

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Walters Oxford, LP :
 :
 v. : No. 2138 C.D. 2007
 : Argued: June 9, 2008
 Board of Supervisors of East :
 Nottingham Township, :
 Appellant :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: September 3, 2008

The Board of Supervisors (Board) of East Nottingham Township (Township) appeals from the order entered by the Court of Common Pleas of Chester County (common pleas) reversing the decision of the Board and granting Walters Oxford, LP (Walters) conditional use approval. On appeal, the Board argues that common pleas committed an error of law because Walters failed to establish sufficient evidence of compliance with the Township’s zoning ordinance (Ordinance).

Walters, the equitable owner of a 109-acre property located in the R-2 Residential District, and bordered by Shadyside, Oaks, and Twin House Roads,

seeks to develop the site as a single family residential community.¹ Specifically, Walters proposes to develop a “Retained Open Space Development,” which is a use explicitly permitted in R-2. The area and bulk requirements for such a development are set forth in Section 1305 of the Ordinance but these are subject to reduction by conditional use where the applicant uses Transferable Development Rights (TDRs).² A reduction in the applicable area and bulk requirements, of up to 25%, may be achieved if the developer uses at least 20 TDRs. Following arrangements to purchase 106 TDRs, Walters submitted a conditional use application, proposing 254 clustered residences on the site, using 81 of the TDRs purchased. Walters proposed less than the full 25% reduction in area and bulk standards.

Following a hearing that extended over several days, the Board announced that Walters failed to establish compliance with the criteria under Sections 2110, 1404.B.3 and 1405³ of the Ordinance. Section 2110 addresses conditional use procedures and criteria generally and, in pertinent part, provides:

¹ Walters initially applied to develop a 119-acre site but subsequently amended the application after resolving a dispute over ten adjacent acres that the parties ultimately agreed Walters had not acquired.

² Section 107 of The Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10107 defines “transferable development rights,” as follows:

The attaching of development rights to specified lands which are desired by a municipality to be kept undeveloped, but permitting those rights to be transferred from those lands so that the development potential which they represent may occur on other lands where more intensive development is deemed to be appropriate.

³ Section 1405 addresses the “Plan Submittal Process” where an applicant proposes use of TDRs to reduce the area and bulk requirements in the base zoning district. In summary, this section requires submission of a deed, along with a title report showing all of the TDRs owners and lienholders, or agreement of sale for the acquisition of the TDRs, a note on the plan showing the total number of additional dwellings resulting from use of the TDRs and in the case where the TDRs proposed for use have not yet been severed from the sending area tract, the applicant
(Footnote continued on next page...)

E. Criteria

The following criteria shall be used by the Board of Supervisors as a guide in evaluating a proposed conditional use. The burden of proof in establishing that all criteria have been met shall at all times rest upon the applicant.

1. The proposed use at the location in question shall be in the public interest and best serve the public health, safety, and general welfare.

....

6. Sufficient land area shall be made available to be able to effectively screen the proposed conditional use from adjoining different uses.

7. Sufficient safeguards for parking, traffic control, screening, setbacks and other design requirements under this ordinance can be implemented to remove any potential adverse influences created by the proposed use.

Section 1404, entitled “Receiving Area Qualifications and Calculations,” generally concerns the use of TDRs on receiving area properties. Subsection 1404.B.3, specifically concerning “Design Requirements and Modifications of Area and Bulk Standards,” provides for the 25% reduction in area and bulk standards and, in pertinent part, states:

Any conditional use approval to permit such modification(s) shall be subject to the following criteria:

(continued...)

must provide a plan of the sending area tract showing the number of TDRs that may be sold, as well as a metes and bounds description of the tract, its tax parcel number and owner name. In a post hearing submission to which the Township did not object, Walters submitted the information required under Section 1405. For this reason and based on the Board’s failure to specify any particular deficiency in the information submitted, we conclude that the Township did not preserve any issues or arguments concerning Section 1405.

a. The design and modifications:

[1] shall be consistent with the purposes and the land use standards contained in this ordinance;

[2] shall not produce lots or street systems that would be impractical in terms of layout or circulation or detract from the appearance of the development or surrounding community; and

[3] shall not adversely affect emergency vehicle access.

b. The applicant shall demonstrate to the Board that the proposed modification(s):

[1] will produce equal or better development design and, as applicable, open space conservation results than could be achieved without the requested modification(s); and

[2] represent the minimum modification necessary.

