

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

North Point Breeze Planning and :  
Development Corporation, Johnnie May :  
Nixon, Cheryl Hall, Lillian Carpenter, :  
Debra Stubbs, Kathryn Romey, :  
William Grisom, and Gregory Hankins, :  
: :  
Appellants :  
: :  
v. : No. 2317 C.D. 2009  
: Argued: November 8, 2010  
City of Pittsburgh Zoning Board of :  
Adjustment, City of Pittsburgh and :  
Western Psychiatric Institute & Clinic :  
of UPMC Presbyterian Shadyside :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH<sup>1</sup>

FILED: December 23, 2010

North Point Breeze Planning and Development Corporation, Johnnie May Nixon, Cheryl Hall, Lillian Carpenter, Debra Stubbs, Kathryn Romey, William Grisom, and Gregory Hankins (Appellants) appeal from the October 26, 2009, order of the Court of Common Pleas of Allegheny County (trial court) which affirmed the decision of the City of Pittsburgh Zoning Board of Adjustment (Board) and dismissed Appellants' appeal.

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<sup>1</sup> This case was reassigned to the author on December 10, 2010.

On June 5, 2008, Western Psychiatric Institute & Clinic of UPMC Presbyterian Shadyside (WPIC) filed an application with the City of Pittsburgh Zoning Administrator (Administrator) to use property located at 333 N. Braddock Avenue in Pittsburgh (Property) for Office use and Multi-Suite Residential use. The Property is zoned UI-Urban Industrial; Office use is a permitted use in UI districts, and Multi-Suite Residential (general) is permitted in those districts as an Administrator Exception.

WPIC intends to improve the Property in order to provide certain crisis services (Crisis Center) pursuant to a contract between WPIC and the Allegheny County Department of Human Services. The purpose of the Crisis Center is to stabilize persons in psychiatric crisis. An individual would stay at the Crisis Center until he or she was stabilized or could be linked with another service. An individual who was not stabilized within 72 hours would be referred to another mental health provider. The proposed program would have four components: a 24 hour, 7 days a week hotline service; a mobile crisis service; a 24 hour, 7 days a week walk-in crisis service; and an overnight residential crisis service. All of these services would be licensed by the Commonwealth.

The interior of the Crisis Center is to be divided into two distinct areas. The first area, consisting of 7,500 square feet would accommodate the hotline and mobile crisis team services. The second area, consisting of 14,900 square feet, would accommodate the walk-in and the overnight residential program services and would include the following: a total of fourteen sleeping rooms; a dining area; lounges; a support staff area; child interview rooms; and adult interview rooms. (Finding of Fact No. 5, R.R. at 11a.)

WPIC's zoning application requested a new certificate of occupancy for "extensive interior alterations to create crisis services center, call center, and office space."<sup>2</sup> In a subsequent letter, WPIC indicated that the Property was to "be partially used as multi-suite residential (general) facility that will contain fourteen...rooms for overnight stays up to 72 hours. The remaining portion of the building will be used as office (general) space." (R.R. at 176a.) The Administrator approved the application.

Appellants filed a protest appeal with the Board, arguing that the Administrator erred in determining that the residential crisis services to be provided by the Crisis Center are permitted as a Multi-Suite Residential use. The Board held a public hearing on September 11, 2008. Thereafter, the Board determined that WPIC's principal use of the Property would be as a clinic that provides crisis intervention services, similar to the outpatient services offered by a Medical Office/Clinic, which use is allowed under section 911 of the Pittsburgh Zoning Ordinance (Code). However, because the proposed Crisis Center may offer overnight services, the Board concluded that the proposed use is not provided for under the Code. Under these circumstances, section 911.03A of the Code authorizes the Administrator to classify the proposed under an existing land use category based upon the definitions in the Code and the similarity of the proposed

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<sup>2</sup> We note that, contrary to representations made at oral argument, WPIC was not granted a special exception. The Administrator granted an "Administrator Exception" to use the Property as Multi-Suite Residential/ Office; however, an "Administrator Exception" is not a "special exception." We also note that, based upon the record, no application for an Administrator Exception was filed pursuant to Section 922.08A of the Code. We further note that because a Multi-Suite Residential use is a permitted use in the UI district no special exception was necessary in order to approve such use.

use with an existing land use category.<sup>3</sup> Here, the Board determined that the proposed use most closely fits with the Code's definition of a Medical Office/Clinic, a permitted use in UI Districts. Next, the Board determined that the overnight residential services were a necessary part of the treatments to be provided at the Crisis Center and thus, were permitted as an accessory use.

Accordingly, the Board reversed the Administrator's granting of a Multi-Suite Residential use but granted WPIC a Medical Office/Clinic primary use with an overnight residential program as an accessory use. Appellants appealed to the trial court, which affirmed the Board's decision and dismissed Appellants' appeal. Appellants now appeal to this court.<sup>4</sup>

Appellants argue that the Board erred and/or abused its discretion in determining that the overnight residential program was permitted as an accessory use to a Medical Office/Clinic without giving Appellants an opportunity to address that issue. Appellants also contend that the Board erred and/or abused its discretion: 1) in finding that an overnight residential program was an accessory use to a primary use that is defined as an establishment providing services on an out-

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<sup>3</sup> Alternatively, section 911.03B of the Code authorizes the Administrator to treat a proposed new use as a Special Exception in the GI District and require review and approval by the Board in accordance with the special exception review procedures set forth in section 922.07 of the Code.

<sup>4</sup> Our scope of review when the trial court does not take additional evidence is limited to determining whether the Board abused its discretion or committed an error of law. Upper Saucon Township v. Zoning Hearing Board of Upper Saucon Township, 583 A.2d 45, 48 (Pa. Cmwlth. 1990). An abuse of discretion can only be found if the Board's findings are not supported by substantial evidence which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 50, 53, 462 A.2d 637, 640 (1983).

patient basis; 2) in finding that the overnight residential program of WPIC was necessary and customary to a Medical Office/Clinic primary use; 3) in finding that a new or unlisted use can be located in a U1 zoning district; and 4) in not finding that the floor area of the accessory use exceeded the limit of 25% of total floor area permitted for an accessory use.

Whether a proposed use, as factually described in an application or in testimony, falls within a given category specified in a zoning ordinance is a question of law. Southco, Inc. v. Concord Township, 552 Pa. 66, 713 A.2d 607 (1998). If a zoning ordinance does not define a term, the term must be given its usual and ordinary meaning. Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa. Cmwlth. 1991). If a court needs to define a term in a zoning ordinance, the court may consult definitions found in statutes, regulations, or dictionaries for guidance, although such definitions are not controlling. Id.

Section 911.02 of the Code defines Medical Office/Clinic as follows:

[A]n establishment providing therapeutic, preventative, corrective, healing and health building treatment services on an out-patient basis by physicians, dentists and other practitioners. Typical uses include medical and dental offices and clinics and out-patient medical laboratories.

Appellants do not argue that the crisis services that the Crisis Center provides do not qualify the Crisis Center as a Medical Office/Clinic use. However, Appellants maintain that Board erred in concluding that the overnight residential program component qualifies as an accessory use to a Medical Office/Clinic.<sup>5</sup>

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<sup>5</sup> Appellants contend that the overnight residential component of the program is a new or unlisted use governed by section 911.03(B) of the Code.

Initially we note that, although the Code defines a Medical Office/Clinic as an establishment that provides services on an out-patient basis, the Code does not define the term “out-patient.” “Out-patient” is defined in Merriam Webster’s Collegiate Dictionary, Tenth Ed., 826 (1993), as “a patient who is not hospitalized overnight but who visits a hospital, clinic, or associated facility for diagnosis or treatment.” The Board correctly determined that the proposed over-night residential services do not fall within the definition of Medical Office/Clinic.

The Board relied on section 912.01 of the Code to determine that the over-night residential program qualified as an accessory use to the Medical Office/Clinic primary use. Section 912.01 of the Code states as follows:

#### 912.01 Accessory Uses and Structures in General.

Primary uses specified as permitted by-right, Administrator Exceptions, Special Exceptions or Conditional Uses shall be deemed to include accessory uses, activities and structures. An accessory use or structure must:

- A. Be subordinate to and serve the primary use or structure;
- B. Be subordinate in area, extent and purpose to the primary use or structure served;
- C. Contribute to the comfort, convenience or necessity of occupants of the primary use or structure served; and,
- D. Be located on the same zoning lot and in the same zoning district as the primary use.

Section 912.03 of the Code states that:

#### 912.03 Nonresidential Accessory Uses and Structures

The following accessory uses, activities and structures shall be permitted by-right in nonresidential districts:

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9. Other necessary and customary uses determined by the Zoning Administrator to be appropriate, incidental and subordinate to the primary use on that lot.

In order for the proposed overnight use to qualify as an accessory use, the record must reflect that the proposed use is secondary to the primary use<sup>6</sup> and necessary and customary to the primary use. Green v. Zoning Board of Adjustment of the City of Pittsburgh, 490 A.2d 488 (Pa. Cmwlth. 1985). Therefore, in order for the overnight residential component of the program to qualify as an accessory use under the Code, WPIC must show that its overnight residential program is necessary and customary or “customarily incidental” to the Property’s primary use as a Medical Office/Clinic. Champaine v. Zoning Hearing Board of East Bradford Township, 374 A.2d 752 (Pa. Cmwlth. 1977).

In Hess v. Warwick Township Zoning Hearing Board, 977 A.2d 1216 (Pa. Cmwlth. 2009), this court examined the meaning of the phrase “customarily

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<sup>6</sup> Here, the Crisis Center is dedicated to assisting children and adults who are in psychiatric crisis. Its treatment program accomplishes this purpose by identifying the crisis, screening and assessing the crisis, crisis intervention, problem solving, referral to other services, crisis stabilization, and providing bridge medications and medical services, if needed. The record reveals that the residential portion of the Crisis Center’s services is subordinate to and serves the primary use of the Medical Office/Clinic. The record also indicates that the residential component of the Crisis Center’s services is a minor component of the crisis services provided; fewer than 5% of the individuals participating in treatment will utilize the overnight services. The residential facilities cannot accommodate more than fourteen adults at any given time and their stays cannot exceed a period of 72 hours. The residential program is intended for individuals who come to the clinic and need to stay overnight in order to be stabilized. Thus, the record reflects that the overnight aspect of the program is dependent upon, or secondary, to the primary use.

incidental” as commonly used in zoning ordinance definitions of the term “accessory use.” We explained in pertinent part as follows:

The term “customarily incidental” can neither be ignored as meaningless nor can it be subjected to proof in each case by some standard quantum of empirical evidence that has not been and probably cannot be articulated. The proper application of “customarily incidental” in any particular case must respect the need for an understandable legal standard and yet allow for the flexibility necessary to the term’s reasonable application in a variety of circumstances....

“Customarily incidental” is best understood as invoking an objective reasonable person standard. Under this standard, we may look not only at how frequently the proposed accessory use is found in association with the primary use (if such evidence is available, it certainly is relevant) but also at the applicant’s particular circumstances, **the zoning ordinance and the indications therein as to the governing body’s intent regarding the intensity of land use appropriate to the particular district**, as well as the surrounding land conditions and any other relevant information, including general experience and common understanding, to reach a legal conclusion as to **whether a reasonable person could consider the use in question to be customarily incidental**. This approach respects the need for an understandable legal standard and the flexibility that is a necessary component of the analysis....

Id. at 1224 (emphasis added).

Although the UI district in which the Property is situated is flexible and accommodates a variety of new or unlisted uses,<sup>7</sup> Appellants maintain that the

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<sup>7</sup> Section 904.07.A of the Code states that the intent of the UI district is to:

1. Allow mid-sized to large industries with lower external impacts on surrounding properties and districts;

*Footnote continued on next page...*

Board erred and/or abused its discretion by permitting an overnight residential program as an accessory use to a Medical Office/Clinic use without affording Appellants an opportunity to present evidence relevant to the analysis required by Hess. We agree.

In Keebler v. Zoning Board of Adjustment of the City of Pittsburgh, 998 A.2d 670 (Pa. Cmwlth. 2010), the property owner submitted an application to the Board for a special exception to change from one nonconforming use to another. The Board concluded that the prior nonconforming use had been abandoned when the building on the property was razed. However, the Board further determined that, due to the unique physical conditions of the property, it could not be used for a single family dwelling. Relying on Appeal of Booz, 533 A.2d 1096 (Pa. Cmwlth. 1987),<sup>8</sup> the Board reasoned that it could permit the grant

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2. Provide a flexible district that addresses the growing need for easily adaptable and flexible spaces, including office parks, incubator spaces, high technology and service sector industries;
3. Allow multi-use buildings that permit assembly, inventory, sales, and business functions within the same space;
4. Encourage adaptive reuse of manufacturing buildings and allow the development of high density multi-unit residential buildings.

<sup>8</sup> In Booz, the applicants sought a variance to sell and lease new tractors and trailers on their property. The zoning hearing board (ZHB) granted the applicants a variance to allow the erection of signs on the property and granted a special exception, instead of a variance, permitting the sale and leasing of tractors and trailers. On appeal, our court first determined in Booz that the hearing notice of adequate. However, we next observed that, because no amendment to the application was made at the hearing, it was possible that protestants were prevented from effectively opposing the application. For this reason, we remanded the matter for additional proceedings, explaining as follows:

*Footnote continued on next page...*

of the use proposed under a different theory than that asserted by the property owner. Accordingly, after observing that the property owner was not entitled to a special exception based on a change in a nonconforming use, the Board concluded that the property owner was entitled to a use variance. Objectors appealed the grant of a use variance to the trial court, which affirmed the Board's decision.

On appeal to our Court, the objectors first argued that the Board erred in granting a use variance without providing them an opportunity to address the issue of whether the property owner was entitled to that specific relief. We agreed that, although the Board may render relief other than that requested in an application, Booz, our holding in Booz requires that objectors have notice of the legal theory that the Board has determined to be applicable.

Thus, although the Board was authorized in this case to grant WPIC relief under a different Code provision than that identified in WPIC's zoning application, the Board erred in doing so without affording Appellants an opportunity to present evidence relevant to the application of the different Code provision. Keebler; Booz.

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While we would find no error in the Board rendering the appropriate zoning relief based on the evidence presented,[] regardless of the initial characterization of the relief requested in an application, we believe that when the board ultimately recognizes that the appropriate zoning relief is not that specified in the application, it must afford any objectors to the application a fair opportunity to present relevant evidence in opposition. If the need for an amendment is recognized at the time of hearing, an opportunity to present relevant evidence may be afforded at the same hearing or at a second hearing if the objectors are not immediately prepared to present their case on the alternate legal theory.

Id., at 1099 (footnote omitted).

Accordingly, we vacate the trial court's order and remand this matter to the trial court for further remand to the Board in order to provide both parties an opportunity to present evidence concerning whether the overnight residential crisis service qualifies as an accessory use to a Medical Office/Clinic.<sup>9</sup>

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PATRICIA A. McCULLOUGH, Judge

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<sup>9</sup> In light of our disposition, we do not address the remaining issues raised by Appellants on appeal.

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**ORDER**

AND NOW, this 23<sup>rd</sup> day of December, 2010 the order of the Court of Common Pleas of Allegheny County (trial court), dated October 26, 2009, is hereby vacated, and this matter is remanded to the trial court for further proceedings in accordance with the foregoing opinion.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge