

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Northeast Entertainment, Inc., :
Appellant :
v. :
City of Philadelphia Zoning Board : No. 566 C.D. 2010
of Adjustment : Argued: February 7, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: March 23, 2011

Northeast Entertainment, Inc., a non-profit organization, (Applicant) appeals from the order of the Court of Common Pleas of Philadelphia County (common pleas court) which denied Applicant’s appeal from the decision of the Philadelphia Zoning Board of Adjustment (ZBA).

Applicant rented 2533-35 East Salmon Street, Philadelphia, Pennsylvania (Property) and intended to operate a sex club (or “swingers” club). The Property was previously used as a social affairs hall, meeting room and club house, which was permitted in the R10 Residential Zoning District.

The City of Philadelphia (City) issued a cease and desist order because the use permit corresponded to a meeting room, social affairs and clubhouse for a literary association, not a sex club. Applicant filed an action in equity to force the City to reopen the Property. The common pleas court instructed Applicant to obtain a permit which corresponded to the specific use as a sex club.

On October 4, 2007, Applicant applied to the Department of Licenses and Inspection (Department) for a Zoning/Use Registration Permit to use the Property as a clubhouse for its several hundred members and guests. Despite the common pleas court's instructions, the Applicant did not disclose that the club would be a "swingers" type sex club where people engage in open sexual activity. The application was not accepted by the Department for filing because it did not specify the use.

In the meantime, Applicant continued to operate a sex club on the Property until the City issued a second cease and desist order.

On October 9, 2007, Applicant filed a second application for a Use Permit. Again, there was no mention that the Property would be used for a sex club. Again, the Application was not accepted for filing due to vagueness.

On February 3, 2009, apparently after some negotiations, the Department **granted** the application and issued the permit for the operation of a private club for meetings and "lawful" activities "as permitted under the Philadelphia Code."

Applicant filed an appeal with the ZBA to "clarify" the meaning of the permit "as an abundance of caution" because "the City of Philadelphia had taken the position that no 'lifestyle activities' were permitted on the premises." Basically, Applicant objected to the language of the permit which limited uses "as permitted by the Philadelphia Code." Applicant asked the Board to clarify "What exactly does this Permit mean that the City of Philadelphia issued to us?"

The ZBA held a public hearing. Edward P. Jefferson, Esquire (City Solicitor) represented the City. At the close of the hearing, the ZBA concluded that the

Department did not err when it granted the application for use of the premises as a private club limited to activities permitted under the Philadelphia Code.

The ZBA noted that its function is to review the Department's determinations. Applicant did not allege any specific error on the part of the Department and it did not find any error in limiting Applicant's private club to "activities permitted under the Philadelphia Code." Therefore, the ZBA denied the appeal. It did not address the question of whether a private club for engaging in non-commercialized, consensual sexual activity is permitted under the Philadelphia Code. It concluded that it was not permitted to issue advisory opinions.

Applicant appealed to the common pleas court. The City Solicitor represented the City and the ZBA before the common pleas court. Applicant filed a motion to disqualify the City Solicitor because "a clear conflict of interest existed as he represented the City before the Zoning Board of Adjustment and then represented the same Board on appeal to the court of common pleas." Applicant's Brief at 11. The common pleas court denied the motion to disqualify counsel.

Regarding the substance of the appeal, the common pleas court affirmed the ZBA because Applicant "was never aggrieved" by the decision of the Department, and "therefore not entitled to relief [from the ZBA]." The common pleas court found that Applicant had the opportunity to apply for a "special exception permit or a variance" for its club, but "chose not to be forthright with what the club did."

On appeal¹, Applicant argues that the common pleas court erred when it (1) affirmed the ZBA's denial of its appeal, and (2) authorized the City Solicitor to represent both the City and ZBA.

In its Brief, Applicant argues that a swinger's sex club is not prohibited under the Philadelphia Code. According to Applicant, the Philadelphia Code does not specifically prohibit this type of activity. The Applicant asks this Court to: "reverse the decision of the [common pleas court] and the Zoning Board of Adjustment of the City of Philadelphia **and hold that the Applicant may allow its members to engage in adult, non-commercialized, consensual sexual activity at its private club.**" Applicant's Brief at 17. (Emphasis added).