The Board focused the “discussion” portion of its written decision on the sufficiency of land for screening from different adjacent uses pursuant to Section 2110. The Board opined that Walters’ cluster housing would require screening because it introduced a use different from the adjacent uses. The Board premised this conclusion on its observation that while Walters did not identify every adjacent use, it is undisputed that neighboring properties contain single family dwellings on much larger lots (one-acre or larger) than those proposed for the Walters site and a ten-acre lot adjoins the site along one property line. In addition, across the road from the Walters site are unidentified uses that occupy significantly larger lots than Walters proposes. Because the Board determined that by virtue of the larger lot sizes the adjacent uses are different and that Walters’

plan failed to establish whether a sufficient land area would be available for screening, the Board concluded that Walters failed to meet the screening requirement in Section 2110.E.6 of the Ordinance. The Board opined that “for this reason alone” Walters failed to meet the requirements for conditional use approval. Board’s decision at 11. The Board also noted in its findings that Walters did not address potential stormwater management issues so as to permit a determination that, pursuant to Section 2110.E.1, the proposed development will best serve the public welfare. Further, the Board indicated that the plan did not provide a traffic study and it did not identify the specific location of the parking spaces on each lot in order to satisfy Section 2110.E.7. Having concluded that Walters failed to meet its burden to demonstrate Ordinance compliance, the Board denied the conditional use application.

Thereafter, Walters appealed to common pleas, which listed three issues preserved for its review, as follows:

1. Have the screening requirements of §2110.E.6 of the Ordinance been met?
 - a. Is the neighboring single family use different from the use proposed?
 - b. Regardless of whether the neighboring single family use is different, has Walters satisfied the requirements of the Ordinance by providing an area on the Plan for screening?
2. Does the Application provide a substantial threat to the community?
3. Does the Application threaten public welfare?

Common pleas' op. at 2. Without taking additional evidence, common pleas observed that during the hearing the Township's concern about screening focused on only certain specific lots rather than the entire development and, at all events, the solicitor acknowledged that the plans would be subject to more detailed review and modification during the subdivision and land development process, as directed in Section 1714 of the Ordinance.⁴ Based on what the court characterized as the Township's repeated deferral of discussion on screening details until land development review, common pleas opined that "the Township's assertion now that the failure to address these issues is a basis to deny the [conditional use] Application is disingenuous." Common pleas' op. at 7.

Common pleas also ruled that, as to the adjoining residential properties on lots larger than Walters proposed, the Board erred as a matter of law in concluding that the lot size difference constituted a different use that requires screening. Common pleas further concluded that, as a matter of law, lots separated from the Walters tract by a road did not qualify as adjoining so as to trigger a screening requirement. Finally, in addressing whether the proposed development is consistent with the public welfare or constitutes a threat thereto, common pleas noted the well-established principle that a conditional use is one permitted under the ordinance and, hence, presumptively consistent with health, safety and public welfare. The court concluded that the record contained insufficient evidence to rebut this presumption and noted in particular that anecdotal comments from neighbors of the proposed development regarding potential detrimental stormwater runoff were too speculative, lacking any foundation testimony in engineering or

⁴ Section 1714 requires compliance with the screening standards established in Section 507.1 of the Subdivision and Land Development Ordinance.

science. Based on these findings and conclusions, common pleas reversed the Board and granted the conditional use. Thereafter, the Board filed the present appeal.

On appeal, the Board contends that common pleas erred in granting the conditional use based on Walters' mere promise of future compliance with the applicable ordinances and in so doing improperly relieved Walters of its burden of proof, granting approval despite insufficient evidence of compliance. Specifically, the Board reiterates the grounds stated in its decision, asserting that it properly denied the conditional use based on Walters' failure to identify areas in need of and sufficient to accommodate vegetative screening and provide details on traffic control measures and the specific location of parking.

Initially, we note our agreement with common pleas' conclusion that single family dwellings on smaller lots do not constitute a different use simply due to the lot size. As the court stated in its opinion, the use of a lot depends not on its size, but on the purpose or activity to which the lot is devoted. We also discern no error in common pleas' conclusion that land separated from the Walters tract by a road does not constitute adjoining land for purpose of the screening requirements of the Ordinance. As the court opined, pursuant to the ordinary dictionary definition, "adjoining" lots are touching or contiguous in a manner precluded when a road separates them. We also agree with common pleas, for the reasons stated in the opinion, that the burden in this case, to show substantial detrimental impact fell upon the objecting neighbors and that the evidence presented by them fails to establish that the development proposed by Walters will impose a substantial threat to the community. In addition to these points of agreement with common pleas, we base our decision on our broader

based conclusion that Sections 2110 and 1404.B.3 of the Ordinance lack sufficiently specific standards on which to impose a threshold proof burden on a landowner/developer.⁵

The applicant for a conditional use has the burden to demonstrate compliance with the *specific objective* standards of the zoning ordinance. *Bray v. Philadelphia Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980). The scope of the applicant's burden has been well-established and is perhaps best described in *Bray*, as follows:

Specificity is the essential characteristic of operative special exception^[6] requirements in an ordinance. The Pennsylvania Supreme Court has long defined a special exception as one allowable where requirements and conditions *detailed* in the ordinance are found to exist. *Lukens v. Ridley Township Zoning Board*, 367 Pa. 608, 80 A.2d 765 (1951); *Devereux Foundation, Inc. Zoning Case*, 351 Pa. 478, 41 A.2d 744 (1945). [See also Section 913.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, added by the Act of December 21, 1988, P.L. 1329, *as amended*, 53 P.S. § 10913.2.]

Accordingly, when municipalities have put general, non-specific or non-objective requirements into the ordinance with respect to special exceptions, our decisions have usually not seen such general provisions as part of the threshold persuasion burden and presentation duty of the applicant. Judge Kramer stated the reason in *In re Appeal of George Baker*, 19 Pa. Cmwlth. 163, 168, 339 A.2d 131, 135 (1975) as follows:

⁵ We may of course affirm a lower court's decision on grounds not relied on by the lower court. *Fitterling v. Workmen's Comp. Appeal Bd.*, 343 A.2d 386 (Pa. Cmwlth. 1975).

⁶ It is well-established that "[t]he law regarding conditional uses and special exceptions is virtually identical;" the burden of proof standards are the same for both. *Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113, 115 n.5 (Pa. Cmwlth. 2002).

It is in the nature of a special exception to require that the applicant meet reasonably definite conditions, and it would be manifestly unfair to require him to prove conformity with a policy statement, the precise meaning of which is supposed to be reflected in *specific* requirements Any other view would enable the Board to assume a legislative role (Emphasis in original.)

Bray, 410 A.2d at 911. Hence, what the applicant must establish to obtain conditional use approval depends on a case-by-case basis on what specifically the ordinance requires. See *Elizabethtown/Mt. Joy Associates v. Mount Joy Tp. Zoning Hearing Bd.*, 934 A.2d 759, 764 (Pa. Cmwlth. 2007).

When the applicant meets this burden, the use proposed enjoys a presumption that it is consistent with municipal planning objectives and with the public health, safety and welfare. *Sheetz*, 804 A.2d at 115. The burden then falls upon those opposing the use to establish with specificity and with more than mere speculative anecdotal testimony that the use will impose detrimental impacts exceeding those ordinarily to be expected. *Id.* For example, opponents can not meet their burden with only statements from neighbors that already troubling traffic volume on local roads will be increased by the introduction of the proposed use or that the area already suffers from stormwater runoff problems. This is so because, even accepting these statements as true, they do not establish that the use will impose more than the normally expected impact of additional development, which presumptively the governing body, in enacting the ordinance, took into account and considered not to be a threat to health, safety or welfare. *In re Cutler Group, Inc.*, 880 A.2d 39 (Pa. Cmwlth. 2005).

In *Elizabethtown/Mt. Joy*, the ordinance required a special exception applicant seeking approval for a shopping center to submit a detailed plan

addressing with specificity provisions for signage, lighting, architectural style, connection to public services and provisions to handle peak traffic flow. Our court ruled that an application presenting only a concept plan for which details had not yet been designed and which the applicant asserted showed what “could be done ... not what would be done” failed to meet the specificity requirements imposed under the ordinance. By contrast, in the present case the ordinance provisions on which the Board based its denial bear no similarity to those enforced in *Elizabethtown/Mt. Joy*.

Section 2110 of the Ordinance before us in the present case announces that the “following criteria shall be used by the Board of Supervisors as a guide” and then lists areas of concern, such as land area for screening and traffic, parking and design requirements for which “sufficient” measures can be implemented. Section 2110 does not establish standards for determining what is “sufficient” land area for screening or safeguards for parking and traffic control; thus, it fails to set forth specific standards that the applicant must meet. Similarly, Section 1404.B.3 of the Ordinance fails to establish specific standards. That section directs consistency with the purpose of the ordinance, the avoidance of impractical street layouts or adverse affect on emergency access and directs that the design be equal or better than that which could be achieved without the modification of area and bulk standards requested by conditional use. These directives do not state standards for street layout, emergency access, or design and, thus, lack the requisite specificity to provide grounds for denying the conditional use. While the Township’s ordinances, both Zoning and Subdivision/Land Development, contain more specific standards, proof of compliance need not be produced at the

conditional use phase.⁷ Walters will need to establish compliance with the more specific standards prior to obtaining development approval but failure to do so at this point cannot defeat Walters' entitlement to a conditional use.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁷ Indeed, we note that Section 1714 of the Zoning Ordinance directs that uses permitted by special exception or conditional use shall be screened from other uses in accordance with the planning specifications in Section 507.01 of the Township Subdivision and Land Development Ordinance "when so directed by the Zoning Hearing Board or Board of Supervisors, respectively, *as a condition of approval* for the special exception or conditional use." (Emphasis added).

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Board of Supervisors of East	:	
Nottingham Township,	:	
Appellant	:	

ORDER

AND NOW, this 3rd day of September, 2008, the order of the Court of Common Pleas of Chester County in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge