

Borough of Olyphant Zoning Ordinance (Ordinance).

O'Shea is also the owner of a contiguous residential property known as 510 East Scott Street (510 Property). On January 22, 2009, O'Shea filed an application for a special exception, seeking approval to construct on the 510 Property, a structure approximately twenty feet by thirty-two feet. O'Shea sought to utilize the rear portion of the structure as a funeral home for pets, including a crematory facility for pets.¹ The parcel, which is located in the R-2 residential district, is bounded by residential uses to the east and mixed uses to the west, including a club/restaurant, a motor vehicle repair/welding shop and a residential structure.

The Board conducted a hearing, at which O'Shea testified and also presented the testimony of Mr. Salvatore. Mr. Salvatore testified that the crematory unit met DEP regulations and stated that the crematory would not produce odor or smoke. Various neighbors (Objectors) presented testimony objecting to the pet crematory.

The Board concluded that the pet funeral home was permissible as a special exception under the Ordinance, as it specifically lists funeral homes as a special exception. The Board, however, denied the pet crematory concluding that it is not specifically listed as a special exception in the R-2 district. Moreover, the Board concluded that a pet crematory is not conducive to the welfare and convenience of the locale, that it is not compatible with the adjacent properties to the east, and that E. Scott Street is not adequate to service the requested use. On appeal, the trial court

¹ O'Shea had previously applied for a special exception for the pet crematory on November 18, 2008. The Board denied O'Shea's request and encouraged O'Shea to resubmit the application.

affirmed. O'Shea now appeals to this court.²

O'Shea argues that the Board erred in denying his request for a special exception to operate a pet crematory. O'Shea contends that funeral facilities are permitted as a special exception in the R-2 district. Although a crematory is not specifically listed as a permitted special exception in the district, O'Shea maintains that the crematory is, in fact, permitted as part of the funeral facility.³ O'Shea relies on this court's decision in Rabenold v. Zoning Hearing Board of the Borough of Palmerton, 777 A.2d 1257 (Pa. Cmwlth. 2001).

In Rabenold, the applicant sought to construct a crematory adjacent to his funeral home in a mixed business/commercial zoning district. Section 405C of the Palmerton Zoning Ordinance listed permitted uses which included "[r]etail stores, shops or service establishments for the conducting of any retail business or service except drive-in establishments." Id. at 1262. Section 405C further permitted accessory uses including "[a]ccessory uses and buildings." Id. The ordinance described an "accessory use" as a "use customarily incidental and subordinate to and located on the same lot occupied by the principal use to which it relates." Id.

In determining that the crematory was permissible, this court stated:

² Where, as here, the trial court does not take additional evidence, this court's review is limited to determining whether the Board abused its discretion or committed an error of law. Limley v. Zoning Hearing Board of Port Vue Borough, 533 Pa. 340, 625 A.2d 54 (1993).

³ O'Shea notes that the Ordinance does not specifically mention crematories as permitted in any district. The trial court, in its opinion, observed that crematories are now permitted in an industrial (M) district.

We agree with the ZHB that the operation of a crematory is an ancillary service of a funeral home, which is a retail service establishment. Both funeral homes and crematories deal with the final disposition of human remains through either internment or cremation. Cremation is a use that is incidental or subordinate to the operation of a funeral home, and constitutes both a permitted use and a permitted accessory use to that of the principal use, a funeral home.

Id. at 1263.

O'Shea maintains that a special exception is not an exception to the zoning ordinance but a use which is expressly permitted absent a showing of a detrimental effect on the community. Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa. Cmwlth. 1991). Here, O'Shea argues the proposed use satisfies the objective requirements of the Ordinance in that a crematory is part of a funeral home, and that the Objectors failed to prove a detrimental effect on the community. Objectors only offered concerns about potential smells and unsubstantiated complaints. An objector cannot meet its burden by merely speculating as to possible harm, instead an objector must show a high degree of probability that it will affect the health and safety of the community. Id.

The Board responds that Section 3.123 of the Ordinance lists fifteen specific activities allowable as a special exception. Such list includes "[u]ndertakers and funeral homes". However, the list does not include a crematory facility for the destruction of animals. Because a crematory is not specifically listed as a special exception, the Board maintains that O'Shea's application cannot be granted. We agree and also observe that the facts in this case differ from those in Rabenold.

In Rabenold, the applicant's existing funeral facility was located in the commercial district. The ordinance in Rabenold listed permitted uses including retail service establishments. The commercial district also permitted accessory uses which were located on the same lot with the permitted principal use. This court determined in Rabenold that the crematory was authorized as a permitted principal use, a retail establishment and, also as an accessory to a principally permitted use, a funeral home.

In this case, the Property is located not in a commercial district, but in a residential district, which does not authorize retail service establishments. The Ordinance lists principal permitted uses, accessory uses and special exceptions that are permitted in the R-2 district. The Ordinance does not specifically list crematories, but it does permit undertakers and funeral homes as a special exception. An accessory use is defined as "[a]ll R-1 accessory uses" and "[o]ther accessory uses customarily appurtenant to a principal permitted use." (R.R. at 438a.) In accordance with the above, a crematory is not permitted as a special exception because it is not specifically listed. Moreover, a crematory is also not permitted as an accessory use, because accessory uses are authorized as an accessory to a permitted use and not to a special exception like the funeral home in the instant case.

In addition to failing to show that the crematory was a permitted special exception under Section 5.810.a of the Ordinance, O'Shea, as found by the Board, also failed to prove that the proposed use "shall be compatible with the adjoining development and the proposed character of the zone district where it is to be located" as is required by Section 5.810.d.

of the Ordinance. Specifically, the Board found that the crematory facility is not conducive to the welfare and convenience of the locale and that it is not compatible with adjacent properties. (Board's finding No. 27.)

Here, Objectors to the crematory testified that they objected to the emissions and argued that the construction of the facility, with a visible smoke stack, would obstruct their view and that it would not be conducive to the neighborhood. Although O'Shea presented expert testimony that the crematory would comply with all state and federal regulations, such is not proof that the crematory will not change the essential character and nature of the neighborhood or would not injure the appropriate use of the neighboring residential properties. Arter v. Philadelphia Zoning Board of Adjustment, 916 A.2d 1222 (Pa. Cmwlth.), petition for allowance of appeal denied, 594 Pa. 691, 934 A.2d 75 (2007). Moreover, credibility determinations and the weight to be given to the evidence are matters solely left to the Board in its role as fact finder. Shamah v. Hellam Township Zoning Hearing Board, 648 A.2d 1299 (Pa. Cmwlth. 1999).

Next, O'Shea argues that his due process rights were violated. Section 908(5) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10908(5), provides that all parties "shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues." Due process principles require an opportunity to hear evidence adduced by an opposing party, the opportunity to cross-examine witnesses, introduce evidence and present argument. Callahan v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981).

We agree with the Board that the issue was waived because O'Shea did not raise any due process claims before the trial court and issues not raised before the trial court are waived on appeal. Stein v. Department of Transportation, Bureau of Driver Licensing, 857 A.2d 719 (Pa. Cmwlth. 2004). Moreover, the record indicates that O'Shea had a hearing before the Board, at which he was afforded an opportunity to present evidence and cross-examine witnesses.

In accordance with the above, the decision of the Board is affirmed.

JIM FLAHERTY, Senior Judge

President Judge Leadbetter concurs in result only.

