearing Board of Huntington Borough*, 734 A.2d 55 (1999)). This principle of law has particular application in this case. One of the significant issues dealt with at the Muncy ZHB was testimony concerning the appropriateness of changing the use under §501., 2., A., and F., relating to traffic generation and congestion and the health, safety and welfare of the area in question. It is clear from the testimony that many of the concerns expressed by the proponents and opponents, to the Bank's application, made certain basic assumptions as to the knowledge of the Muncy ZHB members regarding the use of the affected streets, New and Main, by vehicles as well as pedestrians. Obviously the members of the Muncy ZHB had this awareness and an understanding of the significance of the expressed concerns. This is illustrated by one

of the Muncy ZHB members raising, on his own, a concern regarding traffic and pedestrians, particularly school children. (*See*, Transcript, pp. 39-41.)

The Intervenor's brief aptly recites the testimony that no doubt impressed the Muncy ZHB and demonstrates its decision was based on the evidence presented to it.

The transcript demonstrates that the construction of the bank will create much less noise than the past auto repair shop and oil depot located on the property. The speakers for communication between the tellers and drivers will be designed for privacy. The Bank will have some directional lights to be used during business hours with minimum security lights at other times. (*See*, Transcript of Hearing, Lines 6-13, at 15). Muncy ZHB imposed an additional condition that the lighting of the bank sign and the flag pole be placed so it does not shine into any of the neighbor's homes and required that the intercom system not distract neighbors. (*See*, January 17, 2001. Decision of Appellee Borough of Muncy Zoning Board, at 5). Mr. Berninger testified that the only waste generated by the bank will be paper waste that will be stored inside the building and picked up weekly. (*See*, Transcript of Hearing, Lines 10-13, at 37). The transcript demonstrates that the appearance and character of the area will greatly improve with the new proposed use of the property. The building plan for the Bank will include grass areas and landscaped shrubs. (*See*, Transcript of Hearing, Lines 22-24, at 14). The buildings and canopy designs will conform with the colonial nature of Muncy. (*See*, Transcript of Hearing, Lines 13-14, at 14). In addition, Muncy ZHB imposed a restriction that the sign for the Muncy Bank must be less than 4'6" in height and 7' in width and not be self-illuminating or flashing. (*See*, January 17, 2001. Decision of Appellee Borough of Muncy Zoning Board, at 5). The transcript further shows that the safety and welfare of the entire community will greatly improve with the construction of the bank. Public safety will be promoted with the planned construction of sidewalks and curbs to protect pedestrians. (*See*, Transcript of Hearing, Lines 5-6, at 14). Muncy ZHB also required that the exterior perimeter have curbing and sidewalks with handicap accessibility. (*See*, January 17, 2001. Decision of Appellee Borough of Muncy Zoning Board, at 5).

There was testimony that indicated the present building posed dangers to school children walking on New Street. The Muncy ZHB also heard testimony of the demolition of the present building that sets within one foot of Green Alley and three feet of New Street could improve the safety of those children. This testimony included descriptions of the site views, curbs and sidewalks which would be constructed in connection with this change in use. The Bank and indirectly the Chief of Police testified these changes would improve the safety of those walking or driving on New Street even though the Bank would increase traffic flows on New Street. There was also testimony as to what the Borough and others could practicably do to reduce the traffic problems that existed in that area whether generated by the Bank or other sources. The Board also heard testimony as to the concerns of their Chief of Police relating to other law enforcement issues. It is obvious that the safety of the children and the general well-being children in the neighborhood were and could be adversely affected by the existence of a vacant, deteriorated building.

The effect of the hearing testimony could readily be viewed as demonstrating the proposed change of use would increase safety of pedestrians, particularly school children, by providing proper sidewalks and curbs and greater site views and otherwise promote the welfare and safety of the neighborhood. In fact, the Muncy ZHB so concluded. This determination was one that was within their discretion and one based on significant evidence.

