

**BEFORE THE ZONING HEARING BOARD OF WORCESTER TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

**IN RE: APPLICATION OF WILLIAM AND
MARY JO DEROSATO**

NO. 2017-08

DECISION

I. BACKGROUND

Public hearings on the above Application were held on July 25, 2017 and August 22, 2017 at the Worcester Township Community Hall, 1031 Valley Forge Road, Fairview Village, Pennsylvania, pursuant to Notice as required by the Worcester Township Zoning Ordinance, as amended (hereinafter “Zoning Ordinance”) and the Pennsylvania Municipalities Planning Code. The Applicants/Owners, William and Mary Jo DeRosato, propose to continue to use the property located at 2650-2656 Bean Road, Worcester Township, for a construction services company. The property is located in the AGR–Agricultural Zoning District.

The Applicants requested the following relief:

- (1) A use variance from Section 150-11 of the Zoning Ordinance so as to permit the construction services company to operate on the property.
- (2) An interpretation or variance under Section 150-9 to recognize the use as a No-Impact Home-Based Business.
- (3) A determination that the Applicants are entitled to relief on a variance by estoppel theory.

A quorum of the Zoning Hearing Board participated in the public hearings and conducted a vote in accordance with law. The Applicants were represented by Andrew Laird, Esquire. The following neighboring property owners elected to enter appearance as parties:

- (1) Kim Carroll, who was opposed to the Application.

- (2) Frank Falcone, who was opposed to the Application.
- (3) Anthony Nero, who was not opposed to the Application.
- (4) Stephanie Berardelli, who was not opposed to the Application.

The witnesses were duly sworn or affirmed and Notes of Testimony for the hearings were transcribed and are hereby made a part of this record.

At the meeting on August 22, 2017, the Board voted to deny the application. The Board issues Findings of Fact and Conclusions of Law in support of the Decision and Order.

II. FINDINGS OF FACT

1. The Applicants are William and Mary Jo DeRosato, the legal owners of the properties located at 2650 and 2656 Bean Road, Parcel Nos. 67-00-00150-90-8 and 67-00-00151-00-7, Worcester Township, Montgomery County, Pennsylvania. (N.T. 07/25/17, p. 4, Exhibits A-1, A-2, A-3, A-4)

2. The following Exhibits were marked and duly admitted into evidence:

BOARD EXHIBITS:

- B-1 Public Notice
- B-2 Proof of Publication
- B-3 Zoning Hearing Board Decision 78-6

APPLICANTS' EXHIBITS:

- A-1 Application and Narrative
- A-2 Deed
- A-3 Board of Assessment Record, Block 20, Unit 30
- A-4 Tax Map
- A-5 Board of Assessment Record, Block 20, Unit 2
- A-6 Photos
- A-7 Video on USB

OBJECTORS' EXHIBITS:

- Carroll Exhibit #1 Noise Log
- Carroll Exhibits #2 through #13 Photos
- Carroll Exhibit #14 Audio Tape

3. The property is located in the AGR-Agricultural District; the Applicants live in the house located at 2650 Bean Road, and operate the construction-related hauling and paving business out of 2656 Bean Road. (N.T. 07/25/17, pp. 6-7, 11)

4. The relief requested in the application relates to the property at 2656 Bean Road, which does not contain any residential structure. (N.T. 07/25/17, pp. 29, 38)

5. The Applicants testified that upon purchasing the properties in 1998, it was their belief that the prior owner of the property used the property for a residence and a plumbing business. (N.T. 07/25/17, pp. 9-10)

6. Unfortunately, the Applicants did not inquire at the Township Building as to the status of the zoning for the property, and did not review the files at the Township which contained a copy of Decision No. 78-6, whereby the prior owner of the property was denied a variance to operate a plumbing business out of the property. (N.T. 07/25/17, pp. 15, 29, Exhibit B-3)

7. Until recent complaints from an Objector, Kim Carroll, which caused the current Application to be filed, the Applicants and the neighboring property owners never brought to the Township's attention that the Applicants were operating the construction business out of the property. (N.T. 07/25/17, pp. 10-11, 75-76, 86-87, 191, 195)

8. The Applicants are therefore not entitled to relief under the theory of variance by estoppel in that:

(A) There was no municipal failure to enforce the law under circumstances where the Township knew or should have known of the violation, and there was clearly no active acquiescence by the Township in the illegal use.

(B) Since the Applicants failed to check the property's zoning status prior to

purchase, and there was a specific Zoning Hearing Board Decision in the publicly available Township files to the contrary, the Applicants cannot assert that they acted in good faith and innocently relied on the supposed validity of the use.

(C) There was no detailed or documented evidence of expenditures made by the Applicants in reliance upon their unfounded belief that the use was permitted, only testifying to the possible cost of purchasing (but not renting) a business property. (N.T. 07/25/17, p. 22)

(D) The denial of the variance will not impose an unnecessary hardship on the Applicants. The Applicants testified that the business is operated out of the lot at 2656 Bean Road, which is vacant other than one shed which existed at the time of purchase. The Applicants also constructed a pole barn for vehicle maintenance approximately 13 years ago, but it was unclear from the testimony as to whether the pole barn was constructed at 2650 or 2656 Bean Road. It surely appears from the exhibits that the pole barn is actually located on 2650 Bean Road. In any event, there was no testimony or evidence presented regarding capital expenditures for the construction of business-related structures that cannot be repurposed as accessory residential structures. (N.T. 07/25/17, p. 30)

9. In Section 150-9 of the Worcester Township Zoning Ordinance, a No-Impact Home-Based Business is defined as follows:

A business or commercial activity administered or conducted as an accessory use which is clearly secondary to the use as a residential dwelling and which involves no customer, client or patient traffic, whether vehicular or pedestrian, pickup, delivery or removal functions to or from the premises, in excess of those normally associated with residential use. The business or commercial activity must satisfy the following requirements:

A. The business activity shall be compatible with the residential use of the property and surrounding residential uses.

B. The business shall employ no employees other than family members residing in the dwelling.

C. There shall be no display or sale of retail goods and no stockpiling or inventory of a substantial nature.

D. There shall be no outside appearance of a business use, including, but not limited to, parking, signs or lights.

E. The business activity may not use any equipment or process which creates noise, vibration, glare, fumes, odors or electrical or electronic interference, including interference with radio or television reception, which is detectable in the neighborhood.

F. The business activity may not generate any solid waste or sewage discharge, in volume or type, which is not normally associated with residential use in the neighborhood.

G. The business activity shall be conducted only within the dwelling and may not occupy more than 25% of the habitable floor area.

H. The business may not involve any illegal activity.

10. The Applicants employ four (4) employees, who are not family members residing on the property, but rather arrive at the property every business day, leave their vehicles on the property, and then start, warm up, load, and depart with various construction trucks and equipment stored at the property - namely, five (5) tri-axle 73,000 lb. GVW diesel dump trucks, a 24 foot 20 ton trailer, an additional trailer, a backhoe on occasions, a paving machine on occasions, and various related tools and equipment. (N.T. 07/25/17, pp. 11-13, 16, 26-27, 30-34)

11. The trucks and equipment are usually picked up in the morning at 6:00 or 6:30 a.m., and returned anywhere from 4:00 to 7:00 p.m. and upon return, the equipment is then usually power washed. (N.T. 07/25/17, pp. 16, 61)

12. An outdoor 1000-gallon diesel storage tank is used at the property for the fueling of the trucks and equipment, which tank is refilled every two weeks. (N.T. 07/25/17, p. 31)

13. The business is not conducted in the residence at 2650 Bean Road, and rather is primarily conducted by the use of 2656 Bean Road for the outside storage of the vehicles and equipment, and a staging area for the daily operations. (N.T. 07/25/17, pp. 9, 28-30, 38)

14. Although not entirely clear from the testimony, it appears that the only business-related activity at 2650 Bean Road is the use of the pole barn for storage of tools and the routine maintenance of the trucks and equipment, as well as the use of the 1,000-gallon diesel fuel tank. (N.T. 07/25/17, pp. 30-33)

15. Leftover construction materials are, at times, dumped on the property, and certain

construction related materials are stored at the property for a short period of time. (N.T. 07/25/17, p. 20)

16. The testimony of the objectors established that the use creates substantial noise, vibration and dust, and is not compatible with the residential neighborhood. (N.T. 07/25/17, pp. 60-65, 84-85, Carroll Exhibit #1)

17. The Applicants fail to meet the criteria to qualify as a No-Impact Home-Based Business in that, *inter alia*:

(A) The business is not conducted within the dwelling at 2650 Bean Road, but rather the primary (and sole) use of the substantially vacant lot at 2656 Bean Road is related to the business;

(B) There is vehicular traffic in excess of a normal residential use;

(C) The business activity is not compatible with a residential neighborhood;

(D) There is an outside appearance of the business use;

(E) The trucks and equipment cause a great deal of noise, in addition to vibration and dust, which are clearly detectable in the neighborhood; and

(F) The employees of the business are not family members living at the property.

