

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John Musgrave IV and Regis Donovan,	:	
	:	
v.	:	No. 118 C.D. 2011
	:	
The City of Pittsburgh Department of Planning, and South Highland Mad Mex, LLC, and The City of Pittsburgh	:	Submitted: June 10, 2011
	:	
Appeal of: John Musgrave IV	:	
	:	
 BEFORE: HONORABLE DAN PELLEGRINI, Judge HONORABLE ROBERT SIMPSON, Judge HONORABLE JOHNNY J. BUTLER, Judge		

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: September 12, 2011**

In this zoning appeal, John Musgrave IV (Objector)<sup>1</sup> asks whether the City of Pittsburgh Zoning Board of Adjustment (ZBA) erred in granting South Highland Mad Mex, LLC's (Applicant) requests for two special exceptions sought in connection with its proposed restaurant. Because the ZBA's decision contains no findings regarding whether Applicant satisfied the general criteria for the grant of the special exceptions set forth in the Zoning Code of the City of Pittsburgh, Pennsylvania (Zoning Code), we vacate and remand for the ZBA to make these necessary findings.

The property at issue is located at 220 South Highland Avenue in the City of Pittsburgh, which lies in a Local Neighborhood Commercial (LNC) zoning

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<sup>1</sup> Although the caption references Regis Donovan, only John Musgrave IV filed a brief in support of the appeal in this matter.

district (subject property). The subject property was previously used as a 5,000-square foot retail upholstery shop. Applicant, an entity which owns several restaurants in the area, proposes to use the subject property for a 5,000 square foot restaurant.

Applicant applied for two special exceptions from the Zoning Code in connection with its proposed restaurant. Specifically, it sought a special exception for its proposed 5,000-square foot restaurant as well as a special exception for off-site parking. A brief hearing ensued before the ZBA.

At the hearing, several witnesses appeared on Applicant's behalf. Objector and Regis Donovan appeared in opposition to Applicant's requests.

After the hearing, the ZBA issued a decision in which it granted Applicant's special exception requests subject to attached conditions. In its decision, the ZBA made the following findings.

Applicant's proposed restaurant will include nine on-site parking stalls at the rear of the subject property and twelve off-site parking stalls at 201 South Highland Avenue. Applicant also proposes to construct a seasonal rooftop deck, which would be approximately 2,200 square feet in an area near the front of the building.

Applicant owns four nearby properties, which contain a total of 53 excess, on-site parking stalls that are available for use. Applicant's representative

testified the 12 designated off-site parking stalls will be located less than a block from the subject property, at 201 South Highland Avenue. In addition to meeting the minimum parking requirement, Applicant's representative testified he is working with the owners of a nearby parking structure to obtain additional evening parking. Applicant expects most of the demand for parking to occur during its weekend operations.

Applicant's representative testified the restaurant would operate from 11:00 a.m. until midnight on weekdays, and 11:00 a.m. until 2:00 a.m. on weekends. The kitchen will close at 11:00 p.m. daily. Applicant's representative testified the proposed 2,200-square foot rooftop deck will be fenced with soundproofing material. Applicant's plans indicate that it proposes a bar as part of its rooftop deck, and that the deck will be staffed at all times during the operating season. Applicant's representative also testified no music will be played on the patio, and there will be no live entertainment in the restaurant.

Objector owns residential property at 224 South Highland Avenue, which is adjacent to the subject property, as well as various other properties in the vicinity of the subject property. Objector testified that patrons of Applicant's proposed restaurant will place an additional strain on existing on-street parking. Objector also testified the noise and potential garbage from the rooftop deck will hinder his business interests. Objector also raised invasion of privacy concerns associated with the rooftop deck.

In its decision, the ZBA determined Applicant's proposal satisfied the applicable Zoning Code criteria governing special exceptions for its proposed restaurant and associated off-site parking. See Sections 911.04.A.57 (relating to restaurant use in an LNC zoning district) and 914.06.G.2a (relating to off-site parking) of the Zoning Code. As such, the ZBA granted the requested special exceptions, subject to the following conditions: the proposed rooftop deck shall be screened from adjacent properties and the screening shall be reviewed by the zoning administrator prior to building permit approval; Applicant shall provide acoustic metal panel soundproofing material as identified in one of Applicant's exhibits; and, Applicant's proposal is subject to site plan review in accordance with applicable Zoning Code requirements. Notably, despite a passing reference to Section 922.07 of the Zoning Code, the ZBA made no findings regarding the general special exception criteria set forth in Section 922.07.D.1(2)(a)-(g) of the Zoning Code. Objector and Donovan appealed to the Court of Common Pleas of Allegheny County (trial court).

Without taking additional evidence, the trial court affirmed. Objector now appeals to this Court.<sup>2</sup>

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<sup>2</sup> Because the parties presented no additional evidence after the ZBA's decision, our review is limited to determining whether the ZBA committed an abuse of discretion or an error of law. Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh, 997 A.2d 423 (Pa. Cmwlth. 2010).

The Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§10101-11202, does not apply to appeals of decisions of the ZBA. Lamar Advantage. Rather, the Local Agency Law, 2 Pa. C.S. §§551-555, 751-754, applies here. Id.

