IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Habit OPCO,	:	
Appellant	:	
	:	
v.	:	No. 2312 C.D. 2010
	:	SUBMITTED: February 25, 2011
The Borough of Dunmore	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: April 21, 2011**

Habit OPCO appeals from the order of the Court of Common Pleas of Lackawanna County, which denied Habit OPCO's substantive validity challenge to the Borough of Dunmore's (Borough's) Zoning Ordinance (Ordinance) and request for site specific relief. We reverse.

In 2009, Habit OPCO submitted to the Borough a substantive validity challenge to the Ordinance and a request for site specific relief to develop a property located in the C-4 Commercial District at 188 Monahan Avenue in the Borough as a methadone treatment facility.[1] The application alleged that the

[1] Habit OPCO is a tenant at the Monahan Avenue site. Before the Borough Council, Habit OPCO presented documents from the property owner, Monahan Holdings, stating that Habit **(Footnote continued on next page…)**

Ordinance's treatment of methadone and other drug treatment facilities was *de facto* exclusionary and in violation of the Americans with Disabilities Act (ADA).[2] Habit OPCO's application included a proposed curative amendment and a request for site specific relief. Following hearings, the Borough Council voted to repeal one section of the ordinance, but denied Habit OPCO's other claims, as well as the request for site specific relief. On appeal, without taking additional evidence, common pleas affirmed. An appeal to this court followed.

The Ordinance divides the Borough into 12 Zoning Districts, including C-4 for heavy commercial. The Ordinance lists a number of "principal permitted" uses in C-4 Districts[3] as well as several "conditional uses"[4] and "special exception uses."[5] Ordinance, Table 1, Reproduced Record (R.R.) at 13a-18a. "Medical/Dental clinics" are principal permitted uses, while "Methadone

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(continued…)

OPCO was authorized to bring the challenge, and that Monahan Holdings joined in the application. Habit OPCO's standing in this matter has not been challenged.

[2] 42 U.S.C. §§ 12101-12213.

[3] The principal permitted uses in C-4 Districts are: Accessory Uses (Nonresidential); Automobile Sales and Service; Bakery, Wholesale; Banks & Other Financial Services; Bowling Alley; Clothes Cleaning, Laundry – Industrial; Contractors' Yards; Farm Equipment Sales; Flea Markets; Greenhouses and Nurseries, Commercial; Heavy Equipment Sales and Storage; Hotel/Motel; Lumber Yard; Medical/Dental Clinics/Offices & Medical Labs; Mobile Home Sales; Outdoor Storage; Parking Areas; Radio/TV Studios; Restaurants; Retail Stores; Trade/Business Schools; Sign, Outdoor Advertising; Tavern, Bar, esc; Warehousing; and Wholesale Offices and Showrooms. Ordinance, Table 1, Reproduced Record (R.R.) at 13a-18a.

[4] The conditional uses permitted in C-4 Districts are: Adult Entertainment; Bulk Fuel Storage; BYOB Clubs; Methadone Treatment and Other Drug Treatment; Truck/Freight Terminal/Distribution Center; Recycling Establishments; and Solid Waste Transfer Station. Ordinance, Table 1, R.R. at 13a-18a.

[5] The special exception uses permitted in C-4 districts are: Essential Services; Animal Hospitals and Kennels; Helicopter Landing Pad; Telecommunications Facilities, Commercial; Temporary Uses, Nonresidential; and Culm Bank Removal. Ordinance, Table 1, R.R. at 13a-18a.

Treatment and Other Drug Treatment" is a conditional use. *Id.* Conditional uses must receive approval from the Borough Council on a number of criteria before they are allowed, including a requirement that "no Conditional Use shall be nearer to existing development than 1,000 feet …." Ordinance Section 5.332(d), R.R. at 48a; *See* Ordinance Sections 5.300 - 5.345, R.R. at 46a-53a.

In addition to the conditional use requirements, the Ordinance also puts a number of additional restrictions on methadone clinics:

> 5.270 Drug Rehabilitation Facilities and Drug Treatment Centers
>
> 5.271 No methadone treatment facility shall be permitted unless it is licensed by the PA Department of Health.
>
> 5.272 No methadone treatment facility shall be permitted if it is determined by the PA Department of Health that such use would be detrimental to the health, welfare, peace and morale of the inhabitants of the neighborhood within a radius of one-half (1/2) mile of the facility.
>
> 5.273 No methadone treatment facility or any other permitted drug rehabilitation facilities and drug treatment centers shall be nearer to any of the following uses than one-half (1/2) mile …
>
> a. Church, charitable institution, school or public playground
>
> b. Child day-care center or family day-care home.
>
> c. Pennsylvania liquor store …
>
> d. Hotel, restaurant or club possessing a retail liquor license …
>
> e. Older adult daily living center …
>
> f. Any "senior center" …
>
> 5.274 Such use shall have frontage on a primary street or a collector street, and, it shall be accessible from such a street.

R.R. at 46a.