18. Contrary to the somewhat vague testimony of the Applicant regarding the prior use of the property, Objector Carroll presented credible testimony that even though the prior owner of the property was a plumber, he did not operate his business out of the property; furthermore, there is no credible evidence that the actions or use of the property by the prior owner of the property was in any fashion similar to the actions and business operations of the Applicants. (N.T. 07/25/17, pp. 63, 71-72).

19. With reference to the use variance requested under Section 150-11, and the variance

from the provisions of Section 150-9, upon consideration of Section 910.2 of the Pennsylvania Municipalities Planning Code, and Section 150-219 of the Worcester Township Zoning Ordinance, the Board determines the following:

- (A) There are no unique physical circumstances or conditions, peculiar to the particular property, resulting in an unnecessary hardship which would justify the requested variances.
- (B) There was no credible evidence presented which would support the conclusion that the property cannot be developed and used in strict conformity with the provisions of the Zoning Ordinance; and therefore, the authorization of the variances is not necessary to enable the reasonable use of the property.
- (C) The hardship has been created by the Applicants by using the property contrary to the applicable zoning, without even so much as inquiring of the Township as to whether the use was permitted.
- (D) The granting of the variances will frustrate the intent of the ordinance.
- (E) The variances requested are not the minimum variances to afford relief under the circumstances.

20. Under Section 150-217 of the Zoning Ordinance, the Board determines that granting the requested variances will be contrary to the public interest, and that a literal enforcement of the provisions of the Ordinance does not result in unnecessary hardship.

21. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action:

(A) The property is not suitable for the use, and the variance is not consistent with the spirit, purpose and intent of the Zoning Ordinance.

(B) The relief will injure or detract from the use of neighborhood property and from the character of the neighborhood; in fact, such a finding is not speculative, as the objectors presented considerable testimony that the use has already injured and detracted from the use of neighboring property and the character of the neighborhood.

(C) The proposal will not serve the best interest of the Township, the convenience of the community and the public welfare.

(D) There may be an adverse impact upon the public services of police and fire protection if the 1,000-gallon diesel fuel tank on the property, serving the large trucks and equipment, ever leaks or explodes.

(E) There is waste resulting from the proposed use, by the power washing of the vehicles and equipment.

(F) There was no evidence presented for the Board to determine that the use does not cause runoff water or drainage problems injurious to adjacent or nearby properties.

(G) There are no special circumstances or conditions applying to the land for which the variances are sought, which justify the conclusion that the application of the provisions of the Zoning Ordinance would deprive the Applicants of the reasonable use and development of such land.

(H) The circumstances for which the variances are sought were created by the Applicants, which circumstances result from general conditions in the zoning district in which the property is located.

22. The provisions of the Zoning Ordinance do not impose an unnecessary hardship

whatsoever on the Applicants and, therefore, the requested variances should be denied.

III. CONCLUSIONS OF LAW

1. The Zoning Hearing Board has jurisdiction over the subject matter of the application.

2. The Applicants are the legal owners of the property in question.

3. The Applicants and the subject matter are properly before the Board, and the Applicants have standing to submit the Application. The Objectors have standing to oppose the Application.

4. Hearing notices were duly published and posted in accordance with law, by advertisement in the newspaper and posting on the property.

5. The Applicants are not entitled to relief under the theory of variance by estoppel in that:

(A) There was no municipal failure to enforce the law under circumstances where the Township knew or should have known of the violation, and there was clearly no active acquiescence by the Township in the illegal use.

(B) Since the Applicants failed to check the property's zoning status prior to purchase, and there was a specific Zoning Hearing Board Decision in the publicly available Township files to the contrary, the Applicants cannot assert that they acted in good faith and innocently relied on the supposed validity of the use.

(C) There was no detailed or documented evidence of expenditures made by the Applicants in reliance upon their unfounded belief that the use was permitted, only testifying to the possible cost of purchasing (but not renting) a business property.

(D) The denial of the variance will not impose an unnecessary hardship on the

Applicants.