How to weigh the credibility of the testimony of the witnesses that were present, the own self-interest of some of the neighborhood residents-Appellants, who objected to the Bank (some of whom acknowledged parking close to and/or making use of the property) whether the number of cars using the Bank would prevent residents using their driveways, the comparison

of these different factors and how they would overall affect traffic generation, congestion, health, safety and welfare, were appropriately considered by the Muncy ZHB. These factors were all matters the Muncy ZHB would be much more aware of than would this Court, as would relate to the needs of their community and the impact upon its residents. This is particularly true where this Court is reviewing the matter solely on the transcript without a chance to consider the demeanor and other credibility aspects of the individuals giving testimony.

The Muncy ZHB obviously did not ignore the traffic and other safety concerns. The Board in rendering its decision also remedied the concern of increased traffic flow north on Green Street by imposing a requirement that all traffic exiting the Bank turn right onto Green Street, thus preventing any traffic from travelling north on Green. In fact, their decision specifically addressed those matter indicating a reliance upon the final approval of PennDOT as being appropriate to satisfying certain safety issues and also imposing its own restriction that no left-hand (northerly) turns could be made onto Green Alley from the facility. There is no way for this Court to conclude that the decision of the Muncy ZHB was not a reasonable conclusion for them to reach from the evidence that they took into consideration. The decision shows the Muncy ZHB thoroughly took into account the concerns expressed by those in attendance at the hearing and did not overlook nor disregard evidence but rather made a careful determination based on it. It certainly cannot be said that they abused their discretion.

Appellants challenge the decision in another way, that is, that the Ordinance, despite any testimony introduced, does not authorize this type of change in a non-conforming use. Therefore, Appellants argue that the Muncy ZHB made an error of law in granting a change in

the non-conforming use. This Court believes the argument of Appellants to be resourceful but not correct. In the first instance, the Zoning Ordinance does not state that a non-conforming use cannot be changed. What the ordinance does under §501.2 is set certain limitations upon the type of change. In the first instance, it provides that a non-conforming use of a particular structure may be changed if the enumerated criteria, A. through F., would be the same or less objectionable in external effects than the existing use. As the Zoning Hearing Officer accurately noted criteria C., Storage and Waste Disposal, criteria D., Appearance and criteria E., Character of the Area would clearly be the same or less objectionable. The Zoning Officer's main concern was the traffic to be generated by the Bank and its safety impact. It is not clear if he had knowledge of the exact traffic numbers and the PennDOT approval presented to the Board. Regardless, the Muncy ZHB overruled his determination relating to traffic generation and health and safety. The Muncy ZHB had the full authority to make this determination under the Zoning Ordinance procedures. They also had received testimony and new facts justifying their decision, as noted in our discussion above.

The Zoning Hearing Officer had felt criteria B., relating to noise, smoke, dust, fumes, vapor gases, heat odor and vibration would generally favor granting of the change of use, if the Bank could address the noise issues. Before the Muncy ZHB the Bank testified as to how it could address the noise issue and the Muncy ZHB imposed an appropriate limitation in that regard. Similarly, although not greatly discussed, was the fact that the lights of this new use were to be appropriately controlled and there was testimony to the fact that such lights could not be any worse than the lights of the previous used-car lot.

Appellants argue, however, this should not even be considered since these criteria are established in the second sentence of 501.2., and that the first sentence clearly prohibits such a change. This argument is rejected. Section 501 permits a change of use under two theories, under the second sentence criteria A. through F., listed above, and also under the provision of the first sentence. Clearly, the second sentence is to be distinguished from the first not only in its sentence construction but also in the clear use of the words in the beginning of the second sentence, “In addition.” The first sentence starts out with the words “Except as otherwise provided in this section,...” Obviously, the first sentence sets itself apart from the other provisions of the entire §501. The first sentence then goes on to provide that a non-conforming use can be changed to another non-conforming use which is of the same or more restricted nature, provided no structural alterations were made other than those ordered by an appropriate officer to assure the safety of the structure and provided that the use does not displace any residence in use in the residential district. It is obvious that this change of use provision in the first sentence of 501., 2., gives an absolute right for an owner to make the change of use from one non-conforming use to the other if there are no structural alterations and if the use is to be of a more restricted nature and does not displace a residence. The criteria established by the second sentence do not apply to a change made under the first sentence.

This sentence clearly does not apply to the case before us. The change of use that is to occur will involve structural alterations, in fact, as Appellants correctly argue, the complete demolition of the structure which is the ultimate structural alteration. The Bank argues the Health Officer has directed the building is uninhabitable and should be demolished. However, the Muncy ZHB did not consider this letter as being an order under sentence one of §501.2.



Rather, it was evidence of the current condition and how it might be improved by demolition. Therefore, the Muncy ZHB correctly looked to whether or not other provisions of §502, which would include the second sentence referenced above, would allow the change of use.

The second sentence does not relate or state in any way that a change of use under the requirements of criteria A. through F., of that sentence, are to be applied in granting or denying a change of use under the first sentence where there are no structural alterations or changes or destruction. If the Zoning Ordinance meant to include those conditions, it could have clearly said so either by stating in simple terms at the outset of 501., 2., a statement to the effect that a non-conforming use cannot be changed if the change involves structural alteration. Or, in the second sentence, it could have stated, “In addition to the foregoing limitations,” referring to the first sentence. It did not do so. Nor does it include a condition for any of the criteria under the second sentence that there are no structural changes. It could easily have provided such a criteria by adding it as criteria “G.” at the end. Instead, the second sentence starts with the clear words, “In addition,... without stating thereafter words such as, “if the provisions of sentence one are met for a non-confirming use of a structure to be changed the following criteria must also be met.” Clearly then, the second sentence establishes criteria to be applied to a change of a non-conforming use which does involve structural change.

Granted, the second sentence does say after its introductory of “In addition,...” “...the non-conforming use of a structure may be changed...,” if the criteria are met. This gives rise to the argument of Appellants that the existing structure must be maintained. However, this Court does not believe the use of the word “structure” in the second sentence acts to restrict replacing the structure if doing so meets the criteria of the ordinance. To the contrary, the

wording means the Muncy ZHB had the authority to change the use of the existing structure to that of being a bank with appropriate structural changes. There is no limitation which states any part of the existing structure must be maintained. The ultimate structural change being demolition, it must be permitted as the ordinance does not prohibit it nor place limitations on the reconstruction or replacement structure. Such limitations do exist in the Ordinance if a non-conforming use is damaged by a storm, earthquake or similar disaster. The drafters of the ordinance obviously chose not to make those or similar limitations apply to a voluntary structural change.

In further support of this Court's reasoning and determination of this issue, the Court relies upon the persuasive arguments set forth in the brief of the Muncy ZHB, pages 3-7.

Also, the Intervenor's brief correctly states the following:

Appellants also rely on the case of *Money v. Zoning Hearing Board of Hauerford Township*, 755 A.2d 732 (Pa. Cmwlth. 2000). The Court in that case was ruling on the proposed replacement of a nonconforming garage/chicken coop with anew nonconforming garage.

We recognize that, where a building has become so dilapidated that complete reconstruction is necessary, a zoning ordinance may bar reconstruction in the interest of the public health, safety, morals or general welfare. However, such a restriction must be specifically set forth in the ordinance and absent such regulations, a landowner seeking to continue a valid nonconforming use must be permitted to do so. 755 A.2d at 738.

The Muncy Zoning Ordinance does not specifically bar the rebuilding of a razed nonconforming structure, and Section 501 (2) permits a change of nonconforming use and structural modifications.

### Variance

The Muncy ZHB correctly granted a use variance to permit the property to be used for a bank. The use variance determination may be superfluous given this Court's upholding of the change of a non-conforming use. Nevertheless, to the extent the grant of a variance is essential to the Bank's intended plans, this Court again finds that the Board acted correctly in granting the variance based upon the evidence presented to it as well as the law that is applicable.

Section 910.2(a) of the Municipalities Planning Code governs variances. *See*, 53 P.S. §10910.2(a) and Borough of Muncy Zoning Ordinance, §604. A variance may be granted, provided that all of the following findings are made where relevant in a given case:

- (1) That there are unique physical circumstances or conditions, including irregularity , narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
- (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
- (3) That such unnecessary hardship has not be created by the applicant.
- (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property , or be detrimental to the public welfare.

- (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

*See*, 53 P.S. §10910.2(a)(1)-(5). The provisions of Section 910.2 are mirrored in §604(1)(A)-(E) of the Borough of Muncy Zoning Ordinance. In holding the Bank should be granted a variance under this ordinance the Muncy ZHB stated:

The Muncy Zoning board being in full attendance of all board members hereby grants the applicant permission to continue the non-conforming use of the property located at 319 S. Main St.

SS604.1.B A variance is needed because it is the opinion of the board that the property in question can not be developed in strict conformity with the provisions now put upon it.

SS604.1.C We find that the applicant has not created the hardship.

SS604.1.D We find that the proposed changes will not alter the essential character of the neighborhood, nor will it be detrimental to the public welfare.

SS604.1.E We find that the variance will provide the best relief for the property.

SS501.2 We find that the proposed building has been a nuisance to the neighborhood, and has been a concern of the Health and Safety Officer. This section allows for the alterations for a non-conforming building if ordered by the Safety officer. The applicants exhibit #5 has confirmed this situation.

It is well-settled law in Pennsylvania that a property owner's burden to establish entitlement to a variance is a heavy one and a variance should be granted sparingly and only under exceptional circumstances. *See, e.g., In re Appeal of Lester M. Prange, Inc.*, 166 Pa. Cmwlth. 626, 647 A.2d 279, 283-284 (1994). This is especially true where, as here, the variance is sought for a commercial use in a residential district. *See, e.g., Appeal of Fiori*, 69 Pa. Cmwlth. 463, 451 A.2d 804, 806 (1982). The party seeking the variance bears the burden

of proving that (1) unnecessary hardship will result if the variance is denied; and (2) the proposed use will not be contrary to the public interest. Furthermore, a variance will not be granted solely because the applicant will suffer an economic hardship if he does not receive one. *See, O'Neill v. Zoning Board of Adjustment*, 434 Pa. 331, 254 A.2d 12, 14 (1969).

Appellants raise a challenge to the variance primarily on the basis that hardship of the need to use this property as a bank and to change the use is a self-imposed hardship, that is, that the need to have a use variance has been created by the Bank itself. Therefore, Appellants strenuously argued that since the zoning variance criteria both under the state Municipalities Planning Code and the Muncy Borough Zoning Ordinance condition the grant of a variance upon the applicant not having created the hardship that the Bank cannot possibly be granted a variance. Again, this Court believes the Appellants misconstrue the law and perhaps the facts as would relate to how the hardship found to exist by the Muncy ZHB was created.

In regard to self-imposed hardship the Bank argues a prior owner imposed the hardship. The Court believes that it makes no real difference whether such hardship, if it was created by the owner, the Bank is the owner in creating the hardship, or, whether it was the record title owner, Mr. Gibbs, or whether one of their predecessors in title created the hardship. This Court believes that the circumstances creating the hardship had been created by the preceding owner or the applicant for zoning, the applicant would be bound by any hardship created by the predecessor. Otherwise, anyone could easily obtain a variance in defiance of this statutory provision simply by the transfer of ownership of the parcel. Obviously such is not the intent of the zoning prohibition.

