**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| James J. and Carol E. Leo, husband and wife, | : | |
| Appellants | : | |
| v. | : | No. 354 C.D. 2009 |
| Hampton Township Council | : | Argued: October 13, 2009 |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION**
**BY JUDGE COHN JUBELIRER** **FILED: November 20, 2009**

James J. and Carol E. Leo, husband and wife, (together, Applicants) appeal from an order of the Court of Common Pleas of Allegheny County (trial court), which upheld the Hampton Township Council's (Council) denial of Applicants' Application for Approval of a Conditional Use (Application). The Application sought approval for twenty-two outdoor display spaces for the sale of used vehicles on Applicants' property, which is located in the Neighborhood Commercial District (NCD). As a result of a conditional use granted in 1997, Applicants are currently permitted to use their property for the operation of an automobile repair business as a primary use and to sell no more than five used cars as an accessory use to the automobile repair business. Essentially, Applicants are seeking to

change the primary use of their property from an automobile repair business to a used car sales business. Council and the trial court denied the Application, finding that Applicants did not meet their burden of proving that the proposed use is of a type permitted as a conditional use under the Hampton Township Zoning Ordinance (Ordinance), which was enacted on October 22, 2003, and that the proposed use complies with the requirements of the Ordinance.

Applicants own a parcel of land located at 3793 Mt. Royal Blvd., Allison Park, Allegheny County (the Property), which is in the NCD. The Property has been the subject of zoning litigation for over two decades throughout which Applicants, and their predecessor, have sought to change the principal use of the Property from operating a service station to operating a used car business, which is not a permitted use in the NCD. (See Ordinance § 8.700(A) (setting forth the principal permitted uses in the NCD).) The NCD "includes strategically located land at crossroads of important local streets. These areas have developed or may be developed for commercial activities that support the daily needs of residential neighborhoods in the vicinity." (Ordinance § 7.700.) Car sales have never been permitted in the NCD as a principal use, but are permitted as of right in the Highway Commercial District, Light Industrial District, and Heavy Industrial District. (See Ordinance § 8.600(A)(3) (permitting as a principal use "automobile sales, new, or new and used combined, with subordinate service facilities in an enclosed building"); Ordinance § 8.800(A)(14) (permitting as a principal use "automobile, truck, motorcycle, construction equipment or recreational vehicle sales"); Ordinance § 8.900(A)(1) (permitting as a principal use "any principal permitted use allowed in the Light Industrial District").)

In 1986, Applicants' predecessor filed an application with the Hampton Township Zoning Hearing Board (ZHB), seeking preexisting non-conforming use recognition or, in the alternative, a variance to allow him to sell used cars on a limited basis in connection with his principal automobile service station and repair business. The ZHB issued an order (1986 Order) holding that the predecessor had shown the existence of a pre-existing, non-conforming accessory car sales use, which was limited to its historic scope of selling a small number of cars for others. The ZHB set forth the following conditions for the continued operation of the accessory car sales use: no banners or signs or external lights; no more than five cars can be held on the Property for sale at one time; and the cars must belong to others (consignment sales only). As acknowledged in the predecessor's application, this accessory use was in connection with the automobile service station and repair business. Applicants' predecessor did not appeal from or object to these conditions.

In 1997, upon acquiring the Property, Applicants filed with the Council an application for conditional use approval (1997 Conditional Use Application) to change the principal use of the Property from an automobile service station into an automobile repair business with continued operation of a used car lot "which is secondary to the main use (repair shop)." (Letter from Applicants' Engineer, Mark B. Schmidt, to Land Use Administrator, David Evans (May 16, 1997).) Council explained that Applicants "sought approval to remove the gas pumps and underground storage tanks and then to operate as a conditional use a freestanding automotive repair shop with continued incidental used car sales, presumably unfettered by the consignment limitation." (Council Decision, Findings of Fact

(FOF) ¶ 27.) The 1997 Conditional Use Application narrative submitted by Applicants' engineer stated that:

> The proposed use of the . . . site for a used car lot is appropriate for the following reasons.
> 1. The proposed used car lot is secondary to the main use (repair shop). It is common practice to have a small used car sales area with a repair shop.
> 2. This is a continuation of a legal nonconforming use. The previous owner operated a gas station and repair shop and also sold used cars.

(Letter from Applicants' Engineer, Mark B. Schmidt, to Land Use Administrator, David Evans (May 16, 1997).) Council approved the 1997 Conditional Use Application and Site Plan (1997 Decision) and placed the following conditions upon the approval: (1) "no more than five (5) cars shall be for sale on the property at any one time"; and (2) "no external signs, lights, banners or streamers shall be permitted." (Letter from Land Use Administrator to James J. Leo (July 25, 1997).) Most significantly, the 1997 Decision eliminated the consignment sales requirement imposed by the 1986 Order; however, it retained the five car limitation. Applicants did not appeal the 1997 Decision.

In October 2007, the zoning officer issued a cease and desist order to Applicants after inspecting the Property and finding that Applicants were violating the 1997 Decision by: displaying 8 vehicles; displaying cars in locations other than as provided in the 1997 Decision; and exceeding the limits on advertising signs. Applicants appealed to the ZHB. This appeal was not granted.[1] In January

[1] Council's brief indicates that the ZHB denied Applicants' appeal, and that Applicants did not appeal that decision to this Court (Council's Br. at 7), but the ZHB's determination is not

2008, Applicants filed the present Application seeking to convert the use of the Property from an automobile repair business, with a limited accessory car sales use, to operating a used car sales lot as the primary, if not sole, use of the Property.[2]

At the Council hearing on the Application, Mr. Leo testified that he did not sell cars initially when he bought the Property in 1997, but did begin selling cars after he obtained the 1997 Conditional Use Approval. Mr. Leo revealed that, at times, he had as many as ten to fifteen cars on the site for sale, with another five or six cars on site for repair. He knew that such activity violated the 1997 Decision. Mr. Leo testified "that his present intention is to do very little auto repair on the site [and] that car sales now constitute 70% of his business activity and that it is

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in the record. There is no dispute that the ZHB did not grant the appeal, and whether or not the ZHB denied this appeal does not affect the issue at bar.

[2] The Application seeking approval of the twenty-two used car display spaces made the following changes from the Site Plan approved by the 1997 Decision:

> 35. . . . [I]t eliminates the three (3) employee parking spaces adjacent to the repair shop building and has replaced those with "6 display spaces" – two of which abut the edge of Mt. Royal Blvd; the revised Plan eliminates the two (2) temporary spaces for vehicles under repair and has replaced those with "7 display spaces" at the edge on Mt. Royal Blvd.; and the revised Plan also adds an additional four (4) display spaces to the area originally designated for the five (5) approved display spaces for the total of nine (9) display spaces at the northwest/rear of the property.
> 36. The revised Plan . . . also appears to have changed the 1997 Plan's designation of 8 visitor parking spaces (including one handicapped space) to "9 spaces" – dropping the "parking" designation, and it appears to have shifted those spaces toward the building in a manner that appears to cause the handicapped space to block access to the gravel area where the Applicant currently parks one of its tow trucks. The Plan does not appear to make provision for Applicant's other tow truck.

(FOF ¶¶ 35-36.)

not possible to maintain that level of activity with just five (5) car display spaces." (FOF ¶ 41.) Mr. Leo acknowledged that, in the 1997 Conditional Use Application, he specifically requested conditional use approval strictly to operate the automobile repair business as the main business with incidental used car sales only secondary to that main use. (FOF ¶ 42; Hr'g Tr. at 13-14.)

Council denied the Application. Council noted that Section 8.700 of the Ordinance sets forth the permitted uses, permitted accessory uses, and conditional uses allowed in the NCD and that car sales are not authorized as a principal permitted use, an accessory use, or a conditional use in the NCD. However, Section 8.700(C)(9) allows as a conditional use, "automobile service station or vehicle repair garage . . . [,] both uses must be in a completely enclosed building." (Ordinance § 8.700(C)(9).) Section 8.700(C)(5) contains a "catch-all" conditional use provision allowing "neighborhood commercial uses similar to those listed as permitted and compatible with those uses as permitted [in Neighborhood Commercial District] (12.321[3])." (Ordinance § 8.700(C)(5).) Council rejected

[3] This section provides:

> Highway or Neighborhood Commercial activities similar to those listed under permitted uses. Applicant must submit a written statement describing in detail in which manner the applicant's goods and services are compatible with the goods or services stated as permitted uses, and that the application meets all other applicable requirements of the Ordinance: (HC and NC Zoning Districts)
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> a. proposed business sells goods or services at retail on the premises;
> b. most, (75%) if not all the business is conducted within a completely enclosed permanent structure;
> c. there are no unusual parking and/or off street loading problems connected with the business;
> d. outdoor display is controlled and not arranged so as to be distracting to motorists on adjacent roads or to adjacent properties;
> e. the proposed business will not adversely affect the public health, safety and general welfare.

Applicants' argument that their proposed use fell within the catch-all provision of Section 8.700(C)(5) because a primarily outdoor used car lot is neither "similar" to those uses listed as permitted, nor is such a use compatible with the uses permitted in the NCD. Council explained:

> Q. The 1986 Zoning Hearing Board Decision only recognized and permitted the continued use of the property for limited consignment auto sales accessory to the primary service station business and under the restrictions imposed by that decision.
> R. With the 1997 conditional use approval granted, the previous non-conforming use status was effectively superseded and extinguished, and the new conditional use approval granted allows for no "expansion" of that use beyond that which was approved in 1997.
> S. Township Council concludes that neither the 1997 Conditional Use Application, nor the 1997 Decision of Council, were intended to or did recognize the general proposition that a free-standing auto sales business is a use similar to or compatible with the uses specifically permitted in the Neighborhood Commercial District, which are intended to "support the daily needs of residential neighborhoods in the vicinity."
> T. To the contrary, the 1997 Application specifically sought and received approval and thus recognition *only* for strictly limited accessory auto sales auxiliary to the primary auto repair business. Where the same Applicant's 1997 request was premised on the proposition that limited accessory auto sales were a natural part of his repair business, he can not later argue that Council's approval of that request should now be interpreted as a finding that a larger scale, free-standing outdoor used car lot is similar to or compatible with the Neighborhood Commercial District's zoning scheme.
> U. The current application relies solely upon the 1997 approval and the catch-all "similar" use provision of Section 8.700.C.5 to convert this site to a larger scale and/or freestanding used car lot.

(Council Decision, Conclusions of Law (COL) ¶¶ Q-U (emphasis in original).)

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(Ordinance § 12.321.)

Council further noted that:

> where, as here, the . . . Ordinance specifically provides for and permits the proposed use in the Highway Commercial District (a less restrictive zoning district), one cannot interpret or rely on the catch-all "similar use" provision [of Section 8.700(C)(5)] to gain authorization to conduct that same activity as a conditional use in [the] more restricted [NCD] district.

(COL ¶ W.) Moreover, Council concluded that Applicants were not entitled to conditional use approval because they failed to meet all of the general criteria for obtaining a conditional use, as set forth in Sections 12.100-12.130 of the Ordinance,[4] or the specific criteria for obtaining a conditional use under the "catch-all" conditional use provision, i.e., the similar to permitted use provision, pursuant to Section 12.321 of the Ordinance.[5]

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[4] Council found that the proposed use failed to meet the conditional use general criteria in that the proposed use: (1) did "not meet all other requirements of the . . . Ordinance" for the NCD district (Section 12.130(b)); (2) "is not in general conformity or in harmony with the [NCD] area" (Section 12.130(c)); (3) "is not in conformity with the Zoning and Sub-division regulations otherwise applicable to the [P]roperty, includ[ing] but not limited to density, bulk and use" (Section 12.130(f)); and (4) "is not complimentary to the neighborhood in which it is proposed to be established" (Section 12.130(h)). (COL ¶ L.)

[5] Specifically, Council concluded that even if the use fell within the "catch-all" provision of Section 8.700(C)(5), Applicants' Application failed to comply with Section 12.321 because it failed to meet the following specific criteria:

> b. that most (75%) if not all the businesses [sic] conducted within a completely enclosed permanent structure;
> c. that there are no unusual parking and or off street loading problems connected with the business; and
> d. that outdoor displays controlled and not arranged so as to be distracting to motorist [sic] on adjacent roads or to adjacent properties; and
> e. that the proposed business will not adversely effect the public health, and general welfare.

(COL ¶ M.)

Applicants appealed to the trial court. The trial court did not take additional evidence and affirmed Council's decision. The trial court agreed with Council that Applicants failed to meet their burden of proving that the proposed use is of a type authorized as a conditional use under the Ordinance and that the proposed use complies with the requirements of the Ordinance. The trial court found that Applicants were not entitled to a natural expansion of their conditional use to operate an automotive repair station with only minor auxiliary car sales because "[t]he right to natural expansion associated with nonconforming uses is not applicable to uses permitted by special exception or conditional use. Upper St. Clair Twp. Grange Zoning Case, [397 Pa. 67, 152 A.2d 768 (1959)]; A.R.E. Lehigh Valley Partners v. ZHB of Upper Macungie Twp., 590 A.2d 842, 844 (Pa. Cmwlth. 1991)." (Trial Ct. Op. at 4.) The trial court also denied Applicants' alternative argument that they were entitled to an expansion of the pre-existing, non-conforming use of the Property for the sale of vehicles based upon the 1986 Order. Applicants now appeal the trial court's order to this Court.[6]

Initially, we note that, at oral argument, counsel for Applicants made clear that Applicants are not asserting an entitlement to expand the pre-existing non-conforming use of selling used vehicles on the Property based upon the 1986 Order. Rather, Applicants contend on appeal that the 1997 Decision converted the pre-existing non-conforming use of selling cars to a conditional use to sell cars,

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[6] "Our scope of review in a zoning appeal where the court of common pleas took no additional evidence is limited to a determination of whether the township [council] committed a manifest abuse of discretion, or an error of law." Bailey v. Upper Southampton Township, 690 A.2d 1324, 1325 n.1 (Pa. Cmwlth. 1997).

which they state Council did under the catch-all "similar use" provision of Section 8.700(C)(5) of the Ordinance. Thus, their main contention is that they are only asking for the natural expansion of their already existing conditional use to sell used cars on the Property.[7]

Applicants argue that a conditional use "is nothing more than a special exception which falls within the jurisdiction of the municipal legislative body, rather than the zoning hearing board," and the "fact that a use is *permitted as a conditional use evidences a legislative decision* that the particular type of use is not adverse to the public interest per se." Bailey v. Upper Southhampton Township, 690 A.2d 1324, 1326 (Pa. Cmwlth. 1997) (footnote omitted) (emphasis added). Applicants contend that they satisfied all of the specific requirements for seeking a

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[7] Applicants' brief discusses one main argument with three sub-arguments:

> II. Argument. The Court below erred in affirming the decision of the Township to deny the Appellants' Application for conditional use approval, as the 2008 conditional use application merely sought to expand a use already approved by the Township pursuant to the 1997 conditional use approval.
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> 1. The testimony established that the Leos met all specific requirements of the Township Zoning Ordinance.
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> 2. There was no testimony or evidence regarding the requested expansion's detrimental effect upon the community which would have then shifted the burden to the Leos to persuade the Township that the expansion would not negatively affect the health, safety and welfare of the Township.
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> 3. The 1997 conditional use approval did not identify the sale of used cars from the Property as "accessory" to any other use of the Property, and the Township's Zoning Ordinance does not permit the sale of used cars as "accessory" to any other use.

(Applicants' Br. at 9-19.)

conditional use pursuant to Section 12.321 of the Ordinance, as well as the general requirements of Section 12.130. Thus, the Application must be granted unless there is sufficient evidence that the use will present a substantial threat to the health, safety, or general welfare of the community. Brentwood Borough v. Cooper, 431 A.2d 1177, 1178-79 (Pa. Cmwlth. 1981). Accordingly, Applicants argue that because the use was permitted as a conditional use in 1997, that established a "legislative decision" that the type of use is consistent with the zoning plan and presumptively consistent with the health, safety, and general welfare of the community. Moreover, they contend that there was no testimony or evidence in opposition to the Application, that the Council is the only entity opposing the Application, and that, because the Council granted the conditional use approval in 1997, the Council is now estopped from asserting that the proposed use of the Property is not similar to those uses listed as permitted or is not compatible with uses permitted in the NCD.

Council contends that, contrary to Applicants' assertions, the 1997 Decision did not grant Applicants a conditional use to sell cars; rather, the 1997 Decision merely granted them conditional use approval to operate an automobile repair business as their principal use, and allowed the sale of a limited number of automobiles only as an accessory use.[8]

[8] Council's brief discusses three arguments with sub-arguments:

> IV. Argument.
> A. Applicant failed to show that the proposed conversion of a neighborhood auto repair business with minor auxiliary auto sales into an outright used car lot must be permitted as a use "similar to" uses permitted in the neighborhood commercial district either under the express terms of the Ordinance or pursuant to prior Council decisions.

Applicants' argument hinges on their assertion that the 1997 Decision granted them a conditional use to sell used cars on the Property pursuant to Section 8.700(C)(5) of the Ordinance. However, upon review of the record, this Court cannot construe either the 1997 Decision or Section 8.700(C)(5) of the Ordinance to support Applicants' argument.

We note that the 1997 Decision did grant Applicants' request for a conditional use, but that request was to convert their service station to a vehicle repair garage, both conditional uses under Section 8.700(C)(9), which allows as a conditional use, "automobile service station or vehicle repair garage . . .." (Ordinance § 8.700(C)(9).) The 1997 Decision also permitted the continued accessory automobile sales. There was no reference in the 1997 Decision to Section 8.700(C)(5) of the Ordinance, which is another conditional use provision,

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> 1. Township Council properly denied Leo's Application, since a free-standing used car lot is neither "similar" to nor compatible with the uses permitted as of right in the Neighborhood Commercial District under the Township's Zoning Ordinance.
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> 2. Council's 1997 conditional use decision granting Leo's specific request for only limited auxiliary auto sales secondary and accessory to the main auto repair business use did not reflect a "legislative decision" that used car sales must now be recognized as a compatible "similar" principal use in the Neighborhood Commercial District.
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> B. Leo has no right under the 1997 conditional use decision to "expand" or otherwise convert his limited accessory auto sales activities to a principal use.
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> C. Where Leo failed to appeal from Council's 1997 conditional use decision, which strictly limited car sales on the property, Leo has waived any right to challenge the conditions and limitations placed on that decision and is bound by its terms and conditions whose rational purpose remains germane and valid today.

(Council's Br. at 11-21.)

which allows "neighborhood commercial uses similar to those listed as permitted and compatible with those uses as permitted [in Neighborhood Commercial District] (12.321)." (Ordinance § 8.700(C)(5).)[9] Applicants argue that the 1997 Decision authorized automobile sales as a conditional use and, therefore, must have done so under this "catch-all" provision. We cannot agree with Applicants that Council intended to rely on this "catch-all" provision to allow automobile sales as a principal permitted use. First, we believe the 1997 Decision does no more than permit the continued incidental sale of used cars, but as accessory to a vehicle repair garage instead of a service station. Second, the phrase, "uses similar to those listed as *permitted* and compatible with those uses as *permitted*," can only be referring to the "Principal Permitted Uses" outlined in Section 8.700(A)[10] of the Ordinance under the caption "Neighborhood Commercial District," and not uses permitted as a conditional use under Section 8.700(C). Because there are no "Principal Permitted Uses" under Section 8.700(A) in the NCD that are "similar" to the sale of used cars, the 1997 Decision could not have granted Applicants a

[9] We note that the 1997 Decision was governed by an ordinance that preceded the 2003 Ordinance which is at issue in this case, and the record does not contain any portion of that ordinance. However, since the parties base their arguments on the current Ordinance, we will assume that this section of the current Ordinance is unchanged from the preceding ordinance.

[10] Section 8.700(A) lists the "Principal Permitted Uses" in the NCD, including: art studios; bakeries with on-premises baking and limited only to goods for daily on-property sales; barber or beauty shops; non-drive thru beverage distributors; bicycle repair/sales; non-"adult" book stores; non-drive thru bank branches or savings and loan offices; drug stores; food sales in permanent quarters; forestry activities (subject to certain provisions); interior decorating services; self-service, pick-up and delivery laundry and dry-cleaning services; physician or dental offices; minor repair services of items that can be hand-carried; music conservatories or studios; municipal services or facilities; business or professional offices; public utility service buildings, structures or facilities; small retail stores; and single family dwellings on their own lots. (Ordinance § 8.700(A).)

conditional use to operate their Property as a used car dealership pursuant to Section 8.700(C)(5). Moreover, the 1997 Decision, like the 1986 Order, placed restrictions on the accessory used car sales, limiting the *number* of cars for sale on the Property and the type of advertisement and lighting on the Property. Such restrictions are not consistent with the assertion that the 1997 Decision granted Applicants a conditional use to operate a full-fledged used car dealership on their Property.

Furthermore, as correctly pointed out by Council, the Ordinance cannot be interpreted to allow for a used car lot in the midst of the NCD. It would be contrary to the plain language of the Ordinance and the purpose and intent of the NCD, which was created to foster limited, smaller scale, neighborhood convenience commerce at strategic local crossroads to cater to the surrounding residential district residents for their daily convenience. Indeed, the Ordinance permits the sale of cars as a principal use in the Highway Commercial District, the Light Industrial District, and the Heavy Industrial District, which, unfortunately for Applicants, are not where the Property is located.

Accordingly, we affirm the trial court's order, which upheld Council's denial of Applicants' Application.

**RENÉE COHN JUBELIRER, JUDGE**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| James J. and Carol E. Leo, husband and wife, | : | |
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**O R D E R**

**NOW**, November 20, 2009, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby **AFFIRMED**.

**RENÉE COHN JUBELIRER, JUDGE**