

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis L. Ness and Jill M.	:
Pellegrino,	:
Appellants	:
	:
v.	: No. 1118 C.D. 2013
	: Submitted: October 18, 2013
Zoning Hearing Board of York	:
Township and York Township	:

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: January 6, 2014

Appellants Dennis L. Ness (Ness) and Jill M. Pellegrino (Pellegrino) (collectively, Objectors) appeal from an order of the York County Court of Common Pleas that affirmed the decision of the Zoning Hearing Board of York Township (ZHB) granting a special exception for an external storage facility. We affirm.

Paul Knepper (Applicant) owns and operates existing indoor self-storage facilities at 110 Yoe Drive, Red Lion, Pennsylvania (the Original Property) in York Township (the Township). (ZHB Hearing Transcript (H.T.) at 3-4, 8-9.) On November 1, 2012, Applicant submitted an application to the ZHB seeking a special exception for a self-service external storage facility to store boats, recreation vehicles, travel trailers, U-haul rental trucks and other vehicles on a large parking lot. (Application for Special Exception; H.T. at 5, 8-10, 13-14, 22,

24, 30; ZHB Findings of Fact (F.F.) ¶¶3, 4j, 5c-5d.) This external storage facility is to be constructed on an adjoining 3.5 acre parcel of land (the New Property) that Applicant intends to acquire, which will be subdivided from a larger property at 150 Yoe Drive. (H.T. at 5, 8-9, 11-12; ZHB F.F. ¶¶4d-4e.) The application also sought a special exception for temporary external storage on part of the Original Property until construction of the external storage parking lot on the New Property was completed. (Application for Special Exception at 2; ZHB F.F. ¶3; H.T. at 25-27.) Objector Pellegrino lives at 90 Yoe Drive, adjacent to the Original Property and its indoor self-storage facilities. (H.T. at 75-76.) Objector Ness is a Township resident who does not live in the area near the Original Property and the New Property. (H.T. at 58-60.)

Both properties are zoned Industrial under the Township Zoning Ordinance (Zoning Ordinance), but abut a Residential High Density district on the other side of Yoe Drive. (ZHB F.F. ¶4f; Application for Special Exception at 1; H.T. at 5, 8-9, 15, 19.) Section 265-409 of the Zoning Ordinance provides that self-service storage facilities are a use permitted by special exception in the Industrial district. Zoning Ordinance § 265-409(C)(17). Section 265-668 of the Zoning Ordinance sets forth specific requirements with which such storage facilities must comply. Zoning Ordinance § 265-668. The storage facilities permitted by these provisions include facilities for external storage of operable, registered and licensed vehicles, travel trailers and boats. Zoning Ordinance § 265-668(D).

The ZHB conducted a hearing on Applicant's special exception application on November 27, 2012. At this hearing, Applicant's registered landscape architect and Applicant testified concerning the proposed external

storage facility and submitted exhibits showing the properties and the location of landscape buffers and setbacks on the New Property. Objectors appeared at the hearing and presented testimony and arguments in opposition to the application for special exception. After discussion, the ZHB voted 4-1 to grant the special exception for the external storage facility on the New Property, subject to conditions, and to deny the special exception for temporary external storage on the Original Property. (H.T. at 126-30; ZHB Decision at 4.)

On January 22, 2013, the ZHB issued its written decision, setting forth its findings of fact and conclusions of law and the conditions that it had voted to impose on its grant of the special exception. In that decision, the ZHB found that Applicant had satisfied both the Zoning Ordinance's requirements for special exceptions and Section 265-668's requirements for self-service storage facilities. (ZHB F.F. ¶¶4-5 and Conclusions of Law (C.L.) ¶¶1-2.) The ZHB decision set forth the following conditions for the external storage facility on the New Property: 1) storage of tractor-trailers on both the Original Property and the New Property is prohibited; 2) prior to proceeding with the use, Applicant is required to provide the external storage facility rental contract to the ZHB solicitor and receive his approval; 3) the New Property must be subdivided from the 150 Yoe Drive parcel and merged with the Original Property; 4) construction of the external storage facility is limited to the hours between 7:00 a.m. and 6:00 p.m.; and 5) the external storage facility must be 100% visually screened by landscape buffers and fencing. (ZHB F.F. ¶21 and C.L. ¶3.) The ZHB denied the proposed temporary external storage on the Original Property because Applicant had failed to show that it complied with the Zoning Ordinance's requirement of screening from adjoining residential properties and streets. (ZHB C.L. ¶¶4-5.)

Objectors appealed the ZHB's grant of the special exception to the trial court, which took no additional evidence and affirmed the ZHB. This appeal followed. Where, as here, the trial court does not take additional evidence, this Court's review is limited to determining whether the ZHB committed an abuse of discretion or an error of law. *JoJo Oil Co. v. Dingman Township Zoning Hearing Board*, 77 A.3d 679, 685 n.6 (Pa. Cmwlth. 2013); *In re Brickstone Realty Co.*, 789 A.2d 333, 338 (Pa. Cmwlth. 2001). An abuse of discretion will be found where the ZHB's findings of fact are not supported by substantial evidence. *JoJo Oil Co.*, 77 A.3d at 685 n.6; *Brickstone Realty Co.*, 789 A.2d at 338.

A special exception is not an exception to the zoning ordinance but is, rather, a permitted use allowed so long as standards specified in the ordinance are met. *Broussard v. Zoning Board of Adjustment of City of Pittsburgh*, 589 Pa. 71, 79-80, 907 A.2d 494, 499 (2006); *Tennyson v. Zoning Hearing Board of West Bradford Township*, 952 A.2d 739, 746 (Pa. Cmwlth. 2008). It is the applicant's burden to prove that its proposed use complies with the specific requirements for the special exception set forth in the zoning ordinance. *JoJo Oil Co.*, 77 A.3d at 687; *Blancett-Maddock v. City of Pittsburgh Zoning Board of Adjustment*, 6 A.3d 595, 600 (Pa. Cmwlth. 2010). If the applicant demonstrates compliance with the zoning ordinance's special exception requirements, the burden shifts to objectors to present evidence and persuade the zoning board that the proposed use will have an adverse impact on the welfare of the community beyond what would normally be expected from that type of use. *Blancett-Maddock*, 6 A.3d at 600; *Tennyson*, 952 A.2d at 746.

Objectors argue that the ZHB erred in granting the special exception for the external storage facility on the New Property because Applicant allegedly

did not submit sufficient plans and drawings to the ZHB. (Appellants' Br. at 6 ¶¶4-5, 9-10, 16-17.) We do not agree. An applicant for a special exception is only required to submit plans and evidence concerning the proposed use and its location and size that are sufficient for the zoning board to determine that the proposed use complies with the zoning ordinance's special exception standards. *Brickstone Realty Co.*, 789 A.2d at 339, 342-43. Submission of engineering designs and full plans satisfying all land development requirements is not required at the special exception stage, as such details are properly addressed later in the permitting and approval process. *Id.* at 342-43; *Schatz v. New Britain Township Zoning Hearing Board of Adjustment*, 596 A.2d 294, 298 (Pa. Cmwlth. 1991).

Applicant's special exception application included a site plan showing the location of the proposed external storage facility, existing structures, property lines and surrounding properties. (Site Plan attached to Application for Special Exception.)¹ At the ZHB hearing, Applicant's landscape architect testified at length, explaining the plans for the proposed external storage facility, how it would operate, and how it would comply with the Zoning Ordinance's special exception requirements. (H.T. at 3-25, 38-40.) Applicant submitted as exhibits aerial images of the properties and neighboring properties that showed the location of the proposed external storage facility, and the setbacks, proposed landscape buffers

¹ Although Objectors did not include this document or any of the ZHB record in their Reproduced Record, the ZHB record, which includes the application and accompanying site plan drawings, the ZHB hearing transcript, the ZHB hearing exhibits and the ZHB decision, is in the certified record. Because these documents are in the certified record, the Township's contention that this appeal is barred by failure of Objectors to provide an adequate record (Appellee's Br. 10) is without merit. *Downey v. Downey*, 582 A.2d 674, 678 (Pa. Super. 1990); *see also* Pa. R.A.P. 2152(c).

and proposed fence for that facility. (Applicant Exs. 1, 2; H.T. at 4-7.) Applicant also testified at the hearing concerning the lighting, security and water supply for the proposed external storage facility and what would be stored there. (H.T. at 29-31, 43-44, 51-54, 99.) The ZHB found that the evidence submitted by Applicant was sufficient for it to determine that the proposed external storage facility on the New Property satisfied the Zoning Ordinance's special exception requirements, including Section 265-668's specific requirements for self-storage facilities. (ZHB F.F. ¶¶4-5, 10 and C.L. ¶¶1-2.)

Objectors in their brief do not point to any deficiency in Applicant's submissions that bears upon any of the Zoning Ordinance's special exception or self-storage facility requirements. The only issue concerning documentation relevant to those requirements that Objectors have asserted at any time in this case is that Applicant did not file the proposed storage contract for the ZHB to determine whether it complies with Section 265-668(H) of the Zoning Ordinance. (H.T. at 60-61.) Section 265-668(H) provides:

All Self-Service Storage Facilities' rental and/or use contracts shall specifically prohibit these uses:

1. Bulk storage of flammable, highly combustible, explosive or hazardous materials.
2. Repair, construction, reconstruction or fabrication of any item, including but not limited to, any boats, engines, motor vehicles, lawn mowers, appliances, bicycles or furniture.
3. Auctions, except as provided for in the Self-Service Storage Facilities Act, commercial wholesale or retail sales not related to the storage activity on the premises or garage sales.
4. The operation of power tools, spray-painting equipment, compressors, welding equipment, kilns or other similar tools or equipment.

5. Any business activity within the storage units.

(Zoning Ordinance § 265-668(H)) (emphasis added). Objectors are correct that Applicant did not submit his proposed storage contract with his special exception application or at the hearing.

The fact that the ZHB did not have Applicant's proposed contract before it, however, is not grounds for reversal of the ZHB's decision here. The ZHB addressed compliance with Section 265-668(H) by imposing as a condition on its grant of the special exception the requirement that "[t]he rental contract for External Storage Facility must be presented to, reviewed by and approved by the Zoning Hearing Board solicitor as to compliance with the Zoning Ordinance, prior to implementation of the Use." (ZHB F.F. ¶21b and C.L. ¶3.) In addition, Applicant testified that his current contract for the indoor storage on the Original Property contains each of the prohibitions required by Section 265-668 and that he will also include terms requiring renters to maintain licensing and registration of stored vehicles to ensure continued compliance with the requirement that stored vehicles be "operable and properly inspected, licensed and registered." (H.T. at 87-89, 100-03; Zoning Ordinance § 265-668(D).) Where a zoning ordinance does not specify when an agreement relevant to its special exception requirements must be submitted and there is evidence of intent to comply, the zoning board may address that requirement by a condition that ensures subsequent compliance before the applicant can enjoy the benefit of his special exception. *Broussard*, 589 Pa. at 77, 80-86, 907 A.2d at 497, 500-03 (where zoning ordinance did not specify when parking agreement required for special exception must be provided, zoning board did not err in granting special exception subject to condition requiring submission and approval of the agreement prior to issuance of building or occupancy permit). Because Section 265-668(H) only requires that the storage contracts contain the

prohibitions, not that the contracts be submitted prior to the special exception, the ZHB did not err in granting the special exception subject to a condition that ensured that Applicant's storage contract terms would be in compliance before he could proceed with his proposed storage facility. *Broussard*, 589 Pa. at 80-86, 907 A.2d at 500-03.

Objectors also argue that Applicant's existing indoor self-storage facilities on the Original Property are illegal because a permit for that use was allegedly not properly issued. (Appellants' Br. at 6 ¶¶6-7, 10-11, 18-19.) Objectors do not explain how this would invalidate the special exception granted by the ZHB, which relates only to the New Property. However, even if this argument is relevant, it cannot be grounds for reversal of the ZHB's decision because it is time-barred. Section 914.1 of the Municipalities Planning Code (MPC)² provides that any challenge to a land development approval must be filed within 30 days. 53 P.S. § 10914.1. In addition, any appeal from a zoning board's land use decision must be taken to the Court of Common Pleas within 30 days of the zoning board decision. Section 1002-A of the MPC, 53 P.S. § 11002-A. The change in use that Objectors seek to challenge occurred in 1996 (Ness Ex. 8), over 16 years before the Objectors asserted this challenge at the ZHB hearing. While Objectors claim that they had no notice of issuance of the permit (Appellants' Br. at 19), Objectors' testimony at the ZHB hearing establishes that they have been aware of the construction on the Original Property for 16 years and that they have known for 16 years that Applicant has been allowed to engage in the use to which they object. (H.T. at 75-82.) The 30-day period for asserting this challenge to the

² Act of July 31, 1968, P.L. 805. Sections 914.1 and 1002-A of the MPC were added by the Act of Dec. 21, 1988, P.L. 1329, No. 170 §§ 95 and 101, *as amended*, 53 P.S. §§ 10914.1, 11002-A.

legality of Applicant's operation of indoor storage facilities on the Original Property therefore began to run and expired 16 years ago, even if Objectors did not have actual notice concerning the permit. *Berryman v. Wyoming Borough Zoning Hearing Board*, 884 A.2d 386, 389-90 (Pa. Cmwlth. 2005).³

For the foregoing reasons, we affirm.

JAMES GARDNER COLINS, Senior Judge

³ Objectors make a number of other arguments concerning alleged conflict of interest of the Township Board of Supervisors and the Township's participation in this appeal, ownership of the properties, the filing of and alleged incompleteness of the ZHB record and whether the transcript of the ZHB hearing is a copy, rather than the original transcript. (Appellants' Br. at 6 ¶¶1-3, 8-9, 13-16.) Objectors, however, did not raise any of these issues in their appeal to the trial court. (See Appeal from ZHB Decision at 2-5, R.R. Ex. 1; Trial Court Brief of Appellants at 3-16, R.R. Ex. 5.) These issues are therefore waived and are not properly before us. Pa. R.A.P. 302(a); *Piper Group, Inc. v. Bedminster Township Board of Supervisors*, 612 Pa. 282, 306, 30 A.3d 1083, 1097 (2011); *Lamar Advertising Co. v. Zoning Hearing Board of Municipality of Monroeville*, 939 A.2d 994, 1001 (Pa. Cmwlth. 2007).