Applicant's appeal is essentially a request for this Court to issue an advisory opinion, which is not its function. Harris v. Rendell, 982 A.2d 1030 (Pa. Cmwlth. 2009). For this Court to decide whether Applicant may operate a sex club at the Property in this appeal would necessitate the Court to issue a purely advisory opinion. The ZBA and the common pleas court did not address this substantive issue, and rightfully so. Neither will this Court.

The ZBA is statutorily constrained in its jurisdiction. Title 14 of the Philadelphia Code, Section 1801, sets out the ZBA's "Jurisdiction and Powers" as follows:

¹ This Court's scope of review where the common pleas court took no additional evidence is limited to a determination of whether the Zoning Hearing Board committed an abuse of discretion or error of law. Appeal of M.A. Kravitz, Co. Inc., 501 Pa. 200, 460 A.2d 1075 (1983).

(1) The Zoning Hearing Board of Adjustment may, after public notice and public hearing:

(a) hear and decide appeals in zoning matters where error is alleged in any order, requirement, decision or determination made by the Department under this Title;

(b) hear and decide special exceptions to the provisions of this Title;

(c) authorize, upon appeal, in specific cases, such variance from the terms of this Title as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this title would result ...in unnecessary hardship, and so that the spirit of this Title shall be observed and substantial justice done, subject to such terms and conditions as the Board may ... decide;;

(d) grant Special Use Permits required under this Title;

(e) issue Zoning Board of Adjustment certificates required under this Title;

(f) hear and decide appeals in any matter where it has been given ...special jurisdiction by any ordinance or Act of Assembly.

Applicant neither asserted that the Department erred when it issued the use permit, nor did Applicant pursue a special exception to the Zoning Code, or seek a variance on hardship grounds. In fact, Applicant readily admitted throughout these proceedings that it only appealed to the ZBA for clarification. Applicant's Brief at 10.

In Hopkins v. North Hopewell Township Zoning Hearing Board, 623 A.2d 938 (Pa. Cmwlth. 1993), landowners, like Applicant, applied for and received a permit. They then filed a "Request for Interpretation" with the zoning hearing board. This Court affirmed the common pleas court's ruling that the zoning hearing board lacked jurisdiction to grant the request, and concluded "there is no authority in a zoning hearing

board to render a purely advisory opinion.” Hopkins, 623 A.2d at 940. See also Joe Darrah, Inc. v. Zoning Hearing Board, 928 A.2d 443 (Pa. Cmwlth. 2007).

Here, the ZBA reviewed the Department’s issuance of the use permit for errors in accordance with its statutory jurisdiction after public notice and public hearing. Having found no error, the ZBA dismissed the appeal. The ZBA was simply without jurisdiction to further “clarify” whether Applicant’s members were allowed to have consensual, non-commercialized sexual activity at their private club. The common pleas court correctly affirmed the ZBA.

Regarding the City Solicitor’s representation of the ZBA on appeal to the common pleas court, this Court also finds this issue to be without merit. This Court does not agree that there was a conflict of interest between the ZBA and the Department or that the City Solicitor’s representation of both justifies reversal.

The ZBA, a quasi-judicial body, normally appears as an appellee on appeal to the common pleas court where its presence will: (1) prevent the appeal to go to the property owner by default; or (2) assure that all arguments in opposition to the appellant will be presented to the court. Ryan, Pennsylvania Zoning Law and Practice, §9.5.5.

Here, the Department was a party to the appeal; therefore, the ZBA’s participation was technically unnecessary. Nevertheless, Applicant named the ZBA as an appellee. On appeal to the common pleas court, the City Solicitor simply presented the same arguments presented before the ZBA in opposition to Applicant and made no argument, in particular on behalf of the ZBA, which skewed the proceedings unfavorably against Applicant. The motion to disqualify counsel was properly denied.

The common pleas court is affirmed.

BERNARD L. McGINLEY, Judge

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ORDER

AND NOW, this 23rd day of March, 2011, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby affirmed.

BERNARD L. McGINLEY, Judge