6. As a matter of law, the Applicants fail to meet the criteria to qualify as a No-Impact Home-Based Business in that, *inter alia*:

(A) The business is not conducted within the dwelling at 2650 Bean Road, but rather the primary (and sole) use of the substantially vacant lot at 2656 Bean Road is related to the business;

(B) There is vehicular traffic in excess of a normal residential use;

(C) The business activity is not compatible with a residential neighborhood;

(D) There is an outside appearance of the business use;

(E) The trucks and equipment cause a great deal of noise, in addition to vibration and dust, which are clearly detectable in the neighborhood;

(F) The employees of the business are not family members living at the property.

7. With reference to the use variance requested under Section 150-11, and the variance from the provisions of Section 150-9, upon consideration of Section 910.2 of the Pennsylvania Municipalities Planning Code, and Section 150-219 of the Worcester Township Zoning Ordinance, the Board determines the following as a matter of law:

(A) There are no unique physical circumstances or conditions, peculiar to this particular property, resulting in an unnecessary hardship which would justify the requested variances.

(B) There was no credible evidence presented which would support the conclusion that the property cannot be developed and used in strict conformity with the provisions of the Zoning Ordinance; and therefore, the authorization of the variances is not necessary to enable the reasonable use of the property.

(C) The hardship has been created by the Applicants by using the property contrary to the applicable zoning, without even so much as inquiring of the Township as to whether the use was permitted.

(D) The granting of the variances will frustrate the intent of the ordinance.

(E) The variances requested are not the minimum variances to afford relief under the circumstances.

8. Under Section 150-217 of the Zoning Ordinance, the Board determines that granting the requested variances will be contrary to the public interest, and that a literal enforcement of the provisions of the Ordinance does not result in unnecessary hardship.

9. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action and determines the following as a matter of law:

(A) The property is not suitable for the use, and the variances are not consistent with the spirit, purpose and intent of the Zoning Ordinance.

(B) The relief will injure or detract from the use of neighborhood property and from the character of the neighborhood; in fact, such a finding is not speculative, as the objectors presented considerable testimony that the use has already injured and detracted from the use of neighboring property and the character of the neighborhood.

(C) The proposal will not serve the best interest of the Township, the convenience of the community and the public welfare.

(D) There may be an adverse impact upon the public services of police and fire protection if the 1000-gallon diesel fuel tank on the property, serving the large trucks and equipment, ever leaks or explodes.

(E) There is waste resulting from the proposed use, by the power washing of the vehicles and equipment.

(F) There was no evidence presented for the Board to determine that the use does not cause runoff water or drainage problems injurious to adjacent or nearby properties.

(G) There are no special circumstances or conditions applying to the land for which the variances are sought, which justify the conclusion that the application of the provisions of the Zoning Ordinance would deprive the Applicants of the reasonable use and development of such land.

(H) The circumstances for which the variances are sought were created by the Applicants, which circumstances result from general conditions in the zoning district in which the property is located.

10. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever on the Applicants and, therefore, the requested variances should be denied.

IV. OPINION

Upon consideration of the evidence and testimony presented regarding the Application, the Zoning Hearing Board of Worcester Township determines that:

(1) The use variance from Section 150-11 of the Zoning Ordinance so as to permit the construction services company to operate on the property should be denied.

(2) An interpretation under Section 150-9 to recognize the use as a No-Impact Home-Based Business, and the variance from the provisions of Section 150-9, should be denied.

(3) A determination that the Applicants are entitled to relief on a variance by estoppel theory should be denied.

The Board therefore enters the following Order.

**BEFORE THE ZONING HEARING BOARD OF WORCESTER TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

**IN RE: APPLICATION OF WILLIAM AND
MARY JO DEROSATO**

NO. 2017-08

ORDER

(1) A use variance from Section 150-11 of the Zoning Ordinance to permit the construction services company to operate on the property is **DENIED**.


(2) An interpretation under Section 150-9 to recognize the use as a No-Impact Home-Based Business is **DENIED**. The variance requested from the provisions of Section 150-9 is likewise **DENIED**.

(3) A determination that the Applicants are entitled to relief on a variance by estoppel theory is **DENIED**.

WORCESTER TOWNSHIP ZONING HEARING BOARD



Michael Libor, Chair



Caesar Gambone, Vice Chair



John D'Lauro, Secretary

Alternate – not present at the first hearing
Bradford Smith

Order Entered: September 5, 2017

Circulation Date: September 5, 2017

This Decision and Order of the Board is final and any appeal of it must be filed with the Court of Common Pleas of Montgomery County within thirty (30) days following the Circulation Date set forth above. The Board reserves the right to supplement the Findings of Fact and Conclusions of Law in support of this Decision if an appeal is filed.