

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ryan J. Morris, :
Appellant :
v. : No. 183 C.D. 2013
: Argued: March 10, 2014
Franklin Township Zoning Hearing :
Board and Franklin Township Board :
of Supervisors :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: March 28, 2014

Ryan J. Morris (Applicant) appeals from an order of the Court of Common Pleas of Adams County (trial court) affirming the decision of the Franklin Township Zoning Hearing Board (Board) to deny his application for a special exception to use his property for a law enforcement canine training facility and explosives storage facility. For the reasons that follow, we affirm.

Applicant is the owner of approximately eight acres of real property located at 5400 Chambersburg Road (Property) in Franklin Township's

(Township) Open Space Zone.¹ The Property is rural, heavily-wooded and hilly, with several small clearings interconnected by a series of gravel roads. In early

¹ Section 175-11 of the Township Zoning Ordinance (Ordinance), relating to the Open Space Zone, provides, in relevant part:

A. Purpose. The purpose of the Open Space Zone is to provide for the protection and preservation of areas of the Township which, by virtue of steep slopes, wetlands, floodplains, streams, limited accessibility, unique natural beauty or established State Forest Land, are inappropriate for development. The primary goal of the Open Space Zone is to preserve land from the detrimental impacts caused by urban and suburban sprawl. The Open Space Zone provides for a limited number of low-intensity residential, agricultural or recreational uses.

B. Uses by right. The following uses are permitted by right in the Open Space Zone.

- (1) Crops and gardening.
- (2) Raising of livestock.
- (3) Horticultural and forestry uses.
- (4) Single-family detached dwelling.
- (5) Accessory uses customarily incidental to the uses in Subsection B(1) through (4) above, including but not limited to roadside stands for the sale of agricultural products.
- (6) Migrant worker camp.
- (7) Home occupation, in conformance with §175-46 of this chapter.
- (8) Bed-and-breakfast inn, in conformance with §175-39 of this chapter.

C. Uses by special exception. The following uses shall be permitted as special exception when authorized by the Zoning Hearing Board. The Zoning Hearing Board shall review requests for special exceptions in terms of the criteria established in Articles V and VI of this chapter.

- (1) Public building, including firehouse.
- (2) Campgrounds.

(Footnote continued on next page...)

2011, Applicant purportedly began operating a business on the Property at which canines are trained to detect the presence of explosives and tested to determine their mastery of the training requirements, which is not a permitted use in the Open Space Zone or any other zoning district in the Township. On October 12, 2011, Applicant filed an application for a special exception with the Township pursuant to Section 175-8(B) of the Ordinance² to use the Property purportedly for a “law enforcement canine training facility and explosives storage facility.” (Reproduced Record (R.R.) at 138a).

(continued...)

- (3) Cemetery.
- (4) Kennel.
- (5) Recycling collection center.
- (6) Public utility building or service structure.
- (7) Park or other open space area of a nonprofit nature.
- (8) Outdoor commercial recreation establishment.
- (9) Communication transmitting and receiving facility.
- (10) Churches and related uses.
- (11) Continuing care retirement community, in accordance with the standards of §175-45-1.
- (12) Resort lodge.

² That section provides:

B. All other uses. Any use not specifically allowed elsewhere in this chapter shall be allowed by special exception in the zone or zones where, and to the extent that, similar uses are permitted or allowed by special exception, provided that said use meets the requirements for a special exception and does not constitute a public or private nuisance.

Before the Board, Applicant testified that a number of federal, state and local law enforcement agencies utilize his facility for canine training and testing. He stated that “in a given year we probably go through maybe 500 pounds [of explosives], if that” for the canine training and testing. (November 21, 2011 Hearing Transcript at 63). Applicant explained that the portion of the Property utilized for the training and explosives storage is shielded from neighboring properties by steep slopes and woods. He testified that the only structures on the Property are four half-inch thick steel boxes known as storage magazines, which are used to store explosive materials, and a small storage shed. According to licenses submitted by Applicant, the four storage magazines are authorized to contain 3,990 pounds of explosives.³ He explained that these storage magazines are surrounded by perimeter gates and protected by a security system with remote monitoring which is housed in the storage shed. Applicant further testified that in accordance with ATF requirements, he notified the Pennsylvania State Police and local fire departments that there are explosive materials on the Property and instructed the fire departments to not fight a fire there. Applicant admitted that the sale of explosive materials is one component of his business, but stated that that aspect of the business occurs at his home and not on the Property.

The Board denied the application, finding that although the proposed dog training and testing program is neither a public nor private nuisance and, thus,

³ Applicant submitted into evidence four Magazine Storage Licenses, an Explosives Sales Permit and an Explosives Storage Inspection Report issued by the Pennsylvania Department of Environmental Protection (DEP), as well as an explosives manufacturing permit issued by the Bureau of Alcohol, Tobacco and Firearms (ATF).

is permitted by special exception in the Open Space Zone, Applicant failed to establish that the proposed use met certain requirements relating to parking spaces/areas, loading spaces, driveways/access drives, angle of intersections and slope/cuts in Sections 175-19 – 175-21 of the Ordinance. Additionally, the Board found that Applicant failed to prove that the proposed use has adequate storm drainage, sewage disposal or emergency plans in accordance with Section 175-34(E)(1)(b) of the Ordinance.⁴ Finally, the Board explained that the on-site storage and distribution of explosives is “a separate business that is listed as a use permitted by special exception in the commercial zone” that “may not be folded into another use that would be permitted had Applicant met his burden of proof for that use, i.e., the dog training and testing business.” (Board’s January 4, 2012 Decision at 6).

Applicant then appealed to the trial court and the Township intervened. In its opinion, the trial court first explained that the Board’s consideration of the requirements in Sections 175-19 – 175-21 of the Ordinance was erroneous because those sections are not specifically referenced in Section

⁴ Section 175-34 of the Ordinance is entitled “Special exceptions.” Subsection E, entitled “General Standards,” provides, in relevant part:

(1) A special exception may be granted when the Zoning Hearing Board finds from a preponderance of the evidence produced at the hearing that:

(b) Adequate water supply, sewage disposal, storm drainage and fire and police protection are or can be provided for the use.

175-34 of the Ordinance, which sets forth the standards for special exceptions. According to the trial court, because those provisions are included in the Ordinance as “General provisions,” they “are applicable to all uses, and must be addressed in a land development plan but are not required to be addressed in a request for special exception.” (Trial Court’s January 15, 2013 Opinion at 7). However, the trial court upheld the Board’s conclusion that Applicant failed to meet the requirements of Section 175-34(E)(1)(b) relating to storm drainage, sewage disposal and fire and police protection. The court emphasized that it found the lack of fire protection particularly disconcerting, and explained that compliance with ATF requirements, alone, does not constitute sufficient evidence to support a determination that there is adequate fire protection at the Property. With respect to the storage of explosives, the trial court determined that the Property qualifies as a “warehouse” under the Ordinance,⁵ which is a permitted use in the Township’s Industrial and Commercial Zones. Because Section 175-8(B) of the Ordinance allows for the approval of special exceptions for uses not specifically allowed elsewhere in the Ordinance, the trial court held that section is inapplicable and, therefore, the application is deficient with respect to the explosives storage facility. Accordingly, the trial court affirmed the Board’s denial of the application for a special exception. This appeal by Applicant followed.⁶

⁵ Section 175.6 of the Ordinance defines “warehouse” as “[a] structure to be used for storage only of equipment and merchandise.”

⁶ Our review in a zoning case where the trial court has not taken additional evidence is limited to determining whether the local zoning board committed an error of law or an abuse of discretion. *Lench v. Zoning Board of Adjustment of City of Pittsburgh*, 13 A.3d 576, 579 n.3 (Pa. Cmwlth. 2011). A board is considered to have abused its discretion when its findings are not supported by substantial evidence. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

On appeal, Applicant first argues that the Board and trial court erred in placing the burden of proof for general, non-objective special exception standards of the Ordinance on him. Applicant contends that he had the initial burden of persuading the Board that the proposed use satisfies the objective requirements of the Ordinance and, once he did, the burden shifted to the Township to show that the proposed use does not comply with general, subjective requirements related to the grant of a special exception.⁷ According to Applicant, the provisions of Section 175-34(E)(1)(b) relating to storm drainage, sewage disposal and emergency plans are general, subjective requirements, as the term “adequate” is, by its nature, subjective, and the subsection is entitled “General standards.” Because he did not have the burden and there was no evidence proffered that he did not meet those standards, Applicant contends that the Board could not deny his application. However, we disagree with Applicant that he was not required to establish that he met those requirements.

⁷ Applicant relies on *Greaton Properties v. Lower Merion Township*, 796 A.2d 1038, 1045-46 (Pa. Cmwlth. 2002), which provides:

The applicant for the proposed use has both the duty to present evidence and the burden of persuading the board that the proposed use satisfies the objective requirements of the ordinance for the grant of a special exception. Once the applicant meets these burdens, a presumption arises that the use is consistent with the health, safety and general welfare of the community. The burden then normally shifts to the objectors of the application to present evidence and persuade the Board that the proposed use will have a generally detrimental effect... (Citations and footnotes omitted).

In this case, who has the burden to establish the criteria necessary to meet those requirements is set forth in Section 175-34(E)(2) of the Ordinance, which states that “[t]he applicant for a special exception shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the [Board].” This specifically places the burden on an applicant for a special exception to establish that he has adequate storm drainage, sewage disposal and emergency plans, which is not surprising given the applicant is the only one who knows exactly what is going to occur on the property and how he plans to address those requirements.

We have also addressed standards similar to the ones at issue here, holding that they are specific requirements to be proved by an applicant for a special exception. *See, e.g., Edgmont Township v. Springton Lake Montessori School*, 622 A.2d 418, 420 (Pa. Cmwlth. 1993) (applicant for special exception had burden of proving that proposed use had **effective** storm water management and sanitation systems) (emphasis added); *Reformed Seventh Day Adventist Church Inc. v. Philadelphia Zoning Board of Adjustment*, 561 A.2d 1324, 1326 (Pa. Cmwlth. 1989) (applicant for special exception had burden of proving specific ordinance criteria, including **adequate** supply of light and air to neighboring facility, as well as requirements relating to fire safety and public facilities, while objectors had burden of proving general criteria, such as whether proposed use will adversely affect public health, safety and welfare and be in harmony with the spirit and purpose of ordinance) (emphasis added). As those cases demonstrate, the use of terms like “effective” or “adequate” in an ordinance’s special exception

requirements does not shift the burden of proving non-compliance with those requirements to the objectors; the burden of proving compliance is on those seeking the exception.

Even if he has the burden of proof, Applicant argues that the Board and trial court abused their discretion in finding that adequate sewage disposal, storm drainage and fire and police protection were not available to the proposed use. Applicant contends that there is no need for sewage disposal or storm drainage on the Property, so their absence is adequate for the proposed use. He claims that in finding otherwise, the Board improperly assumed that all special exception uses require the provision of sewage services and storm water controls when, in fact, many special exception uses in the Open Space Zone do not require such facilities. With respect to fire and police protection, Applicant asserts that the trial court failed to explain why his plan is inadequate or cite any evidence supporting that finding.

As the trial court noted, Applicant's only testimony before the Board regarding sewage disposal or storm drainage came during the following exchange:

[Applicant's Counsel]: All right. Do you have or do you need water supplies, sewage disposal [and] storm drainage?

[Applicant]: No.

(November 21, 2011 Hearing Transcript at 57). The Board simply did not find credible the assertion that the Property does not require sewage disposal or storm

drainage.⁸ There is no indication, as Applicant claims, that the Board simply assumed that all special exception uses in the Open Space Zone require such facilities. Rather, the Board's determination was based on the fact that numerous customers and trainers utilizing the Property necessitated sewage disposal, and that the access route to the Property required storm drainage. (*See* Board's Finding of Fact No. 15(b)).

Similarly, we find no abuse of discretion by the Board or trial court in determining that Applicant failed to meet his burden of proving adequate fire and police protection for the Property. As the trial court explained:

As a natural consequence of fulfilling the ATF's requirement of instructing the local fire companies to not fight a fire at the Property, other methods of fire safety must be implemented ... [Applicant's] current plan for fire protection seemingly consists of nothing more than a letter to the local fire companies stating, "[d]on't fight a fire there." ... Simply, that is wholly insufficient to represent any level of fire protection.

(Trial Court's January 15, 2013 Opinion at 10-11) (citation omitted). Applicant argues that "without any evidence in the record to demonstrate how or why [Applicant's] proposed steps are inadequate to [provide] fire and police protection to his proposed use ... the [trial court] agreed with the Board's conclusion that

⁸ This Court may not substitute its interpretation of the evidence for that of the Board, the fact-finder in this case. *Pohlig Builders, LLC v. Zoning Hearing Board of Schuylkill Township*, 25 A.3d 1260, 1266 (Pa. Cmwlth.), *appeal denied*, 613 Pa. 673, 34 A.3d 834 (2011). The fact-finder is the sole judge of the credibility of witnesses and the weight afforded their testimony. *Id.*

these measures were not ‘adequate.’” (Applicant’s Brief at 20) (emphasis in original). However, it is self-evident that the measures taken by Applicant are not adequate, because under Applicant’s proposed plan, there would be no action taken to contain the fire to his Property if a fire started or an explosion occurred, which is problematic given that it is a densely wooded, eight-acre property.

Finally, Applicant argues that the Board and trial court erred and abused their discretion in concluding that the storage of explosives on the Property qualifies as a warehouse use separate from the canine training facility. He contends that the storage of explosives is entirely incidental and subservient to the canine training use and, therefore, cannot be considered a separate use. To the extent that the storage of explosives on the Property could be considered a separate, principal use, Applicant argues that it is not a “warehouse” under the Ordinance.

Despite Applicant’s argument to the contrary, the storage of explosives clearly constitutes a separate use from the canine training and testing business. Applicant repeatedly testified that in addition to his canine training and testing business, he sells explosives, which are stored in the storage magazines on the Property. Moreover, these magazines have the capacity to hold nearly 4,000 pounds of explosives, despite the fact that Applicant uses “maybe 500 pounds” of explosives per year for his canine training and testing business. Because the storage magazines are “structure[s] ... used for storage only of equipment and merchandise,” they fall within the Ordinance’s definition of “warehouse.” Warehouses are permitted by right in the Township’s Commercial and Industrial

Zones. As the trial court recognized, when a use is permitted expressly in one or more districts, it is deemed prohibited in other districts where it is not listed as a permitted use. *Lex v. Zoning Hearing Board of Hampton Township*, 725 A.2d 236, 238 (Pa. Cmwlth. 1999). Because a warehouse use is not permitted in an Open Space Zoning District, we find no error or abuse of discretion in prohibiting the warehousing of explosives on the Property.

Accordingly, for the reasons set forth above, the trial court's order is affirmed.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ryan J. Morris, :
Appellant :
v. : No. 183 C.D. 2013
Franklin Township Zoning Hearing :
Board and Franklin Township Board :
of Supervisors :

ORDER

AND NOW, this 28th day of March, 2014, the order of the Court of Common Pleas of Adams County, dated January 15, 2013, at No. 2012-S-66, is affirmed.

DAN PELLEGRINI, President Judge