

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

544 Church Lane, LLC	:	
	:	
v.	:	
	:	No. 2046 C.D. 2009
The Zoning Hearing Board of the Borough of Yeadon	:	
	:	Argued: September 14, 2010
	:	
The Borough of Yeadon	:	
	:	
v.	:	
	:	
The Zoning Hearing Board of the Borough of Yeadon	:	
	:	
Appeal of: Borough of Yeadon	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: December 1, 2010

The Borough of Yeadon (the Borough) appeals from the September 14, 2009, order of the Court of Common Pleas of Delaware County (trial court), which reversed the decision of the Zoning Hearing Board of the Borough of Yeadon (ZHB) denying the application of 544 Church Lane, LLC (Developer) for a special exception to operate a laundromat. We affirm.

Developer planned to place a laundromat in an existing building located at 554 Church Lane in the Borough’s Neighborhood Commercial District (NC

District).<sup>1</sup> The property is a one-story building measuring 7,146 square feet, with a parking lot, trash enclosures, and landscaping. The neighborhood contains numerous commercial uses, including gas stations, auto body/repair shops, restaurants, a beer distributorship, and grocery and convenience stores. Laundry and dry cleaning establishments are permitted in the NC District by special exception.<sup>2</sup>

Developer applied for a special exception to use the property as a laundromat, and the ZHB conducted a hearing on June 17, 2008. Developer presented the testimony of its sole member and manager, Albert Kuoch, who described the details of the proposed facility. Kuoch testified that he intended to install approximately 120 machines at the property, that there would be an attendant on duty, and that the hours of operation would be 7:00 a.m. to 11:00 p.m. seven days per week. Developer also offered the testimony of David Damon, a licensed professional engineer, who opined that the proposed laundromat satisfied the standards and criteria for a special exception under the Ordinance. Damon provided additional information on the characteristics of the property and the neighborhood,

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<sup>1</sup> Section 1266.01 of the Borough's zoning ordinance (Ordinance) describes the purpose of the NC District as follows:

The purpose of the NC Neighborhood Commercial District is to provide retail and service facilities which primarily serve the daily needs of the immediate surrounding neighborhood and to encourage attractive, compact retail commercial development in locations close to the residences serviced

(Appellant's Brief, Appendix E.)

While this section and a few others are attached to the Borough's brief, the entire zoning ordinance is not part of the original record and we remind counsel that the zoning ordinance should be included in every appeal from the denial of a zoning application. See Shelbourne Square Associates, L.P. v. Board of Supervisors of Exeter Township, 794 A.2d 946 (Pa. Cmwlt. 2002).

<sup>2</sup> Section 1266.02(c)(1) of the Ordinance.

and also on technical issues such as exhaust fans, parking, lighting, and the health, safety and welfare implications of the proposed facility.

The Borough objected to Developer's application for a special exception. The Borough presented the testimony of its engineer, Savine Watson, who was offered as an expert on civil engineering. Among other things, Watson testified regarding crime statistics in the neighborhood and a report on laundromat industry trends and practices drafted by the Coin Laundry Association. Developer's counsel objected to Watson's testimony on the ground that it was based on hearsay information and did not constitute engineering testimony, but her testimony was admitted by the ZHB.

The ZHB denied the application, concluding that: (1) the proposed laundromat was not consistent with community objectives because it will attract criminal activity; and (2) the laundromat would not primarily serve the daily needs of the residents of the immediate neighborhood.

Developer appealed to the trial court, which reversed the ZHB and granted Developer a special exception. The trial court held that the ZHB applied the wrong standard when reviewing the application, that Developer satisfied all of the objective criteria in the Ordinance, and that the ZHB's decision was not supported by substantial evidence.

On appeal to this Court,<sup>3</sup> the Borough contends that the trial court erroneously concluded that the ZHB applied the incorrect legal standard when denying Developer's request for a special exception. The Borough also contends that the trial court erred in finding that ZHB's decision was unsupported by substantial

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<sup>3</sup> When the trial court takes no additional evidence, our scope of review is limited to determining whether the zoning board committed an error of law or a manifest abuse of discretion in rendering its decision. In re Heritage Building Group, Inc., 977 A.2d 606 (Pa. Cmwlth. 2009).

evidence, and improperly concluded that evidence relied on by the ZHB was hearsay.<sup>4</sup>

This appeal turns on whether the ZHB applied the proper burden of proof for a special exception. In Pennsy Supply, Inc. v. Zoning Hearing Board, 987 A.2d 1243, 1249-50 (Pa. Cmwlth. 2009), we articulated this cogent summary of the law:

A special exception is a conditionally permitted use, legislatively allowed, so long as a zoning hearing board finds that the standards and conditions set forth in the ordinance are met. Bray v. Zoning Bd. of Adjustment, 48 Pa. Commw. 523, 410 A.2d 909 (Pa. Cmwlth. 1980).

[It] is not an 'exception' to the zoning ordinance; rather, it is a use permitted in accordance with the express standards and criteria in the zoning ordinance. The applicant has the burden of proving: (1) that the proposed use is a type permitted by special exception and (2) that the proposed use complies with the requirements in the ordinance for such a special exception. It is presumed that the local legislature has considered that the special exception use satisfies local concerns for the general health, safety, and welfare. Accordingly, *once an applicant for a special exception shows compliance with the specific requirements of the ordinance, the burden shifts to the protestors to prove that the proposed use will have an adverse effect on the general public.*

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<sup>4</sup> The Borough argues that the trial court improperly re-weighed the evidence and made credibility determinations. However, our careful review of the trial court's opinion reveals that the court focused on the competency and sufficiency of the evidence and did not exceed its scope of review. Moreover, even assuming *arguendo* that the trial court encroached on the ZHB's fact finding authority, our scope of review in this appeal is limited to determining whether *the zoning hearing board* committed an error of law or a manifest abuse of discretion in rendering its decision. Thus, such an error by the trial court would not alter the disposition of this appeal.

Agnew v. Bushkill Twp. Zoning Hearing Bd., 837 A.2d 634, 637 (Pa. Cmwlth. 2003) (citations omitted). This Court has established that: *‘objectors have the burden of production, as well as the burden of persuasion, where the statute does not . . . provide otherwise, of establishing the existence of non-specific criteria, such as detriment to the public health, safety, or welfare, which would preclude the granting of a special exception.’* Tuckfelt v. Zoning Bd. of Adjustment of City of Pittsburgh, 80 Pa. Commw. 496, 471 A.2d 1311, 1314 (Pa. Cmwlth. 1984) (citations omitted). *‘The objectors cannot meet their burden by merely speculating as to possible harm, but instead must show a high degree of probability that it will substantially affect the health and safety of the community.’* Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Bd., 166 Pa. Commw. 520, 646 A.2d 717, 722 (Pa. Cmwlth. 1994).

(Emphasis added.)

In the instant case, the Borough asserts that the ZHB properly denied the special exception application, because the Developer failed to show that it satisfied all of the specific requirements of the Ordinance. On the other hand, Developer argues that the ZHB denied the application based upon alleged noncompliance with general policy standards and that the burden of proof with regard to such general standards was on the Borough as objector. We agree with Developer.

Although the Borough claims that Developer was required to satisfy twenty-seven different standards in the Ordinance in order to qualify for the special exception, the ZHB provided only two reasons for denying the application: (1) Developer’s application was not consistent with community development goals regarding crime and public safety; and (2) Developer did not establish that the proposed use would primarily serve the daily needs of the immediate neighborhood. These are general health, safety, and welfare standards, and the burden of proof concerning these standards was on the Borough as objector, not on Developer. In re

Brickstone Realty Corp., 789 A.2d 333 (Pa. Cmwlth. 2001); Bray v. Zoning Board of Adjustment, 410 A.2d 909 (Pa. Cmwlth. 1980). Therefore, the ZHB erred by placing the burden on Developer to prove its application was in compliance with these general standards.

Section 908(9) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10908(9), provides that a zoning hearing board decision that is based on any provision of the MPC or any ordinance, rule, or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. Here, the ZHB's decision only referenced and relied on section 1266.1 of the Ordinance, as well as its concerns about public safety. Although the Borough argues that Developer was required to comply with numerous sections of the Ordinance, the ZHB did not rely upon those provisions to decide Developer's application. It is not the role of this Court to step into the shoes of the ZHB and perform an independent evaluation of the Developer's application for a special exception.<sup>5</sup>

Furthermore, we agree with the trial court that the Board's findings regarding those general standards are unsupported by substantial evidence. Noncompliance with general safety and health standards must be proven with *evidence*. Zoning Hearing Board of Upper Darby v. Konyk, 290 A.2d 715 (Pa. Cmwlth. 1972). The trial court correctly concluded that the Borough failed to produce such evidence and that the ZHB's findings were based on hearsay, irrelevant

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<sup>5</sup> The Borough argues that Developer's laundromat is not permitted by the Ordinance because of its massive size. However, the ZHB did not deny the special exception on the ground that the proposed laundromat is too large or that it is not the type of laundromat contemplated by the Ordinance. Furthermore, the trial court properly determined that the Ordinance does not limit the size of laundromats and that the proposed laundromat corresponds to the size of the existing building, which Developer does not plan to enlarge. Therefore, this argument is without merit.

considerations, the personal beliefs and experience of the ZHB members, and speculation.

Regarding hearsay, the ZHB received the testimony of the Borough's engineering expert, Watson, who provided information on crime statistics taken from police records and a report on the laundromat business trends and practices drafted by the Coin Laundry Association. This was error. Although experts are permitted to express opinions based upon reports that they customarily rely upon in the practice of their profession, an expert witness may not merely serve as the conduit or transmitter of the content of an extrajudicial source of information. Luzerne County Flood Protection Authority v. Reilly, 825 A.2d 779 (Pa. Cmwlth. 2003); Primavera v. Celotex Corp., 608 A.2d 515 (Pa. Super. 1992). The record establishes that the Borough used Watson as a conduit to introduce crime and business data. In addition, crime statistics and reports on business trends are not the type of information ordinarily used by engineering experts to form an opinion, and the record does not establish that Watson has any reasonable claim to specialized knowledge in the areas of criminology or the laundromat business.<sup>6</sup> We also note that the police reports were never introduced into evidence; nor did the Borough move for their admission on the theory that they are a business or public record. The Borough responds that the ZHB is not bound by the formal rules of evidence; however, this assertion ignores the principle that the hearsay rule is not merely a technical rule of evidence, but is a vital, basic, and fundamental rule of law. Blue Mountain Area School District v. Unemployment Compensation Board of Review, 503 A.2d 1073 (Pa. Cmwlth.1986).

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<sup>6</sup> Watson's voir dire established that she has the following qualifications: (1) she is a licensed engineer; (2) she has a degree in civil engineering; (3) she has experience as a witness; (4) she has been recognized as an engineering expert in other proceedings; and (5) she represents other municipalities. (R.R. at 74a-75a.)

Moreover, the crime statistics were not relevant to Developer's application because they had no relationship to the proposed laundromat and pertained to criminal activity generally connected to decreased traffic on Church Lane. We observe that zoning is not a proper tool for solving neighborhood crime problems, Van Sciver v. Zoning Board of Adjustment of Philadelphia, 396 Pa. 646, 152 A.2d 717 (1959), and that the ZHB's speculation that the laundromat could increase criminal activity is not a sufficient basis to deny the special exception. Penny Supply; Bureau of Corrections v. City of Pittsburgh, 496 A.2d 1361 (Pa. Cmwlth. 1985) (fears and personal opinions without a concrete basis are insufficient to support the denial of a special exception where the specific ordinance criteria are satisfied). The ZHB must base its decision on evidence showing a high degree of probability that the use will substantially affect the health and safety of the community. Id.; In re Appeal of Dippolito, 833 A.2d 336 (Pa. Cmwlth. 2003).

Furthermore, the ZHB made the following finding on the question of whether the proposed use would primarily serve the daily needs of the immediate neighborhood:

[T]he Zoning Hearing Board, based upon the first hand knowledge of its members and the testimony provided by the various protestants, knows of the number of already existing laundromats within the borough, the high percentage of homeowners who have their own washers and dryers and understand[s] that the addition of a 120 machine laundromat on Church Lane will not be serving primarily the daily needs of the immediate surrounding neighborhood.

(ZHB Decision at 4-5.) However, the personal knowledge of the Board members is not a substitute for record evidence. Doris Terry Revocable Living Trust v. Zoning Board of Adjustment, 873 A.2d 57 (Pa. Cmwlth. 2005). Although Borough residents



offered general statements and opinions at the hearing on laundromats and ownership of washers and dryers in the Borough, those statements and opinions are insufficient to prove that the proposed laundromat conflicts with the purpose of the NC District or to show to a high degree of probability that it will substantially affect the health and safety of the community. Konyk. Therefore, the ZHB erred by finding that the proposed laundromat did not primarily serve the daily needs of the immediate neighborhood.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

