

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samuel's Dell, LLC, :
Appellant :
v. : No. 1001 C.D. 2009
Borough of Lewistown Zoning Hearing : Argued: December 8, 2009
Board :

BEFORE: HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY

FILED: February 17, 2010

Samuel's Dell, LLC (Owner) appeals from the April 23, 2009 order of the Court of Common Pleas of Mifflin County (trial court), which denied Owner's appeal challenging the decision of the Borough of Lewistown Zoning Hearing Board (ZHB) to deny Owner's application for a special exception. We reverse.

Owner owns more than sixteen acres of undeveloped wooded land (Property) in the R-2 Residential District of the Borough of Lewistown (Borough) in Mifflin County. Owner sought a special exception from the ZHB to construct seven separate row house buildings and one community building on the Property. The buildings were to contain a total of forty-three dwelling units with one, two, three or four bedrooms.

After a hearing on the matter, the ZHB denied the request for a special exception. In doing so, the ZHB relied on Section 502.3 of the Borough's Zoning Ordinance (Ordinance), which permits row houses on lots in the R-2 Residential

District when authorized as a special exception. Section 502.3 of the Ordinance further states:

In determining whether a special exception is to be granted or denied, the [ZHB] shall take into consideration [1] whether such building or use will be appropriately located and designed in light of the surrounding uses in the neighborhood and the character of the neighborhood; [2] will meet a community need without substantially adversely affecting the essential character of the neighborhood; and [3] will be consistent with the surrounding uses in the neighborhood and the character of the neighborhood so as to conserve the objective value of maintaining existing local groupings of consistent uses and yet encourage the most appropriate or effective use of the land.

(R.R. at 174). The ZHB ruled that Owner had the burden to present evidence regarding these neighborhood factors and that Owner failed to meet the burden. The ZHB also concluded that section 502.3 does not permit multiple row house buildings on a single lot. Owner appealed to the trial court, which affirmed the ZHB. Owner now appeals to this court.¹

Owner argues that the ZHB erred in concluding that Section 502.3 of the Ordinance does not permit multiple row house buildings on a single lot. We agree.

Section 502.3 of the Ordinance states, “A lot may be used for one of the following principal buildings...: (1) Row house,^[2] apartment house, conversion

¹ Where, as here, the trial court did not receive additional evidence, our review of zoning cases is limited to determining whether the zoning board committed an error of law or abused its discretion. *Adams Outdoor Advertising, LP v. Zoning Hearing Board of Smithfield Township*, 909 A.2d 469 (Pa. Cmwlth. 2006).

² Section 201.2(43) of the Ordinance defines the term “row house” as a “dwelling constructed or designed for, and occupied exclusively by, one dwelling unit and which is one of

apartment house or multi-family house....” (R.R. at 173.) Initially, we note that Section 502.3 does not clearly and unambiguously state that a single lot may be used for only one row house building. Section 503.2 of the Ordinance states, “A lot area of not less than 1,000 square feet for each dwelling unit shall be provided for every building erected or used as a row house....” (R.R. at 174.) Section 503.2 suggests that a lot may contain as many row house buildings as the “1,000 square feet” requirement allows. Moreover, Section 201.2(28) of the Ordinance defines “lot” to include a “tract of land which ... can accommodate **all** the principal buildings ... which occupy or will occupy the land....” (R.R. at 150) (emphasis added). Such a definition contemplates that a “lot” may have more than one principal building, i.e., more than one row house building.

Section 603.1 of the Pennsylvania Municipalities Planning Code (MPC)³ states:

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

three or more abutting buildings or dwellings all in a row or which is one of three or more buildings or dwellings having party walls in common.” (R.R. at 152.) To the extent that the ZHB held that Section 502.3 of the Ordinance prohibits multiple row houses on a lot, the ZHB’s holding is contrary to the “row house” definition. By definition, a “row house” is one dwelling unit associated with others by abutting or party walls.

³ Act of July 31, 1968, P.L. 805, *as amended*, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §10603.1.

Here, because doubt exists as to whether Section 502.3 prohibits multiple row house buildings on a single lot, we interpret Section 502.3 in favor of Owner, i.e., to allow multiple row house buildings on a lot as a special exception. The ZHB erred in concluding otherwise.

Owner next argues that the ZHB erred in placing on Owner the burden of proving the neighborhood factors set forth in Section 502.3 of the Ordinance. We agree.

The applicant for a special exception has the burden of showing that the proposal complies with the specific requirements in the ordinance for special exceptions. *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980). Specific requirements, which must be objective in nature, have been classified as follows: (1) the kind of use allowed by special exception; (2) specific requirements like setbacks and size limits, i.e., measurable requirements; and (3) specific requirements applicable to the kind of use, such as parking requirements. *Id.* The applicant does not have the burden with respect to general, non-specific or non-objective requirements for special exceptions. *Id.* It is the burden of objectors to show that a proposal is detrimental to a neighborhood. *Id.*

Here, Section 502.3 of the Ordinance requires that, in determining whether to grant or deny a special exception, the ZHB consider whether the proposal is appropriately located and designed for the neighborhood, whether the proposal adversely affects the essential character of the neighborhood and whether the proposal is consistent with the character of the neighborhood. These factors are general, non-specific and non-objective, and relate to the impact of a proposal on a neighborhood. Thus, the objectors had the burden of proof in that regard. The ZHB erred in placing the burden on Owner.

Because the objectors in this case had the burden of showing that Owner's proposal would have some detrimental effect on the neighborhood and because the objectors failed to meet that burden, we reverse.⁴

KEITH B. QUIGLEY, Senior Judge

⁴ Objectors cannot meet their burden by merely speculating as to possible harm, but instead must show a high degree of probability that the proposal will substantially affect the health and safety of the community. *Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65 (Pa. Cmwlth. 1991). The objectors here merely speculated about possible adverse effects on their neighborhood from Owner's proposal. (*See* R.R. at 86-89, 93.)

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ORDER

AND NOW, this 17th day of February, 2010, the order of the Court of Common Pleas of Mifflin County, dated April 23, 2009, is hereby reversed.

KEITH B. QUIGLEY, Senior Judge