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**BARRY STONE, JEAN STONE, SANDRA Y. DIXON,
ELIZABETH MAGNER, AND RUTH RANALLI V.
CUMBERLAND TOWNSHIP ZONING HEARING BOARD V.
BRANDON S. KELLER**

1. A conclusion that the governing body abused its discretion may be reached only if its findings of fact are not supported by substantial evidence.

2. The Board's interpretation of the zoning ordinance it is charged with enforcing is generally entitled to a great degree of deference.

3. An owner asserting the protected status of a nonconforming use has the burden of proving that the use pre-dated the pertinent ordinance.

4. The property owner must provide objective evidence of the extent, nature, time of creation, and the continuation of the alleged nonconforming use.

5. In determining what a proper continuation of a nonconforming use is, i.e., whether a proposed use bears adequate similarity to an existing nonconforming use, the doctrine of natural expansion must be given effect.

6. The doctrine of natural expansion permits a landowner to develop or expand a business as a matter of right notwithstanding its status as a nonconforming use.

7. A nonconforming use cannot be limited to the precise magnitude that existed on the day when zoning was adopted, and the owner cannot be prevented from making necessary additions to an existing structure as needed to accommodate increased trade, so long as such additions are not detrimental to the public health, safety and welfare. Further, once it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural development and growth.

8. The Pennsylvania Supreme Court has held that when considering a nonconforming use, the use of the land is the sole question and that the extent, quantity, and quality of the use is immaterial.

9. The existing use is established once there has been a utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose.

**IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY,
PENNSYLVANIA, CIVIL 2015-S-1044, BARRY STONE, JEAN
STONE, SANDRA Y. DIXON, ELIZABETH MAGNER, AND RUTH
RANALLI V. CUMBERLAND TOWNSHIP ZONING HEARING
BOARD V. BRANDON S. KELLER.**

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Samuel E. Wiser, Esq., Attorney for Cumberland Township Board
of Supervisors

Aaron S. Marines, Esq., Attorney for Intervenor

Michael J. Toms, Esq., Attorney for Appellee

Wagner, J., May 4, 2016

OPINION

Before this Court is a Land Use Appeal filed by Appellants, Barry Stone, Jean, Stone, Sandra Dixon, Elizabeth Magner, and Ruth Ranalli (Appellants), on September 10, 2015. Appellants' Appeal is from an August 12, 2015 written decision by Appellee, Cumberland Township Zoning Hearing Board (ZHB), concerning the use of a parcel of land¹ (Property) owned by the Intervenor, Brandon S. Keller (Intervenor). For the reasons set forth herein, Appellants' Land Use Appeal is Denied.

BACKGROUND

The relevant procedural history and facts are as follows. Intervenor is the owner of 1714 Mummasburg Road, Cumberland Township, Adams County. The Property is zoned Agricultural Residential. On August 9, 2012 the Cumberland Township Supervisors (Supervisors) approved Intervenor's Application for Conditional Use to construct and operate a Concentrated Animal Operation consisting of 60,000 laying hens in two poultry barns on approximately 50.74 acres. The approved poultry barns are 71 feet x 688 feet and 46 feet x 558 feet. The conditional use approval was limited to Intervenor's proposal to install the poultry barns, egg packing room, grain bins, manure storage facilities, and related improvements that were described in site plans. The Supervisors approved the conditional use subject to seven conditions submitted by Intervenor and six conditions imposed by the Supervisors. Allowing poultry outdoors was not included in the conditional use approval.

Subsequent to approval of Intervenor's Conditional Use Application, the Supervisors amended the Cumberland Township Code to prohibit animal operations from Agricultural Residential zoned districts within Cumberland Township.

After the first barn was populated with poultry, Intervenor began constructing a fence for the purpose of allowing the poultry to roam outside between the barns. Cumberland Township's Zoning Officer (ZO) determined that allowing the poultry outside the barns in the fenced area was a change of use from the approved conditional use and issued a Notice of Violation (NOV) on March 26, 2015. Intervenor did not appeal the NOV. Instead, Intervenor filed an

¹ 1714 Mummasburg Road, Cumberland Township, Adams County, Tax Parcel Number 09E11-0068A-000.

Application for Special Exception seeking approval of the ZHB to expand the poultry farm to enable poultry to leave the barns and roam free inside the fenced-in areas between the poultry barns.

The ZHB held a hearing on the Application for Special Exception on June 17, 2015. Appellants were each granted party status before the ZHB. Intervenor presented testimony and exhibits in support of his Application for Special Exception. The ZHB prohibited Appellants from cross-examining Intervenor about the March 26, 2015 NOV or introducing the NOV as an exhibit.

The hearing was continued until July 15, 2015, and the ZHB requested the parties submit legal briefs on two issues.² At the commencement of the July 15, 2015 hearing, the ZHB ruled, based on discussions in executive session, that Intervenor's proposed expansion of his poultry farm was a non-conforming use that was neither an enlargement nor a change of use subject to special exceptions. The ZHB adjourned the hearing without any additional testimony or evidence.

In this Appeal, Appellants allege that the ZHB erred in the determination that Intervenor's permitted conditional use was now a non-conforming use and that the expansion of the use to allow outside access for the chickens was not an enlargement subject to special exception or a change of use. Appellants also allege that the ZHB erred in refusing to admit into evidence the NOV issued by the Township's ZO.

LEGAL STANDARD

In zoning cases such as the instant matter where the trial court does not receive any additional evidence, the scope of review is limited to determining whether the Board committed an error of law or a manifest abuse of discretion. *In re Petition of Dolington Land Group*, 839 A.2d 1021, 1026 (Pa. 2003). The Court does not substitute its own interpretation of the evidence for that of the Board. *Pietropaolo v. Zoning Hearing Bd. of Lower Merion Twp.*, 979 A.2d 969, 976 (Pa. Commw. Ct. 2009). "A conclusion that the governing body abused its discretion may be reached only if its findings

² The first issue was whether the conditions imposed by the Supervisors were still valid. The second issue was whether the proposed expansion of the poultry operation was an enlargement of the use within the meaning of the Code.

of fact are not supported by substantial evidence.” *Sutliff Enterprises, Inc. v. Silver Spring Twp. Zoning Hearing Bd.*, 933 A.2d 1079, 1081 n.1 (Pa. Commw. Ct. 2007). Evidence is substantial when a reasonable mind could accept it as adequate to support a conclusion. *Cardamone v. Whitpain Twp. Zoning Hearing Bd.*, 771 A.2d 103, 104 (Pa. Commw. Ct. 2001).

Moreover, the Board’s interpretation of the zoning ordinance it is charged with enforcing is generally entitled to a great degree of deference. *Ruley v. W. Nantemear Twp. Zoning Hearing Bd.*, 948 A.2d 265, 268 (Pa. Commw. Ct. 2008). The basis for this deference is the specific knowledge and expertise the Board possesses to interpret said zoning ordinances. *Willits Woods Assoc. v. Zoning Bd. of Adjustment City of Philadelphia*, 587 A.2d 827, 829 (Pa. Commw. Ct. 1991).

DISCUSSION

In the instant case, Intervenor’s poultry enterprise was approved as a conditional use on August 9, 2012. Subsequently Cumberland Township amended the Cumberland Township Zoning Ordinance to prohibit concentrated animal operations in Agricultural Residential districts within Cumberland Township. On March 26, 2015, the NOV was issued against the Property for a change of use from the approved conditional use. The Intervenor did not appeal this NOV. The Intervenor filed an Application for Special Exemption in accordance with 53 P.S. 10909.1(a)(6) and 53 P.S. 10912.1. Therefore, this Court must first determine whether the ZHB had jurisdiction in this matter based on Intervenor’s Application for Special Exception.

Appellants’ argue that the failure of Intervenor to appeal the March 26, 2015 NOV precludes the ZHB from considering Intervenor’s Application for Special Exception. In support of Appellants’ argument, Appellants cite to the following:

The law is well established that a landowner can contest whether his property is in violation of a municipality’s zoning ordinance only through an appeal to the municipality’s zoning hearing board and that failure to file such an appeal from a zoning violation notice conclusively establishes the violation of the zoning ordinance. *Young v. New Milford Borough*, 108 A.3d 203, 206 (Pa.

Cmwlth. 2015), *Lower South Hampton v. Dixon*, 756 A.2d 147, 150, 152 n.12 (Pa. Cmwlth. 2000); *Township of Penn v. Seymour*, 708 A.2d 861, 864–65 (Pa. Cmwlth. 1998); *Moon Township v. Cammel*, 687 A.2d 1181, 1185 – 86 (Pa. Cmwlth. 1997); *City of Erie v. Freitus*, 681 A.2d 840, 842 (Pa. Cmwlth. 1996); *Johnston v. Upper Macungie Township*, 638 A.2d 408, 411 – 12 (Pa. Cmwlth. 1994).

Appellants’ reliance on *Lower South Hampton Township v. Dixon*, *Young v. New Milford Borough* and the other cited cases is misguided. In all these cases the landowner was issued a NOV from the ZO and the landowner did not appeal the NOV. The municipality initiated civil enforcement proceedings against the landowner before a district justice and the district justice entered a judgment against the landowner. The landowner appealed to the court of common pleas, totally bypassed the ZHB and attempted to argue the validity of the zoning violation before the court of common pleas. In *Lower South Hampton Township v. Dixon*, the Pennsylvania Superior Court ruled “in light of these options, we cannot permit the Dixon’s to completely bypass the ZHB. To hold otherwise would deprive the ZHB of any opportunity to consider, in the first instance, a challenge to its zoning ordinance and would encourage other land owners to forgo appeals to their zoning hearing boards by raising the unreasonableness of the municipality’s filing fee in response to enforcement proceedings before a district justice or trial court.” *Id* at ____, 756 A.2d. at 151.

In this case, Intervenor did not look to bypass the ZHB concerning a challenge to the zoning but rather properly filed an Application for Special Exception with the ZHB so the ZHB could interpret the zoning issues in this case. This Court finds that the ZHB had jurisdiction to review the zoning issues in this case through Intervenor’s Application for Special Exception, in accordance with 53 P.S. 10909.1(a)(6) and 53 P.S. 10912.1.

Next, this Court must determine whether the ZHB correctly ruled that Intervenor’s permitted conditional use was a protected non-conforming use after the amendment of the zoning ordinance.

An owner asserting the protected status of a nonconforming use has the burden of proving that the use pre-dated the pertinent ordi-

nance. *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279 (Pa. Cmwlth. 1994). It is the burden of the property owner to establish that the use existed before the enactment of the zoning ordinance and that the use was lawful. *Hafner v. Zoning Hearing Board of Allen Township*, 974 A.2d 1204 (Pa. Cmwlth. 2009). The property owner must provide objective evidence of the extent, nature, time of creation, and continuation of the alleged nonconforming use. *Jones v. Township of North Huntingdon Zoning Hearing Board*, 467 A.2d 1206 (Pa. Cmwlth. 1983). This case is procedurally unique because the concentrated animal operation was allowed based on the approval of Intervenor's Conditional Use Application on August 9, 2012. Subsequent to this the Supervisors amended the Cumberland Township Code to prohibit concentrated animal operations, thereby making the use a non-permitted conditional use.

To qualify as a nonconforming use, the current use must be sufficiently similar to the nonconforming use as not to constitute a new or different use. *Limley v. Zoning Hearing Board of Port Vue Borough*, 625 A.2d 54, 55 (Pa. 1993). The proposed use need not, however, be identical to the existing use; similarity in use is all that is required. *Id.* In determining what a proper continuation of a nonconforming use is, i.e., whether a proposed use bears adequate similarity to an existing nonconforming use, the doctrine of nature expansion must be given effect. *Limley*, 625 A.2d. at 56. The doctrine of natural expansion "permits a landowner to develop or expand a business as a matter of right notwithstanding its status as a nonconforming use." *Pappas v. Zoning Board of Adjustment of the City of Philadelphia*, 589 A.2d 675, 677 (Pa. 1991). A mere increase in the intensity of a use cannot justify a finding of a new or different use. *Foreman v. Union Township Zoning Hearing Board*, 787 A.2d 1099, 1103 (Pa. Cmwlth. 2001). A nonconforming use cannot be limited to the precise magnitude that existed on the day when zoning was adopted, and the owner cannot be prevented from making necessary additions to an existing structure as needed to accommodate increased trade, so long as such additions are not detrimental to the public health, safety and welfare. *Paulson v. Zoning Hearing Bd.*, 712 A.2d. 785 (Pa. Cmwlth. 1998). Further, once it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural develop-

ment and growth. *Chartiers Twp. V. William H. Martin, Inc.*, 542 A.2d 985, 988 (1988).

The Pennsylvania Supreme Court has held that when considering a nonconforming use, the use of the land is the sole question and that the extent, quantity, and quality of the use is immaterial. *Appeal of Haller Baking Co.*, 145 A.2d 77, 79 (1928). Use is not based upon a requisite number of transactions. *Id.* The existing use is established once there has been a utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose. *Id.*

In *Cheswick Borough v. Bechman*, 42 A.2d 60 (Pa. 1945), the operators of a sand and sand loam business sought to extend their operations in depth and area. In determining that this extension of the business was proper, the Pennsylvania Supreme Court stated:

“The business carried on was the excavation of loam and sand loam. It is not essential that the use, as exercised at the time the Ordinance was enacted, should have utilized the entire tract. To so hold would deprive the owners of the use of their property as effectively as if the Ordinance had been completely prohibitive of all use. This result could not have been intended.

Id at _____, 42 A.2d at 62.

In *Township of Chartiers v. William H. Martin*, 542 A.2d 985 (Pa. 1988) the operators of a land fill contained on a 160-acre facility attempted to significantly increase their daily tonnage intake at the landfill. The Township contended that the increased use of the trash site is an expansion of a pre-existing nonconforming use that requires a zoning variance. The Pennsylvania Supreme Court ruled

“Given these parameters it would seem, as a matter of zoning law, that Chambers had an absolute right to increase the daily volume of intake, and to utilize the East Valley, without the necessity of obtaining a variance. This is so because Chambers was not changing the intended use of the property, and was not expanding the use beyond the area which was contemplated for such use at the time the landfill became non-conforming.”

Id at _____, 542 A.2d at 989. The Pennsylvania Supreme Court in *Chartiers* further stated

“....., that the operator of a nonconforming use may incorporate modern technology into his business without fear of losing that business”. *Id.*

During all relevant time periods from August 9, 2012, the Property was used as a chicken enterprise. It is undisputed that Intervenor used the property to house poultry, pack eggs, store grain, and manage manure from the poultry barns. Since, by the definition in the Cumberland Township Zoning Ordinance, there cannot be a non-permitted conditional use, the use must be considered non-conforming. Therefore, the ZHB properly concluded that the permitted conditional use was now a non-conforming use and the expansion of the use to allow outside access for the chickens was not an enlargement subject to special exception or a change of use.

Accordingly, since Intervenor’s use of the property was a non-conforming use, any proffered testimony regarding the NOV issued after the existence of the non-conforming use is not relevant. Thus, the testimony regarding the NOV and Appellant’s proffer of testimony was properly excluded.

Therefore, for the aforementioned reasons, the Appeal by Barry Stone, Jean Stone, Sandra Dixon, Elizabeth Magner, and Ruth Ranalli presently before this Court is DENIED.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary of or administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF JOHN ADAMIK, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executrix: Theresa Adamik, 1279 Stone Jug Road, Aspers, PA 17304

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, LLC 47 West High Street, Gettysburg, PA 17325

ESTATE OF RICHARD L. NAUGLE, DEC'D

Late of Tyrone Township, Adams County, Pennsylvania

Administratrix: Krista M. Fitzpatrick, 130 East York Street, Biglerville, PA 17307

Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF MARY M. SELBY, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Richard E. Selby, 408 Prince Street, Littlestown, PA 17340

Attorney: David K. James, III, Esq., 234 Baltimore St., Gettysburg, PA 17325

ESTATE OF HELEN L. SMITH, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Theodore A. Stough, 307 Diller Road, Hanover, Pennsylvania 17331

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, Pennsylvania 17331

ESTATE OF WAYNE STOCKSLAGER, DEC'D

Late of Hamiltonban Township, Adams County, Pennsylvania

Personal Representative: Westley Stockslager, 31 High Trail, Fairfield, PA 17320

Attorney: William S. Dick, Esq., Dick, Stein, Schemel, Wine & Frey, LLP, 13 West Main Street, Suite 210, Waynesboro, PA 17268

ESTATE OF GRACE E. STOWELL, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executor: Darlene Kay Diggs, c/o Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

Attorney: Sharon E. Myers, Esq., CGA Law Firm, PC, 135 North George Street, York, PA 17401

SECOND PUBLICATION

ESTATE OF E. RONALD COMFORT a/k/a EDMUND RONALD COMFORT, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Personal Representative: Mara C. Lynaugh, 5715 Billings Road, Mt. Hood, Parkdale, OR 97041

Attorney: Dennis M. Twigg, Esq., Hoffman, Comfort, Offutt, Scott & Halstad, LLP, 24 North Court Street, Westminster, MD 21157

ESTATE OF EVELYN L. FOREMAN, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Connie S. Althoff, 17 Old Bachmans Valley Road, Westminster, MD 21157

Attorney: David K. James, III, Esq., 234 Baltimore St., Gettysburg, PA 17325

ESTATE OF PEARL L. GERRICK, DEC'D

Late of Berwick Township, Adams County, Pennsylvania

Jessica L. Phillips, 2210 Bon Ox Road, New Oxford, PA 17350

Attorney: David K. James, III, Esq., 234 Baltimore St., Gettysburg, PA 17325

ESTATE OF DONALD H. HOLLABAUGH, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executor: Steven D. Hollabaugh, 271 Yellow Hill Road, Biglerville, PA 17307

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF WILLIAM T. KENT a/k/a WILLIAM KENT SR., DEC'D

Late of the Borough of Bonneauville, Adams County, Pennsylvania

Executrix: Charlene Erickson a/k/a Sharlene Eriksen, 29 Bonniefield Circle, Gettysburg, PA 17325

Attorney: Robert E. Campbell, Esq., Campbell & White, P.C., 112 Baltimore Street, Gettysburg, PA 17325

ESTATE OF JAMES D. KILMER, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Administrators: Ralph J. Kilmer, Christine L. Kilmer, 114 West Middle Street, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF LESLIE R. LOBB, DEC'D

Late of the Borough of Carroll Valley, Adams County, Pennsylvania

Executor: David W. Karppala, 270 Friendship Lane, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF ALLAN G. BLUE a/k/a ALLAN GRANT BLUE, DEC'D

Late of Menallan Township, Adams County, Pennsylvania

Executor: R. Joseph Landy, 228 Desmond Street, P.O. Box 206, Sayre, PA 18840-0206

Attorney: R. Joseph Landy, Esq., Landy & Rossettie, PLLC, 228 Desmond Street, P.O. Box 206, Sayre, PA 18840-0206

ESTATE OF RICHARD E. CHAMBERS, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Administratrix: Elisabeth A. Chambers, c/o Robert C. Saidis, Esq., Saidis, Sullivan & Rogers, 100 Sterling Parkway, Suite 100, Mechanicsburg, Pennsylvania 17050

Attorney: Robert C. Saidis, Esq., Saidis, Sullivan & Rogers, 100 Sterling Parkway, Suite 100, Mechanicsburg, Pennsylvania 17050

ESTATE OF J. NORMAND FRONTAIN, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executor: Kenneth S. Frontain, c/o David A. Mills, Esq., Blakey, Yost, Bupp & Rausch, LLP, 17 E. Market Street, York, PA 17401

Attorney: David A. Mills, Esq., Blakey, Yost, Bupp & Rausch, LLP, 17 E. Market Street, York, PA 17401

THIRD PUBLICATION CONTINUED

ESTATE OF WREATHA E. GLATFELTER, DEC'D

Late of Huntington Township, Adams County, Pennsylvania

Co-Executors: Vicki D. Wagaman and Roger L. Wagaman, c/o Sharon E. Myers, Esq., CGA Law Firm, PC, PO Box 606, East Berlin, PA 17316

Attorney: Sharon E. Myers, Esq., CGA Law Firm, PC, PO Box 606, East Berlin, PA 17316

ESTATE OF CLAANNA ELIZABETH GREGG a/k/a CLAANNA E. GREGG, DEC'D

Late of Union Township, Adams County, Pennsylvania

Administrator c.t.a: Mary Rae Stouten, 1742 Mayfair Place, Crofton, MD 21114

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF MARIAN J. KNIPPLE, DEC'D

Late of Germany Township, Adams County, Pennsylvania

Executrix: Linda K. Newman, 80 Locust Drive, Littlestown, PA 17340

Attorney: Robert L. McQuaide, Esq., Suite 204, 18 Carlisle Street, Gettysburg, PA 17325

ESTATE OF FRANK W. MERRBAUGH, JR., DEC'D

Late of Hamilton Township, Adams County, Pennsylvania

Executrix: Mrs. Dawn H. Merrbaugh, 10 Foxtown Drive, Abbottstown, PA 17301

Attorney: Todd A. King, Esq., Campbell & White, P.C., 112 Baltimore Street, Suite 1, Gettysburg, PA 17325-2311

ESTATE OF JEANETTE C. WILT, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executor: James Redding, Sr., 760 Bollinger Road, Littlestown, PA 17340

Attorney: George W. Swartz, II, Esq., Mooney & Associates, 230 York Street, Hanover, PA 17331

ESTATE OF BARBARA J. WINES, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executrix: Martha M. Potter, 598 Wagaman Avenue, Georgetown, DE 19947

Attorney: David C. Smith, Esq., 754 Edgegrove Road, Hanover, PA 17331

TRUST NOTICE

Trust: THE TRUST OF ALLAN G. BLUE DATED MARCH 1, 1994

Deceased: ALLAN G. BLUE a/k/a ALLAN GRANT BLUE

Date of Death: APRIL 2, 2016

Late of Menallen Township, Adams County, Pennsylvania

M&T Bank, Co-Trustee
1100 Wehrle Drive
Buffalo, NY 14221

R. Joseph Landy, Co-Trustee
741 South Main Street
Athens, PA 18810

Attorney: R. Joseph Landy, Esq.
LANDY & ROSSETTIE, PLLC
228 Desmond Street, P.O. Box 206
Sayre, PA 18840-0206