In their validity challenge to the Ordinance, Habit OPCO challenged Sections 5.273 (methadone clinics must be one-half mile from specified uses) and 5.332(d) (conditional uses must be at least 1000 feet from existing development), as *de facto* exclusionary. In addition, Habit OPCO argued that Section 5.271 created an impossible Catch-22: in requiring that methadone clinics obtain licensing from the Department of Health before opening, the Ordinance made it impossible to obtain licenses from the Department of Health, which allegedly will not grant a license before the facility is built and occupied. Habit OPCO also argued that the entire subsection of the Ordinance specific to Drug Rehabilitation Facilities, Sections 5.270-5.274, was invalid under the ADA. Finally, Habit OPCO requested site specific relief.

The Borough Council voted to repeal Section 5.273 of the Ordinance, which required the one-half mile setback from various facilities, but refused to repeal the others, and denied Habit OPCO's request for site specific relief. *See* R.R. at 554a-556a. Without taking additional evidence, common pleas affirmed, and an appeal to this court followed. Before this court, the Borough moved to dismiss the appeal on the ground that the issues on review were not raised in a motion for post-trial relief and were therefore waived. However, this court, in an order by Senior Judge Feudale, denied the motion, on the ground that post-trial motions may not be filed in statutory appeals of this sort. Order of February 9, 2011; *See* Pa. R.C.P 227.1(g).

At the outset, the Borough reasserts its argument that Habit OPCO has waived all of its issues on appeal by failing to file post-trial motions. However, this issue was fully and properly addressed by Judge Feudale's order denying the Borough's motion to quash this appeal. We do not revisit that decision. Therefore,

we will reach the merits, first addressing the ADA issue, then the exclusionary zoning argument, and finally the request for site specific relief.

Sections 5.270, 5.271, 5.272 and 5.274 of the Ordinance are plainly invalid under the ADA, which precludes discrimination based upon disability by public entities, and it was error for common pleas to fail to strike them down. This issue was first addressed in Pennsylvania by the United States Court of Appeals for the Third Circuit, which struck down a Pennsylvania statute requiring methadone clinics to comply with a 500 foot setback from a number of structures, including schools and churches. *See New Directions Treatment Servs. v. City of Reading (New Directions)*, 490 F.3d 293 (3rd Cir. 2007). In *New Directions*, the Third Circuit found that the statute at issue violated Section 12132 of Title II of the ADA, 42 U.S.C. § 12132, which states that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." The Court found that Section 12132 "constitutes a general prohibition against discrimination by public entities." *New Directions*, 490 F.3d at 301. The Third Circuit struck down the statute, concluding that it was facially discriminatory, and that it could not be modified to remove the discriminatory language.[6]

[6] The court in *New Directions* also analyzed whether the statute could be justified based on the premise that the clinic's clientele would present a threat to public health or safety. The Court found that there was no merit to this contention. Likewise, in this case, Habit OPCO presented evidence that its clientele would not pose a threat to public safety. No evidence was put forward to the contrary, and common pleas found as a fact that the proposed clinic did not threaten public safety.

This court embraced the holding of *New Directions* in *Freedom Healthcare Services, Inc v. Zoning Hearing Board of the City of New Castle*, 983 A.2d 1286 (Pa. Cmwlth. 2009), striking down a similar setback requirement and stating that, at least in the land use context, "[s]imply put, a methadone clinic cannot be treated any differently than a medical clinic that is serving as an ordinary medical clinic." *Id.* at 1292. All of the provisions of the Ordinance specific to drug treatment centers, Sections 5.270, 5.271, 5.272 and 5.274, treat methadone clinics differently from other medical clinics, and as such, they are facially discriminatory under the ADA and must be struck down.[7]

We now address the claim that Section 5.332(d) of the Ordinance, which requires that conditional uses be at least 1000 feet from existing developments, is *de facto* exclusionary.[8]

Uncontradicted testimony before the Board indicated that there was no area within the C-4 District that was at least 1000 feet from an existing structure. Nevertheless, common pleas affirmed, noting that other conditional

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[7] In its decision, common pleas found no discrimination in the sections of the Ordinance not already rescinded by the Borough Council. Looking specifically at Section 5.271, for example, which requires methadone clinics to be licensed by the Department of Health, common pleas stated that this provision imposes no requirements not already imposed by the state, and that the burden put on such clinics was no greater than the Ordinance put on some other establishments, such as nursery schools. *See* Ordinance Section 5.241, R.R. 44a. This reasoning ignores the fact that no such requirement applies to medical clinics under the Ordinance, and therefore, the section violates the mandate of *Freedom Healthcare Services* that methadone clinics be treated the same as other medical clinics for land use purposes.

[8] We note that this provision, as applied to methadone clinics, as well as the Ordinance's classification of methadone clinics as a conditional use while other medical clinics are principal permitted uses, is questionable at best under the ADA and *Freedom Healthcare Services*. However, Habit OPCO did not raise an ADA challenge to this provision, and, therefore, we do not reach the issue.

In addition, we note that the word "developments" is not defined by the Ordinance. We, like the parties and common pleas, assume that this word refers to structures generally.

uses, such as recycling establishments and solid waste transfer stations, existed in the Borough. It is not clear from the record when these establishments were built, or if they complied with the setback requirement at the time of their construction.

Implicitly acknowledging that there is no plot in the Borough that meets the setback requirement, the Borough argues that the requirement should be judged at the time of enactment, not presently. Essentially, the Borough argues that Habit OPCO did not meet its burden to prove exclusionary zoning because it did not prove that the rule was exclusionary when adopted.

This is not a correct application of our precedent. While our cases have at times looked to the availability of a particular use at the time an ordinance was enacted, we have never required a party alleging exclusionary zoning to affirmatively prove that the challenged ordinance was exclusionary when enacted. *See, e.g., Larock v. Bd. of Supervisors of Sugarloaf Twp.*, 961 A.2d 916 (Pa. Cmwlth. 2008); *Montgomery Crossing v. Twp. Of Lower Gwynedd*, 758 A.2d 285 (Pa. Cmwlth. 2000). In addition, cases where we have examined the ordinance at the time of enactment are generally not setback cases, but cases where parties assert that an ordinance is exclusionary because all of the land zoned for a particular use has been developed. In this case, Habit OPCO does not assert that all of the C-4 District has been developed; rather, it asserts that the setback requirement precludes it from locating a methadone clinic anywhere in the C-4 district, developed or not.

We evaluate exclusionary zoning challenges to commercial development under the following three part test:

> (1) Does the ordinance exclude the proposed use?
> (2) If so, is the exclusion prima facie valid because the use is objectionable by nature?

(3) If not, has the municipality justified the exclusion?

Cracas v. Bd. of Supervisors of W. Pikeland Twp., 492 A.2d 798, 800 (Pa. Cmwlth. 1985). We now apply this test to the case at hand.

In *Eller v. Board of Adjustment of London Britain Township*, 414 Pa. 1, 198 A.2d 863 (1964), our Supreme Court invalidated as exclusionary an ordinance which required any mushroom house to be 1000 feet from a property boundary. The Court noted that under the ordinance, a mushroom house would be allowed only in the center of a 69 acre lot. *Id.* Similarly, in *Greenwood Township v. Kefo, Inc.*, 416 A.2d 583 (Pa. Cmwlth. 1980), this court found that a setback requiring solid waste disposal areas to be located from 1000 to 2000 feet from roads, residences, businesses and streams to be exclusionary and struck it down. In this case, the setback requirement is 1000 feet, and the uncontradicted testimony before the Borough Council was that there is no location in the C-4 District that complies with the requirement. Therefore, we are compelled to conclude that common pleas erred in finding that the Ordinance was not exclusionary.

The Borough has not prevailed on the two remaining elements of the test, as it as made no effort to prove that methadone clinics are objectionable by nature or to justify their exclusion. Throughout this litigation, the Borough has never argued that methadone clinics are objectionable *per se*, instead presenting evidence about traffic and pedestrian safety at the specific site Habit OPCO has chosen. This testimony, however, is not relevant to justifying the Ordinance's complete exclusion of methadone clinics from the Borough. For these reasons, we find that the Ordinance is exclusionary and that the Borough has failed to justify the exclusion. We now turn to the issue of Habit OPCO's remedy.

When a challenger successfully proves that an ordinance is impermissibly exclusionary, "the governing body must permit the challenging

landowner to develop his land as proposed in the plans submitted with the challenge, provided, of course, that what is submitted is reasonable, and not injurious to the public health, safety, welfare and morals." *Adams Outdoor Adver., Ltd. v. Hanover Twp. Zoning Hearing Bd.*, 633 A.2d 240, 245 (Pa. Cmwlth. 1993) [*citing Casey v. Zoning Hearing Bd. of Warwick Twp.*, 459 Pa. 219, 328 A.2d 464 (1974)]. The only evidence presented before the Borough Council relevant to this standard was the testimony of an objector and the Borough Engineer regarding the safety of the surrounding roadway. According to these witnesses, the roads surrounding the proposed site had no sidewalks, and in some instances, no shoulder, and would, therefore, be unsafe for pedestrian traffic. However, in a very similar instance, we have held that an applicant's conditional use application could not be denied "simply because the proposed use would contribute to an already dangerous traffic condition." *In re Cutler Group, Inc.*, 880 A.2d 39, 43 (Pa. Cmwlth. 2005).

For the above reasons, common pleas erred in concluding that Sections 5.270, 5.271, 5.272 and 5.274 of the Ordinance were valid, that the Ordinance was not exclusionary, that site specific relief was not warranted. We therefore reverse, and remand for proceedings consistent with this opinion.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 21st day of April, 2011, the order of the Court of Common Pleas of Lackawanna County in the above-captioned matter is hereby REVERSED. This matter is hereby REMANDED for proceedings consistent with this opinion. Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge