

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sylvia Haas; Keith and Lisa Kurtz, :
Husband and Wife; Robert and Helen :
Black, Husband and Wife; William and :
Marybeth Brennan, Husband and Wife; :
Terry Bennett; Dean and Marie :
Huntington; Husband and Wife; Cecil :
and Leslie Fisher, Husband and Wife; :
Deborah Jumbelic; Theodore and :
Trudy Baker, Husband and Wife; :
Timothy and Rhonda Gilliam, Husband :
and Wife; and Nicholas and Patricia :
Tamburri, Husband and Wife, :
Appellants :

v. :

Turbot Township Zoning Hearing :
Board :

v. :

Turbot Township; and Dr. Glen :
Feltham :

No. 1710 C.D. 2009
Argued: June 21, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: August 24, 2010

Sylvia Haas, Keith and Lisa Kurtz, Robert and Helen Black, William and Marybeth Brennan, Terry Bennett, Dean and Marie Huntington, Cecil and Leslie Fisher, Deborah Jumbelic, Theodore and Trudy Baker, Timothy and Rhonda Gilliam, and Nicholas and Patricia Tamburri (collectively, Homeowners) appeal from a July

27, 2009, order of the Northumberland County Court of Common Pleas (trial court) that affirmed the order of the Turbot Township Zoning Hearing Board (ZHB) granting a special exception for an indoor gymnasium to Dr. Glen Feltham. We affirm.¹

Homeowners reside in the Agricultural Residential (AR) District of Turbot Township (Township), Northumberland County, Pennsylvania. On June 2, 2008, Dr. Feltham, who also owns property in the AR District, filed a request for a special exception to construct and operate a gymnastics center as a new business on his property.² Dr. Feltham proposed building a metal structure 250 feet wide by 125 feet deep by thirty-two feet high, containing approximately 32,000 square feet. The proposed facility would be open seven days per week from 8:00 a.m. to 9:00 p.m., with an anticipated fifty to sixty gymnasts and twenty to thirty cheerleaders using it on a daily basis. In the cover letter filed with his special exception request, Dr. Feltham characterized the proposed use as a “recreation/entertainment facility.”³ This use is included in the Township’s Schedule of Uses contained in Appendix D of the

¹ By order dated April 8, 2010, this court precluded the ZHB from filing a brief and participating in oral argument.

² Dr. Feltham requested the special exception after the Township’s zoning officer determined that the proposed use did not meet zoning district requirements and denied Dr. Feltham’s permit request.

³ Article II, Section 2.1 of the Township’s zoning ordinance (Ordinance) specifically defines a “Recreation or Entertainment Facility” as “[a] profit or non-profit business in which amusement, entertainment, cultural events, play or other exercise is offered or sold. Such facilities may include but not be limited to theaters, clubs, lodges, social halls, indoor skating rinks, *gymnasiums*, and exercise centers.” (Ordinance at II-23) (emphasis added). As found by the ZHB, the gymnasium Dr. Feltham seeks to construct clearly fits within this Ordinance definition.

Township’s zoning ordinance (Ordinance), which specifically provides for a “recreation/entertainment facility” as a special exception in the AR District.

Thereafter, the ZHB held three public hearings regarding the requested special exception.⁴ During these hearings, testimony was presented, and the public had the opportunity to ask questions regarding the proposed use. At the close of the final hearing, the ZHB voted two-to-one in favor of granting Dr. Feltham’s special exception request without conditions and issued a written decision accordingly. In rendering its decision, the ZHB interpreted Article IV, section 4.1.B of the Ordinance together with Appendix D. In relevant part, Article IV, section 4.1.B of the Ordinance lists the uses permitted by special exception in an AR District as *outdoor* recreational facilities, “such as playgrounds, fishing and hunting clubs, golf clubs, golf driving ranges, ski lodges, tennis courts, boat clubs and similar activities...”⁵ The ZHB observed that an *indoor* gymnastics center is not one of the enumerated special exceptions in an AR District pursuant to Article IV, section 4.1.B of the Ordinance. However, the ZHB concluded that the Ordinance was ambiguous in this

⁴ Homeowners sought and received party status before the ZHB.

⁵ (Ordinance at IV-2.) Further, an “outdoor recreation use” is defined in Article II, section 2.1 of the Ordinance as:

[p]ublic or private outdoor recreational uses and activities, including but not limited to: campgrounds; recreational vehicle parks; marinas; day camps; picnic grounds; golf courses; boat launching and swimming areas; hiking, bike, and horseback riding trails, wildlife and nature preserves; game farms; fish hatcheries; trap and skeet ranges; and hunting and fishing areas.

(Ordinance at II-20.)

regard because the proposed use is a “recreation/entertainment facility” specifically permitted as a special exception under the Township’s Schedule of Uses set forth in Appendix D of the Ordinance. The ZHB reasoned that Appendix D is listed within the Ordinance’s Table of Contents and, thus, is incorporated into Article IV, section 4.1.B of the Ordinance relating to special exceptions in the AR District. Noting that Article IV, section 4.1.B contains no specific conditions pertaining to a recreation/entertainment facility, the ZHB imposed no restrictions on the grant of the special exception. In support of its result, the ZHB further noted that any ambiguity in an ordinance should be construed in favor of the landowner. *Ligo v. Slippery Rock Township*, 936 A.2d 1236 (Pa. Cmwlth. 2007).

On appeal, the trial court affirmed the ZHB’s decision, and Homeowners now appeal to this court.⁶

Homeowners assert that, at its core, this appeal concerns whether the ZHB correctly determined that the coexistence of Article IV, section 4.1.B and Appendix D creates an ambiguity with regard to special exceptions in the AR District.⁷ According to Homeowners, the Ordinance is not ambiguous. The language

⁶ Where, as here, the trial court takes no additional evidence, our review is limited to determining whether the ZHB committed an abuse of discretion or an error of law. *Walck v. Lower Towamensing Township Zoning Hearing Board*, 942 A.2d 200 (Pa. Cmwlth. 2008). The ZHB’s “interpretation of its zoning ordinance is entitled to great weight and deference....” *Id.* at 209. Although Homeowners complain that one of the two ZHB members finding in favor of Dr. Feltham was an alternate, Homeowners cite no case law suggesting that a zoning board’s interpretation of its ordinance should be afforded less weight in such an instance.

⁷ Homeowners synthesize this issue from six of the seven issues raised in the statement of the questions involved portion of their brief, which are as follows:

(Footnote continued on next page...)

of Article IV, section 4.1.B restricts uses permitted by special exception in the AR District as outdoor recreational facilities, and there is no question that an *indoor* gymnastics center is not included.

As for Appendix D, which provides for both “outdoor recreation” use and “recreation/entertainment facility” use by special exception in an AR District, Homeowners argue that Appendix D is merely “a helpful general reference tool,”⁸ not

(continued...)

(a) Did the lower court err as a matter of law and/or otherwise abuse its discretion in finding the [Ordinance] “... ambiguous as it relates to special exceptions for an indoor gymnasium in the ‘AR’ District”; (b) Did the lower court err as a matter of law and/or otherwise abuse its discretion in determining “...that Appendix ‘D’ of the Ordinance is a condensed codification of the intention of the ordinance language itself and should be construed in a manner that will cure the blatant ambiguity between the two provisions of the Ordinance”; (c) Did the lower court err as a matter of law and/or otherwise abuse its discretion in finding “... Appendix ‘D’ to be more than merely instructive, but rather an integral provision of the Ordinance itself”; (d) Did the lower court err as a matter of law and/or otherwise abuse its discretion in affirming the decision of [the ZHB] to permit an indoor recreational facility in an AR District where the Ordinance only permits “outdoor recreational facilities” as expressly stated in Article IV, Section 4.1(B)(1) of the [Ordinance]; (e) Did the lower court err as a matter of law and/or otherwise abuse its discretion in affirming the decision of [the ZHB]; and (f) Did the lower court err as a matter of law and/or otherwise abuse its discretion in concluding there is an ambiguity in the Ordinance supportive of [the ZHB’s] construction of said ordinance to the special exception at issue in this case.

(Homeowners’ brief at 4.)

⁸ (Homeowners’ brief at 14.)

a controlling Ordinance provision, and, thus, does not create ambiguity. We are not persuaded by Homeowners' argument.

Here, the ZHB specifically determined that Appendix D was incorporated into the Ordinance, as evidenced by its inclusion in the Ordinance's Table of Contents. Such a determination is supported by case law interpreting appendices as part and parcel of the ordinances at issue therein. *See Geiger v. Zoning Hearing Board*, 510 Pa. 231, 507 A.2d 361 (1986); *Glencrest Realty Company v. Zoning Hearing Board*, 406 A.2d 836 (Pa. Cmwlth. 1979); *Schimmel Development Corporation v. Zoning Hearing Board*, 14 Pa. D. & C.4th 104 (1991). Further, the ZHB's reasoning is particularly logical here, given the Ordinance's own description of its contents. Specifically, Article I, section 1.2 of the Ordinance provides that the Township's new comprehensive zoning plan "is set forth in the text and map form that constitute This Ordinance."⁹ Because the zoning map, which is the only portion of the bound volume *not contained in* the Table of Contents, has been specifically incorporated by reference, it is reasonable to conclude that all other parts of the Ordinance in the Table of Contents form the Ordinance "text."¹⁰

Given our holding that the ZHB properly concluded Appendix D is part of the Ordinance, there can be no serious contention that the Ordinance

⁹ (Ordinance at I-1.)

¹⁰ Article III, section 3.2 of the Ordinance provides: "The boundaries of the [zoning] districts are hereby established as shown on the 'Turbot Township Zoning Map' which accompanies, and which, with all explanatory matter thereon, is hereby adopted and made a part of This Ordinance." (Ordinance at III-1.)

unambiguously excludes an indoor gymnastics center from the uses allowed by special exception in an AR District.¹¹ Rather, as has been set forth above, Appendix D specifically provides for a “recreation/entertainment facility” as a special exception in an AR District, and Article II, section 2.1 of the Ordinance defines a “recreation or entertainment facility” to include a gymnasium. A “gymnasium” is “a large room used for various indoor sports ... and equipped with gymnastic apparatus” as well as “a building ... containing appropriate space and equipment for various indoor sports activities....” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1014 (1986). By contrast, Article IV, section 4.1.B does not list such a use as either permitted by right, conditional use or special exception. The law is clear that “[t]o the extent there is an ambiguity, a zoning ordinance is to be read ‘in favor of the landowner and against any implied extension of restrictions on the use of one’s property.’” *Ligo*, 936 A.2d at 1248 (quoting *Adams Outdoor Advertising, LP v. Zoning Hearing Board*, 909 A.2d 469, 484 (Pa. Cmwlth. 2006)) (emphasis in original).¹² Accordingly, the ZHB did not err in construing the Ordinance in Dr. Feltham’s favor.

¹¹ Homeowners assert that Appendix D and Article IV, section 4.1.B of the Ordinance can be read together to defeat any ambiguity by interpreting a recreation/entertainment facility permitted by special exception in an AR District to be an outdoor use only.

¹² The Ordinance in this case recognizes this well-settled principle, specifically providing: “Where due to inherent ambiguity, vagueness or lack of clarity in the language of This Ordinance, a reasonable doubt exists as to the meaning of any restriction upon the use of land, said doubt shall be resolved in favor of the property owner and against any implied extension of restriction.” Article XIX, section 19.1 of the Ordinance. (Ordinance at XIX-1.)

Alternatively, Homeowners argue that a remand is necessitated by the ZHB’s failure to apply conditions to the special exception granted here. However, as the ZHB found, Article IV, section 4.1.B “contains no specific conditions or requirements for a recreation/entertainment facility which includes a gymnastics center as proposed by applicant.” (ZHB’s op. at 10, Conclusions of Law, No. 6.) Therefore, there were no specifically stated standards or criteria that the ZHB was required to apply either under this section or under Article XV, section 15.6.B of the Ordinance generally relating to special exceptions.¹³

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

¹³ Article XV, section 15.6.B provides in pertinent part:

The [ZHB] *shall* hear and decide requests for special exceptions in accordance with the standards and criteria set forth in This Ordinance. In granting a special exception, the [ZHB] *may* attach such reasonable conditions and safeguards as it may deem necessary to implement the purpose of This Ordinance and of the PA. Municipalities Planning Code [Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101—11202].

(Ordinance at XV-9) (emphasis added).

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Feltham :

ORDER

AND NOW, this 24th day of August, 2010, the order of the Northumberland County Court of Common Pleas, dated July 27, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge