IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Suburban Realty, L.P., Appellant	:	
v.	:	No. 1791 C.D. 2010
The Zoning Hearing Board of Stroud Township and Township of Stroud and AKA-PRA Limited Partnership	:	Argued: June 9, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE BARRY F. FEUDALE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: September 29, 2011**

Suburban Realty, L.P. (Suburban) appeals from the Order of the Court of Common Pleas of Monroe County (trial court), which affirmed the determination of the Zoning Hearing Board of Stroud Township (Board) granting AKA-PRA Limited Partnership (Landowner) a special exception to expand its current medical offices, ambulatory surgical center, and x-ray imaging facilities to include a short-term stay medical/surgical facility as a health services use in the C-2 (general commercial) zoning district. The Board also granted Landowner a variance from the Stroud Township Zoning Ordinance (Ordinance) requirement that the maximum ground coverage of a property cannot exceed 60%. Suburban argues that the Board erred and/or abused its discretion: in granting Landowner a de

minimis variance where Landowner did not establish all of the necessary requirements for a variance; and in granting the special exception based on its holding that Landowner's proposed use was akin to a clinic or health service center and not a hospital, which requires a lot size much larger than available here. For the following reasons, we affirm.

Suburban owns property located in the Township of Stroud (Township) at the corner of State Route 611 and Appelgate Road. One side of Suburban's property abuts Landowner's property (Property), which is improved with a building previously used as a La-Z-Boy Furniture store. After acquiring the Property, Landowner received permission from the Township to expand the existing structure to operate an ambulatory surgical center, medical offices, and x-ray imaging facilities. (Trial Ct. Op. at 2.) Subsequently, Landowner sought approval for its current expansion plans, namely the addition of medical offices for plastic surgeons and a facility with a limited number of beds for short-term overnight care (one to three nights) for patients whose surgeries require such stays. (Board's Decision, Findings of Fact (FOF) ¶¶ 3, 7, 12, 24.) Landowner also submitted an application for a variance from the Ordinance's 60% maximum ground coverage provision. The Board held hearings on February 3, 2010, and March 3, 2010, at which both Landowner and Suburban presented evidence.

In addition to its plans for the expansion, Landowner presented the testimony of Chitu Patel, Amit Mukherjee, M.S., P.E, and Davis Chant. Mr. Patel testified that he was the project manager for the Property and described the proposed medical office and specialty hospital use on the Property as "an extension

of [the already approved] ambulatory surgery center where patients stay all night, maybe for one night or a couple of nights." (Hr'g Tr. at 17, February 3, 2010, R.R. at 41a.) Mr. Patel indicated that a "specialty hospital" is different from a regular "hospital" in that the former is licensed only to perform certain, limited types of procedures. (Hr'g Tr. at 17-18, R.R. at 41a-42a.) He stated that the use here was going to be limited to prearranged medical services, including plastic and cosmetic surgery, and neurological and orthopedic procedures. (Hr'g Tr. at 20, 46, 67, R.R. at 44a, 70a, 91a.) Mr. Patel explained that there would be no emergency room and that the only time an ambulance would come to the Property would be to transport a patient for non-emergency, prearranged medical services. (Hr'g Tr. at 66, R.R. at 90a.) He further explained that there would be two operating rooms and a procedure room, no more than 12 beds for overnight patients, no doctor present overnight, no patients over the weekend, and, unlike a regular hospital, there would be no or limited opportunities for the patients to have visitors. (Hr'g Tr. at 40-43, 47, 122, R.R. at 64a-67a, 71a, 146a.) Mr. Patel noted that, under the Ordinance, doctors' offices are permitted uses and that other health care services, such as specialty hospitals, are permitted by special exception. (Hr'g Tr. at 20, R.R. at 44a.)

Additionally, Mr. Patel: described the surrounding area as including commercial, retail, health care, and food store uses; stated that there were other doctors' offices approximately 500 yards away; and indicated that he thought the proposed use was compatible with the surrounding area. (Hr'g Tr. at 21, 25-26, 29, R.R. at 45a, 49a-50a, 53a.) He further indicated that there would be sufficient parking on the Property to satisfy the Ordinance's parking requirements, noting

that the Township Engineer came to the same conclusion in his review letter to the Township's Planning Commission. (Hr'g Tr. at 44-45, R.R. 68a-69a.) Mr. Patel testified that, when Landowner purchased the Property, the Pennsylvania Department of Transportation (DOT) transferred the low-volume Highway Occupancy Permit from the former retail use to Landowner. (Hr'g Tr. at 63, R.R. at 87a.) Finally, Mr. Patel stated that Landowner would re-engineer the detention basin behind the Property to address any increase in water runoff caused by the proposed expansion. (Hr'g Tr. at 60-61, R.R. at 84a-85a.)

Mr. Mukherjee, the professional engineer who drafted the plans for the Property, testified that he did so in a manner that followed the applicable criteria of local, state, and federal regulations. (Hr'g Tr. at 68-69, R.R. at 92a-93a.) He stated that the proposed use would create less traffic than the prior uses and that the driveway, although owned by both Landowner and Suburban, serves only Landowner's Property because there is a large ravine and fence that separates the driveway from Suburban's property. (Hr'g Tr. at 70-71, 87, R.R. at 94a-95a, 111a.) Mr. Mukherjee testified that his plan included the requisite 10-foot buffer of landscaping required by the Ordinance, but that more specific details would be presented during the land development stage. (Hr'g Tr. at 73, R.R. at 97a.) Mr. Mukherjee testified that the proposed maximum ground coverage was 65.2%, requiring a 5.2% variance, and that the extra five percent would not have an impact on the adjoining properties because any additional runoff would be mitigated by reconfiguring the detention basin and using pervious materials. (Hr'g Tr. at 77-78, 89-90, R.R. at 101a-02a, 113a-14a.) Mr. Mukherjee indicated that the ground cover overage was the result of not wanting to remove the portions of the already

existing parking lot, which includes thirty-four parking spaces, five more spaces than required by the Ordinance according to Mr. Patel. (Hr'g Tr. at 36, 76, 86, R.R. 60a, 100a, 110a; Trial Ct. Op. at 9.) He noted that, unlike the Township's Subdivision and Land Development Ordinance (SALDO), the Ordinance does not recognize pervious materials and, if it had, no variance would have been necessary. (Hr'g Tr. at 80, 104a.) Mr. Mukherjee explained that, because Landowner was constructing a specialty hospital, and not a regular hospital, the plans had to undergo a separate level of review by the Pennsylvania Department of Labor and Industry. (Hr'g Tr. at 76, R.R. at 100a.) Mr. Mukherjee confirmed that DOT transferred the low-volume Highway Occupancy Permit, which means fewer than 750 cars a day, to Landowner. (Hr'g Tr. at 91-92, 97, R.R. at 115a-16a, 121a.)

Mr. Chant, a licensed realtor familiar with commercial properties and the area surrounding the Property, testified that the proposed use should not have a negative impact on adjoining property owners and, in fact, could have a positive effect. (Hr'g Tr. at 8-11, March 3, 2010, R.R. at 200a-03a.) Mr. Chant explained that one of the best rated properties for investment are medical properties, like Landowner's, because the "market assumes that if you're in the medical business you'll pay your rent." (Hr'g Tr. at 10, R.R. at 202a.) He stated that the proposed use was the highest and best use when compared to retail uses. (Hr'g Tr. at 10-11, R.R. at 202a-03a.)

Suburban offered the testimony of Susan M. Savitski and Emmett Mancinelli. Ms. Savitski, a professional traffic engineer, testified that the prior furniture store use generated 94 trips per day and that the proposed use would

generate 652 trips per day. (Hr'g Tr. at 103-04, R.R. at 127a-28a.) She acknowledged that she was unaware of and previously had not seen Landowner's Highway Occupancy Permit and that she did not know what the trip usage numbers would be for a "medical ambulatory facility." (Hr'g Tr. at 101, 105, 112, R.R. at 125a, 129a, 136a.) Ms. Savitski also agreed that, typically, trip generation studies are used during the land development stage. (Hr'g Tr. at 110, R.R. at 134a.)

Mr. Mancinelli testified, *inter alia*, that Landowner's parking numbers are too low because he would include the Property's licensed nurses as part of the professional staff, which otherwise included only the physicians. (Hr'g Tr. at 130-32, R.R. at 154a-56a.) Mr. Mancinelli acknowledged that his interpretation of the Ordinance's parking requirements as treating nurses as professionals is inconsistent with the Township's interpretation. (Hr'g Tr. at 144, R.R. at 168a.) He indicated that he believed the proposed use was a hospital, requiring a minimum of five acres, and the Property only has 1.75 acres. (Hr'g Tr. at 131, 133, R.R. at 155a, 157a.) Mr. Mancinelli agreed with Landowner's calculation of the ground coverage and that, if the Ordinance recognized the use of pervious materials, Landowner would not need a variance. (Hr'g Tr. at 132, 136-38, R.R. at 156a, 160a-62a.) On cross-examination, Mr. Mancinelli acknowledged that his traffic usage numbers for the proposed use on the Property still fell within the levels for a low-volume Highway Occupancy Permit, which Landowner holds. (Hr'g Tr. at 142, R.R. at 166a.)

The Board summarized the above evidence in its findings of facts and, based on those findings, addressed Landowner's variance request first. Noting that the

Ordinance considered all of Landowner's proposed construction materials impervious, the Board concluded that Landowner's plan exceeded the allowable impervious coverage. (Board Decision at 6.)[1] However, citing Stewart v. Zoning Hearing Board of Radnor Township, 531 A.2d 1180 (Pa. Cmwlth. 1987), for the proposition that a "Zoning Board shall consider if the deviation is minor and if strict compliance due to the request is not necessary to protect the public policy concerns of the Ordinance," (Board's Decision, Conclusions of Law (COL) ¶ 8), the Board concluded that Landowner had established the necessary elements for a de minimis variance, (Board Decision at 6-7). The Board held that Landowner presented evidence that the variance was the minimum necessary and that the amount of the variance requested, 5.2%, was minimal given the 1.75-acre lot size. (Board Decision at 7.) The Board further noted that Landowner was using some materials that were actually pervious, at least under the SALDO, (Board Decision at 7), which reduces the amount of water runoff.

The Board then considered Landowner's application for a special exception. After setting forth the Ordinance's requirements for a special exception, the Board held that Landowner was entitled to a special exception for its proposed use. (Board Decision, COL ¶ 4; Board Decision at 7.) The Board held that Landowner's proposed use was not a hospital as asserted by Suburban, noting that although the Ordinance defines hospital, it does not define clinic, medical facility, or short-term stay medical/surgical facility, and the proposed use was most similar to a clinic or health service center and, therefore, was not required to be located on

[1] We note that the Board's decision is not paginated and, therefore, our references to the decision's page numbers are based on physically counting the pages.

a five-acre parcel. (Board Decision at 7.) Thus, the Board concluded that Landowner's proposed use conformed with the regulations applicable to the use and the C-2 zoning district. (Board Decision at 7.) The Board further held that Landowner presented convincing evidence that the proposed use would not cause substantial injury to the value of the surrounding properties, the development was compatible with the adjoining development, and Landowner would provide adequate landscaping and screening, as well as adequate parking and loading access. (Board Decision at 7.) In fact, the Board held that Landowner was providing more parking than required by the Ordinance. (Board Decision at 7.) Finally, the Board concluded that the proposed use would not jeopardize public health, safety, welfare, and convenience, and indicated that sidewalks along Route 611 would be appropriate but were not included in the existing plans. (Board Decision at 7.) Accordingly, the Board granted Landowner the maximum ground coverage variance and special exception subject to the conditions that: the maximum ground coverage not exceed the planned 65.2%; any pervious materials used comply with State and Township requirements; a more detailed landscape plan be implemented; and Landowner install sidewalks, which would not be counted against the 65.2% impervious coverage amount. (Board Decision at 8.)

Suburban appealed to the trial court, which affirmed without taking any additional evidence. In doing so, the trial court held, *inter alia*, that: a "specialty hospital" is designated as a "health service" use, which is a special exception under the Ordinance; the Board's interpretation of the Ordinance is entitled to deference; and the Ordinance recognizes "general medical and surgical hospitals" and "specialty hospitals" as separate uses. (Trial Ct. Op. at 6-7.) The trial court

explained that "if the township meant a specialty hospital to be included as a general hospital, it would not have created them as separate uses in the [O]rdinance." (Trial Ct. Op. at 7.) With regard to the variance, the trial court concluded that the deviation from the Ordinance was properly calculated, and Landowner was modifying its detention basin to account for the increase in ground coverage, as well as using pervious materials to further reduce water runoff. (Trial Ct. Op. at 13.) Finally, in response to Suburban's argument that the Board should have included the sidewalks in the total ground coverage, the trial court noted that, even if the Board erred in failing to do so, the increase would be less than 1% and would not alter the de minimis nature of the deviation. (Trial Ct. Op. at 13.) Suburban now appeals to this Court.[2]

Suburban first argues that the Board erred or abused its discretion in granting Landowner a variance from the 60% maximum ground coverage set forth in the Ordinance. Suburban contends that, notwithstanding the fact that Landowner sought a de minimis variance, Landowner still had to establish the existence of unique characteristics and a hardship that denied Landowner the reasonable use of the Property. Yeager v. Zoning Hearing Board, 779 A.2d 595, 598 (Pa. Cmwlth. 2001). Suburban asserts that Landowner already enjoys the reasonable use of the Property and that it is the Property, not Landowner, that must

[2] Where, as here, the trial court does not take additional evidence, our review is limited to determining whether the Board committed an error of law or abused its discretion. Greth Development Group, Inc. v. Zoning Hearing Board, 918 A.2d 181, 185 n.4 (Pa. Cmwlth. 2007). An abuse of discretion occurs when the Board's findings of fact are not based on substantial evidence in the record, which is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mehring v. Zoning Hearing Board, 762 A.2d 1137, 1139 n.1 (Pa. Cmwlth. 2000).

suffer the hardship because of the Ordinance's requirements. Id. According to Suburban, Landowner's hardship is self-created in that it wants to construct a larger building and provide more parking than is required by the Ordinance, making this matter similar to Ken-Med Associates v. Board of Township Supervisors, 900 A.2d 460 (Pa. Cmwlth. 2006). In Ken-Med, this Court affirmed the denial of a variance from a 35-foot buffer requirement (the landowner sought permission for a 10-foot buffer) to construct a four-story parking garage. Id. at 465-66. Our Court held that the hardship was self-created by the landowners' increased patient load and desire for greater profit, not by a provision of the relevant zoning ordinance or a condition of the property. Id. Finally, Suburban argues that, in approving the variance, the Board disregarded the very important public interest in preventing increased storm water runoff, erred in citing to the SALDO's recognition of pervious materials, and erred by approving more parking spaces than required by the Ordinance.

An applicant seeking a variance bears the burden of proof, and variances should be granted sparingly and only under exceptional circumstances. Rittenhouse Row v. Aspite, 917 A.2d 880, 884-85 (Pa. Cmwlth. 2006). "To obtain a variance, the landowner carries the heavy burden of proving that he suffers from an unnecessary hardship, the hardship is not self-imposed, and granting the variance will not adversely affect the public health, safety, and welfare."[3] Alpine,

[3] The general requirements for obtaining a variance are set forth in Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2. Under that section, a zoning hearing board may grant a variance where:

(Continued…)

Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186, 191 (Pa. Cmwlth. 1995). However, a dimensional variance requires a lesser form of proof than a use variance, and matters such as economic detriment, financial hardship, and characteristics of surrounding properties may be considered. Hertzberg v. Zoning Board of Adjustment, 554 Pa. 249, 264, 721 A.2d 43, 50 (1998). "[T]he de minimis doctrine is an extremely narrow exception to the heavy burden of proof which a party seeking a variance must normally bear." King v. Zoning Hearing Board, 463 A.2d 505, 505 (Pa. Cmwlth. 1983). The courts have applied the de minimis doctrine and allowed a variance where the violation of the ordinance was a relatively minor one and where rigid compliance with the ordinance was "not necessary to protect the public policy concerns inherent in the ordinance." Constantino v. Zoning Hearing Board, 618 A.2d 1193, 1196 (Pa. Cmwlth. 1992). Whether to grant a de minimis variance is at the discretion of the Board. Alpine, Inc., 654 A.2d at 191. "Variances may be granted where de minimis deviations from a zoning ordinance occur, *even though the traditional grounds for a variance may not have been met*." Constantino, 618 A.2d at 1196 (emphasis added). In granting such variances, a zoning hearing board can equally consider various

---

> (1) an unnecessary hardship will result if the variance is denied, due to unique physical circumstances or conditions of the property; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief.

Ken-Med, 900 A.2d at 463 (quoting Township of Harrison v. Smith, 636 A.2d 288, 290 (Pa. Cmwlth. 1993)). Section 11.940 of the Ordinance sets forth requirements that are consistent with the MPC's requirements. (Ordinance § 11.940.)

factors, including overall scope and square footage, and the actual amount of the area in question. Township of Middletown v. Zoning Hearing Board, 682 A.2d 900, 901 (Pa. Cmwlth. 1996).

As cited above, Suburban is correct that Landowner bears the burden of proving its entitlement to a variance from the maximum ground coverage requirements. However, where the variance is de minimis in nature, the Board has the discretion to grant such a variance even where the traditional grounds for a variance have not been met. Constantino, 618 A.2d at 1196. We agree with the Board and Landowner that the deviation here, 5.2%, is minor and that strict compliance is not necessary to protect the public policy concerns addressed by this particular provision in the Ordinance. It is apparent that, in making this determination, the Board considered multiple factors, including the small increase in square footage compared to the size of the entire parcel, the use of pervious material, the fact that the use was similar to surrounding properties in the area, and that Landowner was going to supply adequate drainage and storm water management to protect the surrounding properties. Although Suburban asserts that the Board disregarded the potential for increased storm runoff, the Board did consider this concern in its determination. The Board, essentially, determined that, although all of the materials Landowner planned to use were considered impervious under the Ordinance, factually, Landowner was using pervious materials that allow water to drain through. This has the effect of reducing the amount of water runoff about which Suburban is concerned. Moreover, Landowner established that it was modifying its detention basin to mitigate any increase in water runoff so as not to impact neighboring property owners. Given

these factors, we conclude that the public policy concern Suburban raises is sufficiently protected by Landowner's proposed plan despite the Board's granting of the variance.

Moreover, the cases Suburban relies upon are distinguishable. The majority of these cases involve dimensional variances generally, which do not address de minimis variances, or variance requests that were found not to be de minimis. See, e.g., In re Boyer, 960 A.2d 179 (Pa. Cmwlth. 2008) (no contention that the requested variances from the ordinance's side yard and steep slope requirements, which the landowner sought to infringe upon to construct an in-ground swimming pool, were de minimis in nature); Yeager, 779 A.2d 565 (no assertion that the multiple variances requested from the ordinance's set back and clear sight triangle requirements were de minimis in nature); Andreucci v. Zoning Hearing Board of Lower Milford Township, 522 A.2d 107, 110 (Pa. Cmwlth. 1987) (concluding that a 7,000 square foot deficiency in lot size was not a de minimis deviation from the ordinance's minimum lot size requirement). Additionally, Ken-Med, which Suburban contends is similar to this matter, involved a request for a dimensional variance that represented a 28.5% deviation from the ordinance's buffer requirement, from 35 feet to 10 feet; a deviation that was by no means de minimis. Ken-Med, 900 A.2d at 465-66. Because Ken-Med did not involve a de minimis variance, there was no question that the property owners in that case had to satisfy the traditional variance requirements. Accordingly, Suburban's reliance on Ken-

Med and the other cases cited is misplaced. Thus, we hold that the Board did not err or abuse it discretion in granting Landowner the requested variance.[4]

Suburban next asserts that the Board erred and/or abused its discretion in granting Landowner a special exception to operate a clinic or health service center on the Property. Suburban argues that the proposed use is a hospital, which the Ordinance defines as a "clinic, and any other place for the diagnosis, treatment or other care of human ailments." (Ordinance § 2.304.) Suburban maintains that, because the Ordinance requires that a hospital have a minimum of five acres and the Property is only 1.75 acres, Landowner could not meet the objective standard for a special exception. Additionally, Suburban asserts that the Board erred because it disregarded the testimony of Suburban's witnesses regarding an increase

---

[4] Citing case law in which the deviation from a zoning ordinance's requirements was calculated differently than here, Suburban also maintains that the calculation used here is not the accepted methodology and that, when the accepted methodology is used, the result is a deviation of 8.74%, which is not de minimis as a matter of law. However, Suburban did not challenge Landowner's calculation before the Board and, therefore, this argument is waived. In re McGlynn, 974 A.2d 525, 534 (Pa. Cmwlth. 2009). Even if this argument was not waived, the method used to calculate the 5.2% deviation is the one provided in Section 2.295 of the Ordinance (defining the maximum ground coverage as "[t]he maximum ratio obtained by dividing the total impervious area . . . on a lot by the total area of the lot upon which the impervious surfaces are located") and Suburban's own engineer, Mr. Mancinelli, agreed that the deviation amount was 5.2%. (Ordinance § 2.295; Hr'g Tr. at 137, February 3, 2010, R.R. at 161a). Additionally, Suburban reiterates its argument that the Board erred in not including the sidewalk area in the ground cover calculation. Like the trial court, however, we conclude that, even if the Board did err in excluding the sidewalk area (which was a condition it imposed on Landowner's development) in Landowner's maximum ground coverage calculation, the additional area amounts to less than 1% and does not alter the de minimis nature of Landowner's variance. Finally, we disagree with Suburban's contention that Landowner had to apply for a variance from the Ordinance's parking regulations because it was providing *more* parking spaces than required by the Ordinance and the Board erred in granting such a variance. We note that, in so arguing, Suburban appears to be abandoning its position during the proceedings before the Board that Landowner was not providing *enough* parking under the Ordinance.

in traffic and inadequate parking on the Property, and Landowner did not establish that there would not be a substantial injury to the value of surrounding properties, could not satisfy the objective standard because the proposed use exceeded the maximum ground coverage, and there was no landscaping and screening plan submitted.

"A special exception is not an exception to a zoning ordinance, but rather a use, which is expressly permitted, absent a showing of a detrimental effect on the community." Greaton Properties, Inc. v. Lower Merion Township, 796 A.2d 1038, 1045 (Pa. Cmwlth. 2002). "The applicant for the proposed use has both the duty to present evidence and the burden of persuading the board that the proposed use satisfies the objective requirements of the ordinance for the grant of a special exception." Id. "Once the applicant meets these burdens, a presumption arises that the use is consistent with the health, safety and general welfare of the community." Id. at 1045-46. "The burden then normally shifts to the objectors of the application to present evidence and persuade the Board that the proposed use will have a generally detrimental effect." Id. at 1046.

Schedule I of the Ordinance authorizes health services, which includes hospitals, clinics, and specialty hospitals, in the C-2 zoning district as special exceptions. Sections 4.821 through 4.827 set forth the Ordinance's "General Standards and Criteria for Review" for a special exception. Those sections provide, in relevant part, that the proposed use: "[s]hall not cause substantial injury to the value of other properties where it is to be located," Section 4.821; "[s]hall conform with regulations applicable to the District where located or shall conform to the more specific standards of Article V of the Ordinance, and shall conform to

the intent of the District," Section 4.822; "[s]hall be compatible with adjoining development," Section 4.823; "[s]hall provide adequate landscaping and screening to protect and enhance adjoining areas," Section 4.824; "[s]hall provide off-street parking and loading and access in keeping with this Ordinance so as to minimize interference with traffic on local streets," Section 4.825; "[s]hall not jeopardize the public health, safety, welfare, and convenience," Section 4.826; and is subject to the additional safeguards that the Board may place as warranted by the character of the area, Section 4.827. (Ordinance §§ 4.821-827.) Section 5.390 of the Ordinance sets forth the specific requirements for "Health Service Centers, Hospitals, and Medical Clinics," and indicates that these uses must be located on lots that are of sufficient size to "provide sufficient space for all buildings and required support facilities, parking and sewer and water systems." (Ordinance § 5.390.) This section further provides that the minimum lot sizes for hospitals and clinics shall be five acres and one acre, respectively. Id.

We first consider whether the Board erred in concluding that the proposed use is not a hospital and, consequently, did not need a minimum of five acres to be approved as a special exception. The Board determined that the proposed use was not a hospital, but more akin to a clinic or health service center, noting that the Ordinance does not define clinic, medical facility or short-term stay medical/surgical facility. "In the absence of any definition to the contrary in a zoning ordinance, . . . [a] term must be interpreted in its broadest, most permissive sense." Greaton Properties, 796 A.2d at 1042. Where an administrative board, like the Board, reasonably interprets the ordinance it is charged with administering, that interpretation is entitled to deference unless clearly erroneous or inconsistent

with the ordinance. Turchi v. Philadelphia Board of License and Inspection Review, 20 A.3d 586, 591-92 (Pa. Cmwlth. 2011). The Board came to its conclusion because the facility would provide no emergency services, the facility would not be open to the general public, and the facility would not accommodate anyone with general health problems. (FOF ¶¶ 22, 25.) Rather, the proposed use would serve only those patients who had scheduled appointments or prearranged specific surgical procedures. (FOF ¶¶ 21-22, 25.) We note, as Landowner points out, that Suburban's argument that *any* place that provides for "the diagnosis, treatment and other care of human ailments," (Ordinance § 2.304), is a hospital would render practically every use under the health services category a hospital, including a primary care physician's office, and require a minimum of five acres. Additionally, the Ordinance's definition of hospital specifically includes clinics, which are not only a separate use, but can be located on smaller lots than hospitals pursuant to Section 5.390 of the Ordinance. Given that the Ordinance leaves undefined many of the health service uses permitted, provides a very broad definition of "hospital," and includes as separate and distinct uses "hospitals," "clinics," and "specialty hospitals," which Mr. Patel indicated this use would be, we hold that the Ordinance's provisions regarding these uses are ambiguous. Because the Ordinance is ambiguous, we must construe its terms broadly so as to give Landowner the benefit of the least restrictive use. Section 603.1 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. § 10603.1.[5] For these reasons, we conclude that the Board's interpretation of the Ordinance holding that the use here is not a hospital is reasonable and not clearly erroneous and, therefore, is entitled to deference. Turchi, 20 A.3d at 591-92.

[5] Added by Section 48 of the Act of December 21, 1988, P.L. 1329.

We next consider whether the Board erred or abused its discretion in concluding that Landowner satisfied its burden of proof for a special exception. After reviewing the record, including all reasonable inferences therefrom, in the light most favorable to Landowner, the party that prevailed, In re McGlynn, 974 A.2d 525, 535 n.9 (Pa. Cmwlth. 2009) (citing Bensalem Township v. Press, 501 A.2d 331, 334 (Pa. Cmwlth. 1985)), we conclude that Landowner did meet its burden and presented substantial evidence to support its special exception request.

First, the Board's determinations that Landowner's proposed use would "not cause substantial injury to the value of other propert[ies]," is "compatible with [the] adjoining development," "will not jeopardize the public health, safety, welfare and convenience," and "will provide . . . adequate parking and loading access," (Board's Decision at 7; Ordinance §§ 4.821, 4.823, 4.825, 4.826), are supported by the testimony of Mr. Chant, Mr. Patel, and Mr. Mukherjee.[6] Mr. Chant testified, *inter alia*, that the proposed use would not have a negative effect on the surrounding development and would likely improve the area because such medical uses were considered the best type of investments. (Hr'g Tr. at 8-11, March 3, 2010, R.R. at 200a-03a.) Mr. Patel stated that the proposed use was compatible with the surrounding area, which included health care, retail, and commercial uses. (Hr'g Tr. at 21, 25-26, 29, February 3, 2010, R.R. at 45a, 49a-

[6] In granting the special exception and variance, the Board necessarily found Landowner's witnesses' testimony credible and rejected Suburban's contrary evidence. The Board is the fact finder and its credibility determinations are not subject to review. In re Brickstone Realty, 789 A.2d 333, 339-40 (Pa. Cmwlth. 2001). Thus, we reject Suburban's assertions that the Board erred in not finding, based on Suburban's experts' testimony, that the proposed use would cause an unsafe increase in traffic or that there would be insufficient parking.

50a, 52a.) Mr. Patel further testified that DOT transferred the previous owner's low-volume Highway Occupancy Permit to Landowner and that the planned parking satisfied the Ordinance's parking requirements, a conclusion with which the Township Engineer (in his letter to the Planning Commission) and the Planning Commission agreed. (Hr'g Tr. at 44-45, R.R. at 68-69a.) Mr. Mukherjee stated that: the proposed use would create less traffic than the prior retail use and DOT transferred the low-volume Highway Occupancy Permit to Landowner; the proposed use and expansion would not have a negative impact on the adjoining properties because of Landowner's water runoff mitigation plans; and Landowner was providing more parking than required by the Ordinance. (Hr'g Tr. at 70, 73, 76-78, 89-92, 97, R.R. at 94a, 97a, 100a-02a, 113a-16a, 121a.) Additionally, Mr. Mukherjee's testimony that the plan included the 10-foot buffer of landscaping, with more specific plans being presented during the land development stage, (Hr'g Tr. at 73, R.R. at 97a), supports the Board's determination that Landowner "will provide adequate landscaping and screening," (Board's Decision at 7; Ordinance § 4.824).[7] Moreover, the Board's legal conclusion that the proposed use did not need a minimum of five acres, i.e., because it is not a hospital, and the Board's grant of the de minimis variance from the Ordinance's maximum ground coverage requirement allowed Landowner to establish that the proposed use satisfies the "regulations applicable to the District where located" and "conform to the more specific standards listed in" Section 5.390 of the Ordinance. (Ordinance § 4.822.)

---

[7] This conclusion is further supported by the Board's condition that any future plans conform to the Ordinance's landscaping provisions. Because the plan included the presence of landscaping, including the 10-foot buffer, and Mr. Mukherjee indicated that, in addition to the current plan, more specific plans would be included in the later stages of development, which the Board reinforced by adding that as a condition of its approval, Suburban's repeated assertion that there was *no* landscape plan submitted is not supported by the record.

Because Landowner satisfied its burden of proving each of the Ordinance's special exception requirements, the burden shifted to Suburban "to present evidence and persuade the Board that the proposed use will have a generally detrimental effect." Greaton Properties, Inc., 796 A.2d at 1046. Suburban submitted evidence in the form of the testimony of Ms. Savitski and Mr. Mancinelli; however, the Board, as fact finder, was not persuaded by that evidence, choosing instead to accept Landowner's contrary evidence that supported the grant of the special exception. We cannot say that such a decision was either an error of law or an abuse of discretion.

For the foregoing reasons, we conclude that Landowner satisfied its burden of proving both its entitlement to a variance from the maximum ground coverage provisions and to a special exception. Accordingly, the Board's Order is affirmed.

____

RENÉE COHN JUBELIRER, Judge

Judge Simpson did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Suburban Realty, L.P., Appellant	:	
	:	
v.	:	No. 1791 C.D. 2010
	:	
The Zoning Hearing Board of Stroud Township and Township of Stroud and AKA-PRA Limited Partnership	:	

O R D E R

NOW, September 29, 2011, the Order of the Court of Common Pleas of Monroe County in the above-captioned matter is hereby **AFFIRMED**.

____

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Suburban Realty, L.P., Appellant	:	
v.	:	
The Zoning Hearing Board of Stroud Township and Township of Stroud and AKA-PRA Limited Partnership	:	No. 1791 C.D. 2010 Argued: June 9, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE BARRY F. FEUDALE, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: September 29, 2011

Because a facility with two operating rooms, a possible additional procedure room, a laboratory, 10 to 12 patient rooms where patients can stay up to three nights while recovering from various procedures, and a nurse on staff 24 hours a day to provide care is a hospital, I would reverse the Board's grant of a special exception that allowed the facility as a "medical office building/clinic" use.

AKA-PRA Limited Partnership (Partnership) sought to enlarge its existing facility located in a C-2 zoning district in which it will perform plastic, cosmetic, orthopedic and urological surgery. The Partnership described the proposed use as a "specialty hospital," a term not used in the Stroud Township

Zoning Ordinance (Ordinance). While that term is not used in the Ordinance, Section 2.304 of the Ordinance states that "[u]nless otherwise specified, the term 'hospital' shall be deemed to include clinic, and any other place for the diagnosis, treatment or other care of human ailments."[1] However, the Ordinance, in Schedule I, allows for a "medical office building/clinic" in a C-2 district by special exception. With regard to lot size, Section 5.390 makes a distinction as to the land area required for clinics and hospitals. It provides that:

> **5.390 Health Service Centers, Hospitals and Medical Clinics (SIC-806)**. These uses are permitted as set forth in Schedule I. The following standards, requirements and criteria shall apply: Lot sizes shall be sufficient to provide sufficient space for all buildings and required support facilities, parking and sewer and water systems. Minimum lot size for hospitals shall be five (5) acres. Minimum lot size for clinics shall be one (1) acre. Lot width, yards and building height and lot coverage requirements for these uses shall be the same as those for similar size minimum lots in the respective districts. Buffer yard and a ten (10) foot wide buffer strip shall be required along the property line(s) that face an existing residential dwelling structure and/or a residential 0-1, S-1, R-1k, R-2 or R-3 Zoning district. A Landscape Plan and landscaping in required for this land use activity as per Section 6.300 of this Ordinance.

---

[1] Section 1 of The Public Welfare Code, Act of June 13, 1967, P.L. 31, No. 21, art. 10, *as amended*, 62 P.S. §1001, defines "Hospital" as "any premises, other than a mental health establishment as defined herein, operated for profit, having an organized medical staff and providing equipment and services primarily for inpatient care for two or more individuals who require definitive diagnosis and/or treatment for illness, injury or other disability or during or after pregnancy, and which also regularly makes available at least clinical laboratory services, diagnostic X-ray services and definitive clinical treatment services. The term shall include such premises providing either diagnosis or treatment, or both, for specific illnesses or conditions."

The Partnership contended that it only had to meet the one-acre minimum because the proposed use as a "specialty hospital" was a clinic and not a hospital as the proposed facility will not be open to the public, will take patients by appointment only, and does not have an emergency room or gift shop. The Board found that the proposed use is a "medical office building/clinic" and not a hospital and is only required to have a one-acre minimum lot size. The majority affirmed, holding that because the Ordinance is ambiguous in defining what a hospital and a clinic, the Board properly granted the special exception. Because there is no dispute that the proposed use falls within the Ordinance's general definition of hospital, and excluded from the one-acre minimum because it is not a clinic, I respectfully dissent.

Within the context of the Ordinance, a "medical office building/clinic" use is a facility dealing with primary healthcare needs on an outpatient basis to take care of primary healthcare needs such as going to your doctor's office for your annual physical or to a "free clinic" or a "pain clinic" or whatever other type of clinic that can be taken care of during that visit. When people go to a facility to be admitted and stay overnight, they do not go to a "medical office building/clinic" but to a hospital, and if the hospital specializes in treating certain conditions or populations, e.g., children, it is a specialty hospital. Here, the proposed facility will perform various types of surgical procedures, contain 10 to 12 beds where patients can stay up to three nights while recovering and a nurse will be on duty 24 hours a day. This is a hospital use, not a "medical office building /clinic" use.

That the proposed use is a hospital and not a "medical office building/clinic" is consistent with the Partnership's own characterization of the uses as a "specialty hospital." The Department of Health's regulations defines "specialty hospital" as:

> A hospital equipped and staffed for the treatment of disorders within the scope of specific medical specialties or for the treatment of limited classifications of diseases in their acute or chronic stages on an inpatient basis of 24 or more hours.

28 Pa. Code §101.4. Under this definition, a specialty hospital is a type of hospital, not a clinic.

Because the property where this specialty hospital is proposed falls well below the Ordinance's five-acre minimum lot size, I would hold the Board erred in granting the special exception. For this reason, I would reverse the Board, and, accordingly, I respectfully dissent.

____

DAN PELLEGRINI, JUDGE

Judge Simpson did not participate in the decision in this case.