In this case, there is no question the present commercial structure has existed since the 1930's and perhaps prior thereto from the very early 1900's. It has remained virtually unchanged in physical characteristics over the years. The Muncy Borough Zoning Ordinance was adopted in 1976. It is not clear to this Court if there has been any change in this particular area under the zoning ordinance since 1976 but all parties agree that since the very first zoning ordinance this structure has been nonconforming. Under the terms of the Ordinance, the non-conformance both as to use, as well as to lot size, the hardship that has been created is that which was created when the Zoning Ordinance was adopted. The building was then in existence. The owners of the property did not create the hardship.

Overall, the evidence would support the wearing out and natural aging and nonuse from adverse market conditions for a commercial property of this type have caused the building to be as it exists, making the continued feasibility of using the lot to support its current structure a hardship.

Muncy ZHB heard extensive testimony as to the current condition of the property. A letter was read into the record from Alfred L. Poff from the Pennsylvania Department of Health. Mr. Poff's letter states that the current structure of the property in question is condemned. Mr. Poff further states that "This officer is not totally satisfied adequate repairs are feasible that could both guarantee structural integrity and provide an inhabitable structure. It is opinion of this officer that demolition of this deteriorated structure is the only effective abatement of any and all hazards and realized dangers." (*See*, Transcript of Hearing, Lines 7-25, at 20).

Further testimony regarding the current condition of the property was heard from Richard Sutton, Police Chief of Muncy. When asked about enforcement problems of the property, Mr. Sutton replied, "The enforcement has included weeds, trash, broken windows, not cleaning sidewalks during snow removals. A few years ago Mr. Gibbs acquired the building and the windows started to get broken. I called him, told him that he really needed to cover the windows because if he didn't, the kids were going to break the rest of them. He expressed no real interest in coming down and doing it. And that's exactly what happened. The kids broke a majority of them." (*See*, Transcript, Lines 9-17, at 86). The mayor of Muncy, Tony Rizzo, also testified as to the current condition of the property. Mr. Rizzo described the property as "very bad. It's deteriorated. The roofs falling in." (*See*, Transcript, Line 23, at 98).

The property in question is unique in its physical condition because it is, in essence, condemned and in a deteriorated condition. The variance is necessary to enable a reasonable use of the property. Due to the condition of the property, there is no possibility that this building can be developed without demolishing the building. The Health and Safety officer testified that demolition of the building is the only effective abatement of the hazards. The current building, therefore, has no reasonable use.

There was evidence that the subject property cannot be utilized in manner consistent with its R-2 zoning. This factor has been satisfied by the Muncy ZHB action. The Bank provided, and the Muncy ZHB accepted, evidence that the property cannot now be developed in conformance with the zoning ordinance. All agree the condition of the building is terrible. The property has been vacant for seven (7) to eight (8) years because no purchaser can be found to use the existing building. The diagram of the irregular shaped lot as attached to the

permit application is clear that it contains 16,200 square feet, is a corner lot with a frontage of 75 feet. The requirement in a "R2" district for a corner lot is 90 feet. The yard size requirements would also prohibit reasonable residential use (§303(6) of Muncy Zoning Ordinance).

The hardship of continuing the present use relates in part to the uniqueness of the lot. The lot has a frontage on South Main Street of 75 feet and on New Street of 180 feet making it a corner lot. It is rectangular in shape with a northern property line of 182.2 feet and an east property line along Green Alley of 105 feet. Lot area regulations for R-2 residential districts require a 25-foot setback from the edge of a lot line for any building as would relate to "front yards." On corner lots this side yard width also requires a 25-foot setback. Eight feet is otherwise required. A 35-foot setback is required from the rear. The lot size and shape is not a self-imposed hardship.

The hardship of the present building not being saleable or able to be used or occupied for any practical current commercial or non-commercial use is also not a hardship created by the owner. This is obviously a commercial structure that has become outmoded and outdated because of its age and the advancements which have been made in construction including such things as insulation, heating and air conditioning, electrical and plumbing systems. The inefficient older mechanical systems no doubt have been a factor in making this property not saleable on the open market as a commercial structure. The structure even lacks an appropriate loading dock – essential to almost any commercial use. Trucks making deliveries to prior users were required to stop and block traffic lanes on New Street or Main Street. Other prior commercial users had limited parking spaces available for employees or customers. These are



not conditions created by the applicant, but have resulted from advances made in the functioning of economic commercial structures over time. Although one person testified the property could be used as a mini-warehouse the evidence is otherwise. No prospective purchaser contemplating such use has come forward during the many years the property has been for sale. The building lacks a loading dock. Truck deliveries must be made by stopping in the street to unload.

Perhaps an owner's failure to appropriately maintain a structure and thus causing it to become so dilapidated that it must be torn down, of which there has been some testimony in this case, might be evidence the hardship is self-imposed. Also, such might be evidence of an abandonment of use. If an actual order for destruction of the property under an appropriate order of a government official because of routine normal property maintenance and neglect might also be evidence of self-imposed hardship. Although a health officer says the building may have to be demolished before occupancy, no such order has been issued.

The determination as to whether a self-imposed hardship has been created in this case largely depends upon the weight given to these various factors and the credibility given to the testimony of various witnesses. The Muncy ZHB has made a determination that the factors and testimony they heard satisfied it that the hardship was not self-imposed. The Muncy ZHB had substantial testimony before it to justify that determination.

In analyzing the hardship which will result if a variance is denied the second finding that a zoning hearing board must make in order to approve a request for a variance is that there is no possibility that the property in question can be developed in strict conformity with the

provisions of the zoning ordinance. *See*, 53 P.S. § 0910.2(a)(2) and Borough of Muncy Zoning Ordinance, §604(1)(B). The lot dimension requirements discussed above support this finding.

Under §303 of the Zoning Ordinance, §303., 6., E., lots must have a 90-foot width. It would appear that the appropriate interpretation as argued before this Court by the Zoning Hearing Board Solicitor, this 90-foot width requirement would apply both to the South Main Street frontage as well as the New Street frontage.

This is impossible to meet. The Appellants state there is no evidence to support the finding of the Muncy ZHB that the lot cannot be developed and used in compliance with the ordinance. This is not so since the Muncy ZHB had before it the maps and plot plans giving the lot dimensions, as well as the zoning ordinance itself. The limitation on use do to the shape and location of the lot is obvious. Even if the lot width of 90 feet is only said to apply to the New Street frontage, any house must be set back from New Street 25 feet and from its northern line 35 feet. This means the house could only be 15 feet in width if located near the western end of the property and although it could extend to approximately 50 feet in width if located at the extreme eastern end (taking into consideration the required 25-foot setback) the design of a house to fit the lot restrictions would prove challenging.

In essence the Board found that the lot was unique and that a variance for its use was appropriate. There was a great deal of testimony that the lot could not be developed in strict conformity with the provisions of the Zoning Ordinance.

There was substantial evidence to support the Muncy ZHB finding the variance is needed. In order to approve a request for a variance a zoning hearing board must also determine that the essential character of the neighborhood is not altered by the variance. *See*, 53 P.S. §18

10910.2(a)(4) and the Borough of Muncy Zoning Ordinance, §604(1)(D). There was testimony to the effect there would be no essential change in the character of the neighborhood but rather the area would likely be improved and the public welfare benefited. The record in this case is filled with testimony about how the proposed commercial drive through banking facility will be less of an impact than any of the nonconforming uses previously located on the subject property. This includes the fact that the subject property has been standing idle for at least six to seven years. (*See*, Transcript, p. 3, Lines 21-22.) (*See*, Notice of Appeal from Zoning Hearing Board's Decision, paragraph 9, at 4). The analysis of whether the proposed commercial drive through banking facility alters the essential character of the neighborhood must involve comparison with the current status of the neighborhood.

Legitimate concerns regarding vehicle trips per day, *inter alia*, were raised by Appellants at the public hearing. These concerns were considered but found by the Muncy ZHB to not be an altering of the current character of the neighborhood. There was substantial testimony that indicated that New Street and Main Street already carry a lot of traffic, to the school and to other businesses both inside and outside Muncy. There was testimony that regardless if this bank were not built, traffic, especially on Main Street, would increase. There was a lot of testimony about existing traffic congestion in other areas of Muncy. The Muncy ZHB had the discretion to determine if the additional traffic generated by this Bank would alter the essential character of this neighborhood which already experienced a lot of through traffic on these two streets. It did not abuse its discretion by holding the essential character would not be changed.

The final finding that a zoning hearing board must make in order to approve a request for a variance is that the variance represents the minimum variance, which will afford relief. *See*, 53 P.S. §10910.2(a)(5) and the Borough of Muncy Zoning Ordinance, §604(1)(E).

A great deal of open space is provided by the design. Muncy Bank plans to promote public safety by the construction of sidewalks and curbs. In addition, as noted by the plans there will be grass areas and landscaped shrubs. The size of the building constructed upon the premises is of limited size and seeks to conform to the colonial architecture. There was testimony of several residents and those associated with the Borough's historic concerns the demolition and new construction would enhance the area. Testimony also was received that the proposed building would be less intrusive upon the historical integrity of the area than the present one. The building and canopy will be designed to conform to the colonial nature of Muncy. These factors will improve the character of the area and the entire community.

It was reasonable for the Muncy ZHB to reach the conclusion that the proposed changes constitute a minimal variance which will not alter the essential character of the neighborhood, as it now exists, nor will it be detrimental to the public welfare. This Court cannot say otherwise and those judgments were judgments to be made by the Muncy Zoning Hearing Board. Muncy ZHB correctly found that the variance represents the best relief for the property. Muncy ZHB took extensive testimony as to what affect the proposed construction will have on the traffic, noise, safety and appearance of the neighborhood.

Muncy ZHB imposed nine conditions on the property to ensure that the proposed building will represent the minimum variance that will afford relief. (*See*, January 17, 2001. Decision of Appellee Borough of Muncy Zoning Board, at 5).

As stated above, the standard for review is limited to determining whether the Board's findings are supported by substantial evidence. It is clear that the findings of the board are supported by the evidence and there has been no abuse of discretion. Relevant evidence that a reasonable mind might accept as adequate to support a conclusion was submitted and was accepted. The variance as approved should be confirmed and upheld.

**Inappropriate Consideration of A Prior Zoning Variance Permit by the Muncy ZHB**

Appellants argue that the Muncy ZHB inappropriately considered testimony that in 1996 a variance was granted for the property so that a prospective purchaser was given authorization to construct a loading dock in contravention of the side yard dimensions. The Muncy ZHB does not discuss or refer to that grant of variance and thus the Court is unaware as to what impact, if any, it may have had. It did not appear to play any impact upon the decision. Nevertheless, it was not inappropriate for the Board to consider this testimony. If nothing else, it showed clearly that the owner had not abandoned the commercial use and intended continued commercial use of the property even though it had not been occupied since approximately 1993. It illustrated that the owner was making some efforts to find a buyer or occupant for the property for commercial purposes. Further, the fact that this sale was not consummated, despite the grant of the variance as the prospective purchaser had requested, is some indication contrary to that which has been suggested by one of the witnesses at the Muncy ZHB hearing to the effect that there were some other usable functions for the structure that exists on the property such as a warehouse. In essence, this shows that the essential feature such as a

loading dock that would be necessary for a warehouse could not be constructed without obtaining an appropriate variance, that is, without contravening the Zoning Ordinance. This is one of the criteria necessary for any variance to be granted. The evidence was relevant and apparently given appropriate consideration by the Muncy ZHB. In any event, the introduction of that testimony cannot be said to be an error of law. Nor does its consideration, for whatever use it did play in their decision, amount to any abuse of their discretion.

**Procedural Claims of Intervenor**

This Court, at oral argument, advised the parties that the procedural challenges raised by the Bank as Intervenor would be DENIED. The first challenges related to serve the landowner, Matthew T. Gibbs. In essence the real landowner has been served. The Bank is the vendee under an Agreement of Sale and hence vested with all the necessary aspects of title so that when the Bank was served the Municipalities Planning Code requirement that the landowner be served was met. This is especially true where this Agreement of Sale provides that it is the Bank who shall pursue all necessary zoning issues. If nothing else, the sale contract is a written document by which the landowner made the Bank his appropriate agent for purposes of this zoning matter including the Appeal. Perhaps parenthetically the Court also notes that Attorney Howard Langdon represented to the Muncy ZHB and/or the zoning officer that in essence, with the consent with both the Bank and Mr. Gibbs he was the attorney for both. There is no question that he was served and the Court can find no fault on the part of Appellants by causing service to be made upon him as well as the Bank.

Similarly, the challenge to the Appeal, because it failed to comply with Lycoming County Civil Procedural Rules in that an appropriate Cover Sheet under Rule L.1007 was not

attached, cannot be used as a basis for dismissing the Appeal. Rule L.1007 requires a Cover Sheet to be attached so that upon the filing of a zoning case an appropriate document is sent by the Prothonotary to the Court Scheduling Technician so the Court may be advised that a matter has been instituted that should be scheduled for a Caseflow Conference at which an appropriate trial or hearing dates can be assigned. It is the intent of the Rule, as to matters such as a zoning appeal, that they be placed on an Administrative Track and either scheduled at the next available non-jury trial term or scheduled at a special date if a hearing is necessary with the optimum time of scheduling being within ninety days of the filing of the appeal. Non-compliance with a local rule of court, however, cannot be used as a basis for dismissing an action including a properly filed zoning appeal, at least where service of notice of the appeal has been appropriately made. *Murphy v. Armstrong*, 662 A.2d 992 (Pa. Super. 1993).

Certainly it would be preferable for this form to have been attached to the zoning appeal and the matter could then rightfully have been scheduled for a prompt Caseflow Conference and in accordance with this Court's policy would have been so scheduled within thirty days of the filing of the appeal and no doubt an appropriate argument date set sometime within three months from the time the appeal was filed. The actual date of the hearing, however, could not have been until the transcript of testimony was supplied. This appeal was instituted on February 16, 2001, and the transcript was not filed until July 9, 2001. Accordingly, with counsel ultimately agreement they needed a sufficient period of time after filing of the transcript in which to determine first whether or not a further evidentiary hearing was needed and second to adequately brief their intentions. The Court, in holding argument on September 5, 2001, did not cause the parties to suffer any unavoidable delay in bringing this matter before

the Court. This is noted because of the fact that a scheduling conference was held on July 13, 2001, at which the parties indicated additional time was necessary to prepare the record of the Muncy ZHB proceedings. If anything, an earlier scheduling conference would have prompted a more speedy preparation of the transcript, although the Court is satisfied that the Borough and Zoning Hearing Board did use their best efforts to have the transcript prepared as quickly as possible. Nevertheless, it was the delay in the filing of this transcript, not the failure to file the cover sheet, that caused this case to linger somewhat before it was brought on for argument. Furthermore, counsel for the Borough and counsel for Intervenor were well aware that the case had been filed as they were appropriately served. Being served they would have recognized they did not receive from Appellant's counsel the necessary caseflow conference order, as might normally be expected if the cover sheet had been appropriately filed. Counsel for either of those parties could have easily contacted the Court Scheduling Technician and requested a Caseflow Conference if they felt a more timely conference was in order.

**ORDER**

The Decision Order of the Muncy Zoning Hearing Board dated January 17, 2001 as to their Docket #2000-5, is Sustained. The appeal is Denied. Each party is to pay their own costs.

BY THE COURT,

William S. Kieser, Judge

cc: J. Michael Wiley, Esquire  
J. Howard Langdon, Esquire  
Carl Barlett, Esquire  
Judges  
Suzanne R. Lovecchio (Law Clerk)  
Gary L. Weber, Esquire (Lycoming Reporter)