

**ZONING HEARING BOARD OF WARWICK TOWNSHIP  
BUCKS COUNTY, PENNSYLVANIA**

Docket No. 22-13

Applicant: Alan B. Leonard  
2751 York Road  
Jamison, PA 18929

Owner: Same

Subject Property: Tax Parcel No. 51-010-021 and 51-010-021-001 for property known as 2751 York Road<sup>1</sup>

Requested Relief: The Applicant appeals the Zoning Violation Notice dated September 30, 2022 and in the alternative requests the following: a determination that the use of the Subject Property for a landscaping company began in 1962, predates the 1979 enactment of the Warwick Township Zoning Ordinance and therefore the use constitutes a legally existing pre-existing nonconforming use; in the alternative a variance by estoppel; in the alternative, a determination that the Zoning Officer's verbal opinion constituted an opinion of the Zoning Officer that left unappealed became binding law; or in the alternative a variance from §195-53 of the Warwick Township Zoning Ordinance ("Ordinance") to permit an H5 Contracting use at the Subject Property.

Hearing History: The Application was filed in Warwick Township on October 31, 2022. The hearing was held on December 6, 2022 at the Warwick Township Administration Building.

Appearances: Michael J. Malloy, Esquire  
Obermayer Rebmann Maxell & Hippel LLP  
1001 Conshohocken State Road  
W. Conshohocken, PA 19428

Parties: Warwick Township  
Sean P. Duffy, Esquire  
Grim Biehn & Thatcher  
104 S. Sixth Street  
P.O. Box 215  
Perkasie, PA 18944

Mailing Date: January 9, 2023

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<sup>1</sup> Although both Parcel Numbers are provided in the Application, the relief requested pertains to Parcel 51-00-021-001 which will be referred to as the Subject Property.

## DECISION

### FINDINGS OF FACT:

1. The Zoning Hearing Board of Warwick Township met the requirements of the Zoning Ordinance, the Municipalities Planning Code, and other relevant statutes as to legal notice of the hearing held.

2. The Applicant is the owner of the Subject Property and is therefore possessed of the requisite standing to make application to this Board.

3. The following exhibits were marked and admitted during the December 6, 2022 hearing:

#### Board Exhibits:

B-1 Application with attachments received by Warwick Township on October 31, 2022

B-2 Proof of Publication from the Intelligencer for advertising notice on November 20, 2022 and November 27, 2022. Public Notice advertising hearing scheduled for December 6, 2022 at 7:00 pm and confirmation from the Intelligencer

B-3 Letter dated November 14, 2022 to Michael J. Malloy, Esquire from Vicki L. Kushto, Esquire advising of the hearing date

B-4 Resident mailing certification dated November 18, 2022 sent by Kristen Beach, Warwick Township Zoning Officer and copy of list of property owners

B-5 Property Posting Certification by Kristen Beach, Zoning Officer dated November 18, 2022

B-6 Letter from Mary Eberle, Esquire dated December 2, 2022

#### Applicant Exhibits:

A-1 Application for Plan Examination and Building Permit dated January 2, 2004

A-2 Application and Permit # 040001 dated January 20, 2004

A-3 Aerial Photograph of the Property

4. The Subject Property is located in the O Office Zoning District. The Applicant's property consists of a total of 3.05 acres and currently contains a single family detached dwelling and several accessory structures on parcel 51-010-021 and a pole barn on parcel 51-010-021-001.

No relief is requested with regard to parcel 51-010-021 and it will continue to be used as a single family detached dwelling.

5. Mr. Malloy on behalf of the Applicant made an opening statement that can be summarized as follows:

The Township did extensive research to determine the history of the Subject Property. The Applicant will stipulate that the use does not predate the Township's first Zoning Ordinance which was enacted in 1962. The Applicant is therefore withdrawing the appeal from the Zoning Officer's determination, the request for a determination that the use is a legally pre-existing nonconforming use and that the Township's Zoning Officer's verbal opinion constituted an opinion of the Zoning Officer that left unappealed became binding law. Applicant will proceed with his request for a use variance or a variance by estoppel.

6. Mr. Malloy presented the testimony of Kristen Beach, Warwick Township Zoning Officer. Ms. Beach's testimony can be summarized as follows:

Exhibit A-1 is an Application for Plan Examination and Building Permit dated January 1, 2004. She is responsible for issuing zoning permits but not building permits. The Township does not use the same form today. Ms. Beach confirmed that the Zoning Officer's notes seem to confirm the use as an A6 Nursery use. A Nursery is generally defined as a place where things are grown. Ms. Beach typically checks the use of the property as part of her review process.

Exhibit A-2 is a Building Permit for the Subject Property. Ms. Beach found this in the file for the Subject Property. The Permit was issued for a pole barn. It was signed by Julie Leonard and it indicates that it was approved by the Zoning Officer. Ms. Beach cannot speak to what the Zoning Officer did as part of her/his review when this Permit was issued but she can confirm that the Permit was issued. When Ms. Beach receives an application, she checks the use of the property to confirm it is permitted.

7. Mr. Malloy provided a history of the Subject Property and summarized Mr. Leonard's testimony as follows:

Mr. Leonard's father started the company known as Frankford Sod Co., Inc. ("Company") in 1962 when he moved to Warwick Township. Mr. Leonard purchased the Company in 1989 and lives in the house on the property. The Company is a landscaping business that includes taking machines in and out of the pole barn, loading them on a truck, driving to a job site and then returning the machines to the pole barn. For more than 50 years there have been no complaints about the operation of the business. Mr. Leonard would like to retire, sell the business and as part of the conveyance this issue was discovered. The buyer would like to improve the Subject Property and continue the landscaping business use.

Exhibit A-3 is an aerial view of the Subject Property. It shows that there are really no close neighbors. The landscaping business use is not a threat to the health, safety and welfare of other residents of the Township.

Mr. Leonard was present during this summary of his testimony and confirmed that it was accurate with the exception that he does not intend to retire yet but wants to downsize his responsibilities.

8. Mr. Malloy then provided legal argument regarding the Applicant's requested relief which can be summarized as follows:

For a variance by estoppel, the use must have existed for a long period of time and that is present here because the use has continued for more than 50 years. The Township must have taken an affirmative step in tacitly allowing the use which occurred here when the building permit was issued. In addition, the Township acquiesced to the use by not objecting. The hardship is that Mr. Leonard would like to sell his business. Although financial hardship is not always relevant, it is here. Even though the Township classified the use as a Nursery, no plants have been grown on the Subject Property since Mr. Leonard purchased it more than 50 years ago.

With regard to the use variance, the MPC criteria are applicable "where relevant". The hardship has developed over time, the Subject Property is in a commercial zoning district and it is impossible to use the Subject Property for any other use. In addition, Mr. Leonard innocently relied on his father's use of the Subject Property and the prior permits that were issued by the Township. Mr. Leonard has also expended money working and keeping up the Subject Property.

9. Mr. Duffy expressed that the Board of Supervisors voted to remain neutral on this Application and provided a letter from Mary Eberle, Esquire which was marked as Exhibit B-6. The Board of Supervisors requested that the Zoning Hearing Board consider the following conditions if the requested relief is granted:

- a. Applicant shall install a fully landscaped buffer as set forth in the Zoning Ordinance against the residentially zoned property which abut the subject parcel;
- b. Applicant shall pave and stripe the parking lot;
- c. Applicant shall comply with all building code requirements for the change in use between the agricultural use currently permitted and the landscape contractor use proposed by the Applicant.
- d. Applicant shall have no outdoor storage of logs, wood debris, mulch or similar materials.

Applicant agreed to the imposition of these conditions.

10. Randy Hulings of 1822 Adams Way was present for the hearing. Mr. Hulings provided the following public comment:

He has lived at his current residence within the Country Club Knoll development since 2006. His Association uses Mr. Leonard's landscaping services. The Company has done a great job and has always been upfront with the Association. He is the President of the Association and he has never received a complaint from other community members regarding the Company or its operations. He is in support of the Applicant and the Application and does not want to lose the Company's services.

11. In response to Mr. Hulings, Ms. Beach confirmed that to her knowledge, no complaints have been made to the Township about the Company or the use.

12. No other members of the public were present or provided public comment.

### CONCLUSIONS OF LAW:

1. Applicant withdrew its appeal of the Zoning Violation Notice dated September 30, 2022, the request for a determination that the use is a legally existing pre-existing non-conforming use and the request for a determination that the Zoning Officer's verbal opinion constituted an opinion of the Zoning Officer that left unappealed became binding law.

2. A variance by estoppel is an unusual remedy under the law and is granted only in the most extraordinary of circumstances. See *Moses v. Zoning Hearing Board of the Borough of Dormont*, 87 Pa.Cmwlth. 443, 487 A.2d 481 (Pa. Cmwlth. 1985); *Camaron Apts., Inc. v. Zoning Board of Adjustment of the City of Philadelphia*, 14 Pa.Cmwlth. 571, 324 A.2d 805 (Pa. Cmwlth. 1974). In *Mucy v. Fallowfield Township Zoning Hearing Board of Washington County*, 147 Pa.Cmwlth. 644, 609 A.2d 591, 592 (Pa. Cmwlth. 1992) (citations omitted) the Court summarized the factors to be considered when determining whether to grant a variance by estoppel as follows:

1. A long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use. However, a mere showing that a municipality has failed to enforce the law for a long period of time is insufficient in itself to support the grant of a variance.

2. Whether the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceedings. But in assessing whether a landowner's reliance upon municipal inaction is reasonable, a landowner is duty bound to check the property's zoning status before purchase.

3. Whether the landowner has made substantial expenditures in reliance upon his belief that his use was permitted.

4. Whether the denial of the variance would impose an unnecessary hardship on the applicant, such as the cost to demolish an existing building. *Id* at 281.

In addition, there is a fifth element which Court decisions have held must be considered: Whether the use is a threat to the public interest or public health safety or morals. *Greene Townes Financial Corp. v. Zoning Hearing Bd. of Lower Merion Twp.*, 157 Pa. Cmwlth. 454, 461, 630 A.2d 492, 495 (Pa. Cmwlth. 1993) (citing *Appeal of Crawford*, 110 Pa.Cmwlth Ct. 51, 531 A.2d 865 1987); *Hitz v. Zoning Hearing Board of South Annville Township*, 734 A.2d 60 (Pa. Cmwlth. 1999), *Springfield Township v. Kim*, 792 A.2d 717 (Pa. Cmwlth. 2002). Furthermore: "These factors must be established by clear, precise and unequivocal evidence." *Adsmart Outdoor Advert., Inc. v. Lower Merion Twp. Zoning Hearing Bd.*, 2012 WL 8666773, at \*4 (Pa. Cmwlth. Dec. 5, 2012).

3. Section 910.2 of the Pennsylvania Municipalities Planning Code requires that an applicant demonstrate all of the following in order to be entitled to a variance: (1) there are unique

physical circumstances or conditions peculiar to the Property that impose an unnecessary hardship; (2) because of such unique physical circumstances or conditions, there is no possibility that the Property can be developed in strict conformity with the Zoning Ordinance and that the variance is therefore necessary to enable the reasonable use of the Property; (3) such unnecessary hardship has not been created by applicant; (4) the variance will not alter the essential character of the neighborhood; and (5) the variance represents the minimum variance that will afford relief. (53 P.S. §10910.2).

4. The burden on the applicant seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious, and compelling. Pequea Township v. ZHB of Pequea Township, 180 A.3d 500 (Pa. Cmwlth. 2018) (citations and internal quotations omitted).

5. The hardship must relate to the property and not the person. *Id.*

6. The Board finds that the Township issued a permit that acknowledged the use of the Subject Property as an A6 Nursery Use.

7. The credible evidence presented by the Applicant and the parties demonstrates that the use of the Subject Property is as an H5 Contracting use and not an A6 Nursery use as the Applicant admitted that nothing has been grown on the Subject Property.

8. The Board finds that the Applicant has failed to show that the Township knew or should have known that an H5 Contracting use was being conducted on the Subject Property and that the Township actively acquiescence in this use.

9. The Board concludes that the Applicant cannot meet all of the necessary requirements for the granting of a variance by estoppel.

10. The credible evidence presented by the Applicant and unrebutted leads, the Board to conclude that, the Applicant has met the requirements for a use variance.

11. The Board concludes that the Applicant has suffered hardship in that the Subject Property has been used for an H5 Contracting use for more than 50 years and the evidence has established that it would be impossible for the Subject Property to be used for any other use.

12. The credible evidence presented by the Applicant established that the variance will not alter the essential character of the neighborhood and represents the minimum variance that will afford relief.

13. Accordingly, the Warwick Township Zoning Hearing Board determined, unanimously, to deny the Applicant's request for a variance by estoppel but to grant the relief for a variance subject to the conditions enumerated below.

## ORDER

Upon consideration and after the hearing, the Zoning Hearing Board of Warwick Township hereby DENIES the Applicant's request for a variance by estoppel and GRANTS the Applicant's request for a variance to allow an H5 Contracting use so that the Applicant can continue to operate a landscaping business on the Subject Property subject to the following conditions:

- a. Applicant shall install a fully landscaped buffer as set forth in the Zoning Ordinance against the residentially zoned property which abut the Subject Property;
- b. Applicant shall pave and stripe the parking lot;
- c. Applicant shall comply with all building code requirements for the change in use between the agricultural use currently permitted and the landscape contractor use proposed by the Applicant.
- d. Applicant shall have no outdoor storage of logs, wood debris, mulch or similar materials.

The relief contained herein granted is subject to compliance with all other applicable governmental ordinances and regulations, including obtaining the proper permits.

### ZONING HEARING BOARD OF WARWICK TOWNSHIP

By: /s/ Kevin Wolf  
Kevin Wolf, Chairman

/s/ Lorraine Sciuto-Ballasy  
Lorraine Sciuto-Ballasy

/s/ Joseph Thiraway  
Joseph Thiraway

## NOTICE TO APPLICANT

You have the right to appeal this Decision to the Court of Common Pleas of Bucks County. Such an appeal must be taken within thirty (30) days of the date the Decision was issued and mailed to you as stated above.