At the outset, we note that an applicant seeking a special exception has both the duty of presenting evidence and the burden of persuading the ZBA its proposed use satisfies the Zoning Code's objective requirements for the grant of a special exception. Manor Healthcare Corp. v. L. Moreland Twp. Zoning Hearing Bd., 590 A.2d 65 (Pa. Cmwlth. 1991). Once an applicant meets its burden of proof and persuasion, a presumption arises the proposed use is consistent with the health, safety and general welfare of the community. Id. The burden then normally shifts to any objectors to present evidence and persuade the ZBA the proposed use will have a generally detrimental effect on health, safety and welfare. Id.; Yarnall v. Allen, 444 A.2d 1335 (Pa. Cmwlth. 1982). The evidence presented by objectors must show a high probability the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community. Greaton Props., Inc. v. L. Merion Twp., 796 A.2d 1038 (Pa. Cmwlth. 2002).

Section 922.07.D.1 of the Zoning Code sets forth the general criteria governing the grant of special exceptions. It provides (with emphasis added):

The [ZBA] shall approve Special Exceptions only if (1) the proposed use is determined to comply with all applicable requirements of this Code and with adopted plans and policies of the City and (2) the following general criteria are met:

(a) That the development will not create detrimental visual impacts, such that the size and visual bulk of the proposed development is determined to create an incompatible relationship with the surrounding built environment, public streets and open spaces and land use patterns;

(b) That the development will not create detrimental transportation impacts, such that the proposed development is determined to adversely affect the safety and convenience of residential neighborhoods or of vehicular and pedestrian circulation in the vicinity of the subject tract;

(c) That the development will not create detrimental transportation impacts, such that the proposed development will result in traffic volumes or circulation patterns that substantially exceed the capacity of streets and intersections likely to be used by traffic to and from the proposed development;

(d) That the development will not create detrimental operational impacts, including potential impacts of hours of operation, management of traffic, servicing and loading operations, and any on-site operations associated with the ongoing functions of the use on the site, in consideration of adjacent and surrounding land uses which may have differing sensitivities to such operational impacts;

(e) That the development will not create detrimental health and safety impacts, including but not limited to potential impacts of noise, emissions, or vibrations from the proposed development, or functions within the proposed site which would otherwise affect the health or safety of others as a direct result of the operation of the proposed use;

(f) That the development will not create detrimental impacts on the future and potential development of parcels in the vicinity of the proposed site of the development; and

(g) That the development will not create detrimental impacts on property values.

Section 922.07.D.1 of the Zoning Code.

Despite a passing reference to Section 922.07, the ZBA made no findings regarding the special exception criteria in Section 922.07.D.1(2)(a)-(g) of

the Zoning Code. Further, no party asserts that Applicant was not required to prove it satisfied the criteria set forth in Section 922.07.D.1(2)(a)-(g) of the Zoning Code. In the absence of any findings regarding the special exception criteria in Section 922.07.D.1(2)(a)-(g) of the Zoning Code, we must remand to the trial court with directions to remand to the ZBA for findings regarding these criteria based on the existing record.<sup>3</sup> See, e.g., Domeisen v. Zoning Hearing Bd. of O'Hara Twp., 814 A.2d 851 (Pa. Cmwlth. 2003) (remand necessary where zoning board did not make necessary findings regarding variance). Accordingly, we vacate and remand.<sup>4</sup>

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ROBERT SIMPSON, Judge

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<sup>3</sup> While the trial court offered an explanation regarding how Applicant satisfied these special exception criteria, the trial court took no additional evidence here. Because a complete record was made before the ZBA here, the trial court lacked authority to make its own findings of fact and conclusions of law. See In re Thompson, 896 A.2d 659 (Pa. Cmwlth. 2006) (citing Section 754(b) of the Local Agency Law, 2 Pa. C.S. §754(b)).

<sup>4</sup> Objector filed a Motion to Supplement the Record/Motion to Take Judicial Notice as well as a second Motion to Supplement the Record. As to Objector's Motion to Supplement the Record/Take Judicial Notice, Objector seeks to supplement the record to include certified documents he obtained from the State Bureau of Corporations regarding Applicant's corporate identity. However, Objector did not ask the trial court to supplement the record to include these documents; thus, he waived this issue. As a result, we deny Objector's Motion to Supplement the Record/Motion to Take Judicial Notice.

Further, Objector's Motion to Supplement the Record to include the brief he filed before the trial court is moot because Objector's brief to the trial court is already contained in the certified record.

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**ORDER**

**AND NOW**, this 12<sup>th</sup> day of September, 2011, the order of the Court of Common Pleas of Allegheny County is **VACATED** and this matter is **REMANDED** to the Court of Common Pleas for further remand to the Zoning Board of Adjustment of the City of Pittsburgh for proceedings consistent with the foregoing opinion.

Musgrave's Motion to Supplement the Record/Motion to Take Judicial Notice is **DENIED**, and Objector's Motion to Supplement the Record is **DISMISSED** as **MOOT**.

Jurisdiction relinquished.

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ROBERT SIMPSON, Judge