

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Above & Beyond, Inc., :
Appellant :
 : No. 2383 C.D. 2009
v. :
 :
The Zoning Hearing Board of :
Upper Macungie Township and :
Upper Macungie Township :

Above & Beyond, Inc., Nadar F. :
Hamati, Kelly Hamati, Tony M. :
Attieh and Rasima Hamati-Attieh, :
Appellants :
 : No. 2384 C.D. 2009
v. :
 : Argued: June 24, 2010
The Zoning Hearing Board of Upper :
Macungie Township and Upper :
Macungie Township :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: November 3, 2010

In these consolidated appeals, owners/operators of a proposed assisted living facility appeal from the November 13, 2009, order of the Court of Common Pleas of Lehigh County (trial court), which affirmed two decisions of the Zoning

Hearing Board of Upper Macungie Township (ZHB) denying their request for a special exception. We reverse.

Above & Beyond, Inc. (Applicant) is the proposed operator of an assisted living facility¹ to be located on property at 5844-5846 Daniel Street and 5757 Cetronia Road. The property is owned by Nadar Hamati, Kelly Hamati, Rasima Hamati-Attieh and Tony M. Attieh (with Applicant, Appellants) in an R-2 zoning district in Upper Macungie Township (Township). The property's current use is that of a single family home and detached garage. The property includes two lots with a total area of 7.39 acres. Portions of the property are vacant, and a portion is used as a storm water detention pond. Access to the property currently is by way of two driveways that connect to Cetronia Road, which is a state road.

Appellants seek to develop the property as an 80-bed personal care home, a use permitted by the Upper Macungie zoning ordinance (Ordinance) in the R-2 district by special exception. Under the proposed plan, lot 1 as subdivided will include 294,310 square feet, and lot 2 as subdivided will include 27,874 square feet. The personal care home will be located on lot 1; the home and garage will remain on lot 2.

Appellants have twice sought special exception approval from the ZHB to utilize the property as a personal care home. At the March 11, 2009, hearing, Applicant also requested an interpretation of the Ordinance categorizing such use as residential, rather than institutional.² Section 202 of the Ordinance (terms defined)

¹ The Ordinance permits such use as a "personal care home."

² The Township's classification of the use as an institutional use triggers the requirement of 50-foot and/or 75 foot buffer yards along boundary lines, under section 803.D of the Ordinance. Appellants sought a variance for a proposed buffer of 15 feet.

defines a personal care home as “a residential use providing residential and support services primarily to persons who are over age 60, physically handicapped and/or developmentally disabled....” In section 306 of the Ordinance, which sets forth a table of permitted uses by district, a personal care home falls under the category of “institutional uses” permitted in the R-2 and R-3 residential districts.³ Alternatively, Applicant sought a variance from buffer requirements applicable to institutional uses. Following the hearing, the ZHB denied the requested relief, and Applicant appealed to the trial court.⁴

In the interim, on March 26, 2009, Appellants submitted a second request based on an altered design that changed the design of the proposed structure from one-story to two-story, thereby alleviating the need for an interpretation of the Ordinance and/or a variance. Following a second hearing, the ZHB again determined that the proposed personal care home use was an institutional use and that Appellants’ proposal did not meet Ordinance standards governing the grant of a special exception. Appellants appealed to the trial court, which consolidated the two appeals and affirmed the ZHB’s decision.⁵

The relevant Ordinance provisions may be summarized as follows. Pursuant to Ordinance section 119.C, the ZHB “shall approve any proposed special

³ The Ordinance permits personal care homes by right in two other residential districts and prohibits them in three residential districts.

⁴ The Board issued official notice of its decision on March 12, 2009, and a written decision on April 8, 2009. (R.R. at 167a-69a, 170a-83a.) Applicant filed an appeal to the trial court on May 1, 2009. (R.R. at 250a-56a.)

⁵ The ZHB issued official notice of its decision on April 23, 2009, followed by a written decision dated May 27, 2009. (R.R. at 262a-88a.) Appellants filed an appeal to the trial court on June 18, 2009. (R.R. at 290a.)

exception use if [it] finds adequate evidence that the proposed use will meet” all of the standards listed in section 118.C.4,⁶ the specific standards for the proposed use listed in sections 402 (related to setbacks), section 403, and all other applicable requirements of the Ordinance. In addition, Ordinance section 812.B states that a

⁶ Ordinance section 118.C.4 sets forth the following standards:

- a. Other Laws. [The special exception use] will not clearly be in conflict with other Township Ordinances or State or Federal Laws or regulations known to the Township.
- b. Traffic. The applicant shall show that the use will not result in or significantly add to a significant traffic hazard or significant traffic congestion (based upon overall levels of service below the level “C”)
- c. Safety. The applicant shall show that the use will not create a significant public safety hazard, including fire, toxic or explosive hazards.
- d. Storm Water Management. Will follow adequate, professionally accepted engineering methods to manage storm water. Storm water shall not be a criteria of a decision under this Ordinance if the applicant clearly would be subject to a separate engineering review and an approval of storm water management by the Board of Supervisors under the Subdivision and Land Development Ordinance and under plans adopted pursuant to the PA. Storm Water Management Act.
- e. Neighborhood. Will not significantly negatively affect the desirable character of an existing residential neighborhood, such as causing heavy truck traffic through a residential neighborhood, or a significant odor or noise nuisance or very late night/early morning hours of operation.
- f. Site Planning. Will involve adequate site design methods, including plant screening and setbacks as needed to avoid significant negative impacts on adjacent uses. The use shall meet the landscaping and buffer requirements of the Subdivision and Land Development Ordinance.
- g. Performance Standards. The applicant shall show that the use will not have a serious threat of inability to comply with the performance standards of this Ordinance, as stated in Article V [Environmental Protection].

traffic study and written report must be provided for certain new uses, including residential uses with seventy-five or more dwelling units and institutional uses with 30,000 square feet or more of new or additional floor area; section 812.C of the Ordinance states that the traffic study shall be submitted at the same time as the special exception application.

At the first hearing, Appellant Nadar Hamati, a mechanical engineer and licensed personal care home administrator, testified that the proposed facility would have eighty beds and approximately sixty to sixty-five residents at any given time, since some of the rooms would be shared by two residents. He described a typical living unit as 400 square-feet in size, including a small kitchenette. Hamati stated that the proposal calls for thirty parking spaces, and he estimated that twenty-five employees would be working over the course of three shifts each day.

Hamati presently owns a personal care home in Allentown, Pennsylvania, which serves thirty-six residents and employs fourteen employees who work three different shifts. He testified that the Allentown facility provides meals, administers medications and provides supervision to residents, who are typically between seventy-five and eighty years of age. Based on his experience with the Allentown facility, Hamati did not believe that residents of the proposed facility would have their own cars nor have many visitors. He estimated that the proposed facility would have about ten visitors per day and would receive approximately four deliveries of food and other supplies per week. Hamati also stated that residents would use an ambulance or other means of transport every two to three months for non-emergency medical visits. Hamati acknowledged that ambulances would inevitably be called at any time of day or night due to the medical needs of residents, and he added that the facility would be required to have monthly fire drills.

David Bray, an employee of Jena Engineering, testified that the proposed facility will be licensed, that twenty percent of the land will be available for development as passive use, that the proposal complies with Ordinance density requirements, and that it will comply with the Township's Subdivision and Land Development Ordinance (SALDO). Bray stated that an area is to be reserved for storm water management, that employees who specialize in lighting would ensure that the facility's lighting meets Ordinance requirements, and that the proposal can meet the Ordinance performance standards. Addressing driveway concerns, Bray stated that internal driveways could be widened if necessary. With regard to traffic, Bray testified that Appellants were not required to present a traffic study with their sketch plan but that Appellants had established through testimony that the impact on traffic would be minimal, in that residents do not have cars, there would be approximately twelve visitors per day, and, including employees and deliveries, approximately twenty to thirty cars entering in one day. Bray observed that the proposed use would generate significantly less traffic than would twelve to sixteen homes in a subdivision. Bray appeared not to understand questions concerning the Ordinance reference to "level of service." He pointed out, however, that parking requirements were set by the Ordinance, and he stated that the thirty spaces required for this proposal would be adequate to serve the anticipated traffic needs at the facility. (R.R. at 106a-19a, 138a.)

Individuals objecting to the proposed facility expressed concerns about plans for lighting, the view from the rear of the property, potential noise, and the possibility that residents would wander onto their property. (R.R. at 42a-64a, 143a-56a.) Bruce Wlazelek, the Township's Director of Community Development, had attended a meeting of the Township Planning Commission, and he reported that the

Planning Commission objected to Appellants' request for a variance from buffer yard requirements. (R.R. at 84a-90a.) Samir Ashmar, a Township supervisor and a fire marshal in Trexlertown, testified that his fire department has had problems with the type of facility proposed, with driveways being a major concern. Ashmar explained that when a fire truck extends its equipment it blocks the exit for ambulances, and he opined that the driveway as proposed in this case also would present that problem. (R.R. at 97-99.)

Appellants withdrew their request for a variance from the buffer requirements at the first hearing, apparently realizing that they did not satisfy the criteria necessary to obtain that relief. (R.R. at 139a-41a.) Appellants presented no testimony concerning their request for an interpretation of the Ordinance.

In its April 8, 2009, decision, (R.R. at 170a-83a), the ZHB found that Appellants failed to present substantive evidence to demonstrate the following: how the proposed facility would comply with all applicable laws; the amount of traffic that would be created; that the facility would not pose a public safety hazard; how storm water runoff would be controlled; what screening and/or buffering would be provided; that the proposed use would not adversely alter the nature of the surrounding neighborhood; and that the proposed use would meet the performance standards of Article V of the Ordinance. (FOF 30-37.) The ZHB noted the testimony and concerns of the objectors and specifically cited the uncontradicted testimony of fire marshal Ashmar that the driveway as proposed would not provide adequate access for emergency vehicles. (FOF 38-42.)

The ZHB first concluded that the proposed personal care home was properly characterized as an "institutional use" for purposes of the buffering requirements. In doing so, the ZHB set forth the two applicable Ordinance provisions

and referred to the rules of statutory construction but did not undertake any meaningful analysis to support its conclusion. (R.R. at 175a-76a.) The ZHB next concluded that the proposal did not meet all applicable criteria in Ordinance sections 118, 119, 402.43 and 403.44, citing the absence of traffic studies and the other findings summarized above. The ZHB found Ashmar's testimony credible to establish that the proposed facility would not provide adequate access to emergency vehicles and accepted testimony from objectors that the purpose of the Ordinance was to preserve the R-2 district primarily for use by single family residences. Finally, the ZHB observed that Appellants presented no evidence supporting the grant of a variance. The ZHB denied all of the relief requested, and Appellants appealed to the trial court.

Appellants submitted a second request for a special exception, specifically averring that the facility as proposed would comply with all applicable Ordinance provisions. (R.R. at 185a-86a.) Appellants again also requested an interpretation of Ordinance section 202 that the proposed personal care home was a residential use; alternatively, Appellants asserted that, to the extent the Ordinance characterizes the use as "institutional," the Ordinance is vague, and, therefore, Appellants are entitled to a favorable interpretation. With their second request for a special exception, Appellants submitted an alternate plan for a two-story structure in the event the ZHB again determined that the buffer requirements for an institutional use applied. The two-story proposal reduces the size of the building from a total of 33,000 square feet to a total of 32,400 square feet, with a 16,200 square-foot footprint. (See April 8, 2009, decision, FOF 18, and May 27, 2009, decision, FOF 18.)

At the April 22, 2009 hearing, the ZHB incorporated the testimony given by the objectors, but not by Appellants, at the first hearing. During the subsequent hearing, Hamati stated that he prefers a one-story design and believes it is more compatible with the homes in the community; however, he explained that he was proceeding with a two-story proposal because it would enable Appellants to comply with applicable setback and buffer requirements. Hamati further testified that there is absolutely nothing unique or unusual about the personal care facility as proposed. He noted that the facility would not store any flammable or explosive materials and pointed out that the Pennsylvania Department of Public Welfare regulates issues concerning fire safety at the facility, including suppression systems and fire drills. Hamati also testified that no heavy trucks would be making deliveries. He stated that he has kept a traffic log of traffic at his Allentown facility, including visitors, deliveries and employees, which supports his opinion that the proposed facility will have a minimal impact on traffic.

Bryan Ritter, an engineer with JENA, testified that proposed access to the facility is compliant with regulations promulgated by the Pennsylvania Department of Transportation (PennDOT). He also stated that, as planned, traffic circulation within the property would be compliant with the Township's SALDO. Ritter testified that assisted living facilities generate very little traffic, and, in support of that opinion, he submitted a trip generation report based on statistics compiled by the Institute of Traffic Engineers (ITE). (R.R. at 198a-204a.) Ritter also reviewed each of the specific Ordinance requirements for a special exception and stated that the proposal would be compliant with every applicable provision. He specifically stated that the proposed use would not present any environmental concerns because there were no streams, steep slopes, or hazardous substances on the property. Ritter added

that lighting would not be an issue and that there would be no noise, dust, heat or glare caused by the proposed use or any other negative impact on the neighborhood. Ritter noted that storm water issues would be addressed with the county conservation district, the Township Planning Commission and the Pennsylvania Department of Environmental Protection at a later stage; the Township's zoning officer likewise indicated that Appellants were not required to undertake storm water analysis at this time. (R.R. at 222a.)

In its second decision, dated May 27, 2009, (R.R. at 265a-88a) the ZHB found that Appellants failed to present evidence to demonstrate the following: the proposed use would not create a public safety hazard, including fire, toxic or explosive hazards, (FOF 38);⁷ any increase in storm water flow would be controlled, (FOF 39); the proposed use would not significantly affect the surrounding neighborhood in a negative manner by creating increased emergency vehicle trips to and from the facility on a regular basis at any hour of the day or night due to the medical needs of the residents, (FOF 40); adequate screening or buffering would be provided in order to prevent light, glare, and noise generated from the facility from negatively impacting the immediately adjacent homes, (FOF 41); the proposed use, as designed, would meet the performance standards set forth in Article V of the Ordinance; and an examination was made of the subject property in accordance with accepted scientific, engineering, environmental or governmental standards with respect to wetlands or other conditions implicating Article V. (FOF 42.)⁸

⁷ Compare FOF 31 - No flammable or explosive materials, beyond that typically found at a residential home, would be stored at the facility.

⁸ Note that the language of section 118.C.4 does not require proof of compliance but, rather, adequate evidence that "the use will not have a serious threat of inability to comply with the performance standards" of the Ordinance.

With respect to the specific issue of traffic, the ZHB made the following findings. Appellants estimate that sixty to sixty-five residents would be at the facility at any given time. Residents would be permitted to have their own cars, but a typical resident would not have a car. Eight employees will work the day shift, four employees would work a second shift and two or three employees would work the night shift. Visiting hours would be from 7:00 a.m. to 8:00 p.m. A physician would visit the facility approximately once a week. Food for the residents would be trucked in approximately twice a month during normal business hours, and incidental deliveries of fresh foods would occur periodically. (FOF 16, 20, 22-23, 27, 29-30, 34.)

The ZHB also found that Appellants had performed no traffic studies or preliminary investigations regarding Cetronia Road to determine its current PennDOT designated service level for traffic or to show how the current PennDOT designated service level to Cetronia Road would be affected by the proposed use. (FOF 25-26.) The ZHB did not reference Ordinance section 812.B, requiring traffic studies.

The ZHB again determined that the proposed use was an institutional use within the meaning of Ordinance section 306 (permitted uses by district). The ZHB next concluded that the proposal did not satisfy all applicable Ordinance requirements, adding that the proposed use “will clearly create a legitimate public health, safety, and welfare issue, issues which Appellant failed to address.” (R.R. at 279a.) The ZHB further stated that, due to the large size of the proposed use and the extremely low density of the surrounding area, the use will generate “a high probability of adverse effects greater than that of typical Special Exception Personal Care Homes” which “will pose a substantial threat” to the health safety and welfare

of facility residents and individuals living in the surrounding neighborhood. (R.R. at 279a-80a.)

In addition, the ZHB again found that Appellants failed to satisfy the requirement of Ordinance section 118.C.4 to prove that the proposed use will not significantly result in traffic congestion based upon overall levels of service below the level “C.” Finally, the ZHB concluded that the proposed use fails to satisfy Ordinance criteria related to its impact on the existing neighborhood, such as odors, noise, lighting, the need for contingency plans to manage patients who might wander, the need to mitigate storm water, and other environmental issues implicating article V of the Ordinance.

Accordingly, the ZHB denied Appellants’ second request for a special exception. Appellants appealed to the trial court, which consolidated the two appeals at the parties’ collective request. Following argument on August 19, 2009, the trial court denied the appeals. The trial court specifically concluded that Appellants failed to comply with Ordinance section 812.B.5, which requires a traffic study, and failed to establish that the proposed use would not reduce the public road below the traffic service level of “C.” The trial court also noted that Appellants failed to present evidence concerning storm water control. Finally, the trial court observed that Objectors “appear to have presented substantive, credible evidence of health, safety and welfare concerns that were not rebutted by Appellant[s].” (R.R. at 397a.) Appellants now appeal to this Court.⁹

⁹ Our scope of review in a zoning appeal where the trial court took no additional evidence is limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law. Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa. Cmwlth. 1991).

A special exception is not an exception to the zoning ordinance but rather is a use expressly permitted absent a showing of a detrimental effect on the community. Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa. Cmwlth. 1991); Bray v. Zoning Board of Adjustment, 410 A.2d 909 (Pa. Cmwlth. 1980). The applicant for a special exception has both the duty of presenting evidence and the burden of persuading the ZHB that the proposed use satisfies the objective requirements of the ordinance relevant to the grant of a special exception. Manor Healthcare. It is presumed that the local governing body has determined that the special exception use satisfies local concerns for the general health, safety and welfare of the community. Pennsy Supply, Inc. v. Zoning Hearing Board of Dorrance Township, 987 A.2d 1243 (Pa. Cmwlth. 2009). Accordingly, once an applicant for a special exception has met his burden of proof and persuasion, a presumption arises that the proposed use is consistent with those concerns, and the burden shifts to the objectors to present evidence that the proposed use will have a detrimental effect on health, safety and welfare or will conflict with the expressions of general policy contained in the ordinance.¹⁰ Id.; Manor Healthcare. With respect to the specific issue of traffic, we have held that applicants have the burden to present evidence regarding traffic congestion criteria. Bray. Importantly, not every anticipated increase in traffic will justify the refusal to grant a special exception. Id. Instead, there must be, not only a likelihood, but a high degree of probability that the

¹⁰ Although an ordinance may place the “burden of proof” on the applicant as to matters of detriment to health, safety and welfare, such provisions merely place the burden of persuasion on the applicant, and the objectors still retain the initial burden to present evidence with respect to these matters. Manor Healthcare.

traffic increase would pose a substantial threat to the health and safety of the community. Id.

Appellants assert that the analyses of the trial court and the ZHB contain numerous errors. The threshold issue presented is whether Appellants satisfied the specific requirements of Ordinance section 119, governing special exceptions. Section 119.C requires the ZHB to approve a special exception upon evidence that “the proposed use will meet” all elements of 118.C.4 and all other applicable ordinance requirements. Ordinance section 118.C.4.b expressly requires an applicant to “show that the use will not result in or significantly add to a significant traffic hazard or significant traffic congestion (based upon overall levels of service below the level C”). However, the Ordinance does not define “level C,” which apparently relates to PennDOT requirements. (The ZHB submitted a PennDOT study with its brief to the trial court, but no evidence was presented on these criteria at the hearings.)

Due to the absence of a definition of “level C” it is impossible to determine whether the proposal will “significantly result in traffic congestion based upon overall levels of service below the level C.” We conclude that this provision lacks the specificity essential to special exception requirements. Bray. “Specificity is the essential characteristic of operative special exception requirements in an ordinance. [Our supreme court] has long defined a special exception as one allowable where requirements and conditions *detailed* in the ordinance are found to exist.” Id. at 911 (emphasis in original). Thus, the ZHB improperly placed the burden on Appellants to prove that the proposed use satisfies general, non-specific provisions of the Ordinance.

Next, we note that permission of a use by special exception reflects a legislative determination that the traffic generated by such use will not be detrimental to the public health and safety. In Re Appeal of Brickstone Realty Corp, 789 A.2d 333 (Pa. Cmwlth. 2001). In light of this presumption, we conclude that Appellants presented sufficient evidence that, if accepted, would satisfy the requirement of Ordinance section 118.C.4 to prove that the proposed use will not create a significant traffic hazard or congestion. Applicants submitted an ITE study reflecting the number of trips to be generated and, by expert testimony, established that the driveway will qualify as a “low volume use.” Appellants’ expert also testified that there are no issues concerning visibility, access or congestion. In fact, he noted that development of the property with single family homes would generate comparable or greater traffic than that anticipated with the proposed use. Although Appellants presented evidence to demonstrate that the facility would generate minimal traffic and would not create more traffic than a typical personal care home, it appears that all of this evidence was disregarded by the ZHB.

The ZHB counters that, because Ordinance section 119 requires evidence that a “proposed use will meet all other applicable requirements of this Ordinance,” Appellants were absolutely required to present a traffic impact study pursuant to Ordinance section 812. However, Appellants complain that this issue was not raised before the ZHB, and, relying on Stroudsburg Municipal Water Authority v. Versatile Investment Projects, Inc., 480 A.2d 352 (Pa. Cmwlth. 1984), Appellants argue that this issue is waived.¹¹ We agree.

¹¹ In Stroudsburg, the relevant ordinance provision required the submission of an environmental effects statement. We held that where the applicant presented testimony and other evidence concerning the environmental effects of a proposal, objectors did not object to the lack of a written environmental statement, and the township supervisors did not refer to the omission of a **(Footnote continued on next page...)**

Finally, Appellants argue that zoning only regulates the use of land and not the particulars of development and construction, Schatz v. New Britain Tp. Zoning Board of Adjustment, 596 A.2d 294 (Pa. Cmwlth. 1981). Thus, according to Appellants, the ZHB erred in requiring Appellants to present additional evidence concerning storm water management. Again, we agree; as previously noted, the Township’s zoning officer acknowledged that such evidence was not required at this stage of development.

Having determined that the requirements of Ordinance section 118.C.4.b concerning traffic are insufficiently specific, there is no evidence that a traffic increase would pose a substantial threat to the health and safety of the community, and the application of Ordinance section 812 was waived, we conclude that Appellants satisfied the specific Ordinance criteria governing the grant of a special exception and the ZHB erred in denying their request.

Accordingly, the trial court’s order affirming the ZHB’s decisions is reversed.

PATRICIA A. McCULLOUGH, Judge

(continued...)

written statement in their decision, objectors were precluded from raising this issue before the trial court, and the local water authority was precluded from raising it on further appeal.

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Macungie Township and Upper :
Macungie Township :

ORDER

AND NOW, this 3rd day of November, 2010, the order of the Court of
Common Pleas of Lehigh County, dated November 13, 2009, is hereby reversed.

PATRICIA A. McCULLOUGH, Judge