

In 1994, Applicant applied for a special exception and variances to expand the facility on Parcel 1 by nearly 34,000 square feet. On April 28, 1994, the Board denied the application, finding no hardship that would justify the necessary variances to expand beyond the building coverage and impervious surface limitations on the site. *Akiba Hebrew Academy*, Appeal No. 3313 (April 28, 1994). Applicant appealed that decision to the Court of Common Pleas of Montgomery County. The appeal was docketed at No. 94-09903. The parties submitted briefs in the matter, but there is no record of a decision having been made and the appeal is no longer indexed by the Court.

While that appeal was pending, on July 6, 1995, Applicant submitted a new, scaled-down application to expand its facility. This time, Applicant sought a special exception to increase the facility by approximately 15,220 square feet, but still sought variances from the maximum impervious surface and building coverage restrictions. Applicant's 1995 application also sought a variance to expand the facilities without providing additional off-street parking. The Board docketed this application at Appeal No. 3378 and held several hearings on it. The matter was then continued generally at Applicant's request.

On April 18, 1996, Applicant submitted an "amendment" to the 1995 application. The Board docketed that amendment as a new application at Appeal No. 3433. The most significant change represented in the 1996 plans was the proposed development and use of Parcel 2 for parking in connection with the expansion of the educational facility.

The Board held a hearing on Applicant's amended application on June 20, 1996. A number of objecting neighbors testified at the hearing in opposition to the appeal. The neighbors expressed concerns regarding existing problems with traffic, storm water management and soil conditions in the area - all of which the neighbors blamed on Applicant's development of Parcel 1. The Board in 1996 granted the requested special exception (subject to certain conditions), but denied the

requested variances. The Board found that the proposed expansion met the objective criteria for a special exception and that, with the merger of Parcels 1 and 2, the building coverage and impervious surface limitations would not be violated and the required parking could be provided there. *Akiba Hebrew Academy*, Appeal No. 3433 (June 20, 1996).

The neighbors appealed the Board's decision to the Court of Common Pleas of Montgomery County, which affirmed the Board on November 26, 1997. The neighbors appealed to the Commonwealth Court, but that appeal was discontinued on April 14, 1998.

The Board incorporates its decisions in Appeals 3313 and 3433.

Applicant took no action on its expansion plans in the years after the Board's approval. In 1998, Applicant installed a stormwater management system in the existing driveway that separates Parcels 1 and 2. Applicant installed this system to connect to the new stormwater management system the Township installed at the time in Highland Avenue.

On March 23, 2004, Applicant submitted the present application for a special exception to expand its educational facility. The Board held hearings on the application on June 24 and August 24, 2004.

For the reasons that follow, the Board grants the special exception.¹

Special Exception Standard

A special exception is not an exception to the zoning ordinance, but rather is a use to which an applicant is entitled unless the Board determines according to standards set forth in the zoning ordinance that the proposed use would adversely affect the community. *East Manchester Township Zoning Hearing Board v. Dallmeyer*, 147 Pa. Cmwlth. 671, 609 A.2d 604 (1992); 53 P.S. §10912.1.

¹ A number of zoning ordinance sections applicable to Applicant's use were amended since the Board decided the 1996 Akiba application. The Board cannot, therefore, simply rely on the reasoning of its prior opinions in deciding this matter.

Once an applicant for a special exception satisfies its burden of proving that the proposed use meets the specific and objective criteria under the zoning ordinance, a presumption arises that the use is consistent with the public health, safety and welfare. *Id.* The burden then shifts to any objectors to present evidence of a high degree of probability that the use will substantially affect the health, safety and welfare of the community. *Id.*

The objectors' burden is more than merely showing an adverse impact. When the township commissioners permit a use by special exception, they are exercising their legislative judgment that such uses, in the ordinary case, will not negatively impact the public welfare. The objectors' evidence, therefore, "must show a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community." *Appeal of Michael Dippolito*, 833 A.2d 336 (Pa. Cmwlth. 2003); *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038, 1045 (Pa. Cmwlth. 2002).

The Use is Permitted by Special Exception

Applicant's proposed use in this matter is undeniably the expansion of an accredited educational institution, permitted by special exception. Code §155-11 S(2), 155-11 X. The additions to the principal building on Parcel 1 are part of a building-wide renovation that will expand and make more efficient use of space for classrooms, labs, seminars, library and associated offices. [N.T. 8/24/04, pp. 13-21; Exhibit A-22] The building on Parcel 2 will also be renovated to house 2200 square feet of administrative offices for the school. [N.T. 8/24/04, p. 21] The zoning ordinance limits administrative offices for educational institutions to 10% of the habitable floor area of the principal building on the lot. Code §155-11 S(2)(b). According to Applicant's architect, the administrative offices will occupy a total of 4400 square feet (2200 square feet in each building),

less than 10% of the habitable floor area of the principal building (61,000 square feet). [N.T. 8/24/04 pp. 21, 35; Exhibit A-22] The fact that Parcel 2 had heretofore been used only for residential purposes does not preclude its being used for an educational use permitted by special exception. The only potential impediment would be the spacing and density provisions, which for the reasons below, do not apply.

The Spacing and Density Limitation is Not Violated

The zoning ordinance requires that certain nonresidential uses located in residential districts (Applicant's being one) observe a limited density and maintain a separation of at least 500 feet:

Y. Except for those uses permitted by §§ 155-11S(7), 155-128, 155-144 and 155-141.4, and except for those uses involving fewer than seven residents/participants per day, the special exception or conditional use permitting the initial use or the expansion thereof shall only be granted if the applicant's evidence establishes compliance with the following conditions:

- (1) ...
- (2) ...
- (3) Spacing and density regulations. No more than one property whose use is regulated by this subsection shall be permitted:
 - (a) Within the same block, defined as both sides of an uninterrupted road segment between two intersections; and
 - (b) Within 500 feet of another use regulated by this subsection and/or a nonconforming use, measured by the shortest distance between the lot on which the proposed use will be located and the lot or lots which contain the existing use.

Code §155-11 Y(3).

The parties disagree about how this ordinance section should be interpreted. The Applicant argues that the section prohibits more than one, not merely one, regulated use on the same block and

within 500 feet of another regulated use. The neighbors argue that the Commissioners intended to prohibit any two regulated uses on the same block or within 500 feet of each other.

The Board has examined the spacing limitation in two recent decisions. In *Congregation Beth Hamedrosh*, Appeal No. 3755 (May 9, 2002), the Board held that a synagogue did not need a variance from the separation requirement even though two other nonresidential religious uses were within 500 feet. In so holding, the Board noted that the separation requirement may be ambiguous because: (1) it could be read to prohibit more than one (but not merely one) additional nonresidential use, and (2) it could be read to prohibit the additional use only where it is within the same block and within 500 feet of another such use. Later, in *Lubavitch of the Main Line*, Appeal No. 3868 (January 22, 2004), the Board cautioned that its observations about the first potential ambiguity in the ordinance were not necessary to the decision in the *Congregation Beth Hamedrosh* matter and should not be treated as precedent.

The Board now reiterates its holding in *Congregation Beth Hamedrosh* that Section 155-11 Y(3) requires that the proposed use be within 500 feet and be on the same block in order for the prohibition to apply. In addition, the Board interprets the introductory language of that section ("no more than one property ...") to mean that a single additional property used for nonresidential purposes may be located within the same block and within 500 feet of another use regulated by that section. We base this on the settled rule of zoning ordinance interpretation that "restrictions on a property owner's right to free use of his property must be strictly construed and all doubts resolved in his favor." *Gilden Appeal*, 406 Pa. 484, 492, 178 A.2d 562, 566 (1962). *see also, Fidler v. Zoning Hearing Board of Upper Macungie Township*, 408 Pa. 260, 182 A.2d 692 (1962) (the permissive, widest use of land is the rule and not the exception). Further, the Municipalities Planning Code requires that, in determining the extent of a restriction upon the use

of property, an ordinance must be interpreted, where doubt exists as to the intended meaning of the ordinance, in favor of the property owner and against any implied extension of the restriction. 53 P.S. §10603.1.

The Board's interpretation is also supported by the contrasting language in another spacing provision of the zoning ordinance. Section 155-11 T provides:

No residential use authorized under Subsection Q, R or S above shall be permitted if any other residential use listed in those subsections or any nonconforming use is located in any residential district except R 7 and within 500 feet [.]

Code §155-11 T.

This section plainly prohibits any property from being used for a regulated residential purpose if a single other regulated residential use is within 500 feet. Had the Commissioners similarly intended to prohibit any additional regulated nonresidential use within 500 feet of another in Section 155-11 Y(3), it would have used the same language as Section 155-11 T, which was adopted eight years earlier.²

Given the MPC's mandate to afford the Applicant the "benefit of the doubt" in interpreting the ordinance, the Board will not read a limitation into the ordinance that does not exist.

As a consequence of the Board's interpretation, the use of Parcel 2 for educational purposes is not prohibited by Section 155-11 Y(3).

The Parking Requirements Are Met

Determining whether any additional parking spaces are necessary on account of the expansion requires an analysis of the various parking regulations for educational uses:

² Section 155-141.3, adopted in 1989, has the same effect of prohibiting a single additional use if it is within the prohibited distance from an existing use.

AA. Educational uses, including student residence halls, day care and nursery schools.

(1) Number of space[s] required.

(a) One and one-half spaces per two students/participants of driving age;

(b) One space per faculty/staff member or volunteer;

(c) One visitor space per 25 students/participants; and

(d) One space per five seats, or 50 square feet of floor area where seating is not installed, for the largest place of public assembly on the site, except that parking for assembly places to be used no more than six times a year may be accommodated on unpaved areas, if their availability can be demonstrated.

(2) Reserved.

(3) The expansion of any use regulated by this subsection shall be required to meet these parking standards only for the additional students/participants or additional place of assembly.

(4) ...

Code §155-95 AA (emphasis supplied).

Analyzing the specific aspects of the Applicant's proposed expansion, the Board determines that no additional parking is required under the Code.

Parking is not required on account of the additions to the principal building on Parcel 1. The gymnasium will remain the largest place of public assembly. [N.T. 8/24/04 p. 19] The Board has previously held that the Code does not require additional parking for each new place of public assembly, but only for the largest area of public assembly. Code §155-95 AA(1)(d); *Baldwin School*, Appeal No. 3863 (July 22, 2004); *Sisters of Mercy Academy*, Appeal No. 3762 (January 29, 2002).

Applicant is not required to provide any additional parking on account of an increase in the number of faculty and staff. Code §155-95 AA(1)(b). The number of faculty and staff has increased from 74 in 1998 (when the definition of "expanded use" was adopted) to 80 in 2003, an increase of 6, which is below the threshold of 10 percent (7.4) for an expanded use. Code §155-4 ("Expanded Use"). [Exhibit A-19]

Nor is Applicant required to provide any additional parking on account of an increase in the number of students or the number of students of driving age. Code §155-95 AA(1)(a) and (c). In 1998, there were 368 students attending the school. That number decreased to 335 in 2003. Enrollment is capped at 350 students by virtue of the Board's 1974 decision. [Exhibit A-19] Likewise, the number of students of driving age has decreased from 120 in 1998 to 93 in 2003. [Exhibit A-19] No additional parking is required for the student population element. Code §155-95 AA(3).

Although no additional on-site parking is required, the Applicant plans to install 29 new spaces (most of them on Parcel 2) to bring the total on-site parking to 97 spaces. This can only result in an improvement over the current conditions in which approximately 25 vehicles whose occupants are bound for Akiba now park on the adjacent streets or in undesignated spaces on site. [See, Exhibit A-21, p. 8]

Loading and Queuing Requirements are Met

The zoning ordinance requires that new or expanded educational uses provide certain loading and queuing areas. Code §155-11 Y(4). However, the requirement applies only to the portion of the property proposed for the expanded use. Code §155-11 Y(4)(d). In this case, the number of students, faculty and staff will not increase. The additional educational space in the

principal building is being designed to better serve the existing population. [N.T. 06/24/04, pp. 20-21]

The report of the Applicant's expert traffic engineer indicates that the present loading, queuing and student drop-off procedures are adequate, but recommends that 5 parking spaces on the internal loop driveway be closed to allow for safer pedestrian and vehicle circulation. [Exhibit A-21] The Board will impose that recommendation as a condition to the approval.

Akiba is Nonconforming With Regard to Other Requirements

The neighbors point out that the zoning ordinance requires educational uses to front on and provide ingress and egress solely from a primary, secondary or tertiary arterial road. Code §155-11 W. The Applicant's property is nonconforming to this requirement. Likewise, although the post-development impervious surface of 35.4% will exceed the ordinance limitation of 21%, the site is nonconforming to that limitation as well.³

The Open Space Preservation District Regulations Do Not Apply

The Open Space Preservation District, adopted in 1990, is an overlay on all parcels five acres or larger within any residential district. Code §155-143 A. All properties used or intended to be used for residential purposes must comply with the special provisions applicable in that District. Code §155-143 B. By combining Parcels 1 and 2, the Applicant's property will be greater than 5 acres. It is not, however, intended for residential use. The Open Space Preservation District regulations do not apply.

³ The total impervious surface will actually decrease from 35.9% to 35.4% after the improvements are constructed. [N.T. 06/24/04, p. 81]

The Proposed Expansion Will Not Result in Extraordinary Negative Impacts

As noted above, when the Commissioners legislated that educational uses are permitted in residential districts by special exception, they made the determination that such uses will not ordinarily negatively impact the public health, safety and welfare. Consequently, the neighbors had the burden in this case to prove "a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community." *Appeal of Michael Dippolito*, 833 A.2d 336 (Pa. Cmwlth. 2003); *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038, 1045 (Pa. Cmwlth. 2002).

While the Board is sympathetic to the neighbors' concerns, we must find, as was the case in 1996, that the neighbors did not meet this extraordinary burden of proof.

The existing traffic congestion around the property is insufficient to deny a special exception. *In re O'Hara's Appeal*, 389 Pa. 35, 131 A.2d 587 (1957). Indeed, the Applicant's expansion does not involve any increase in traffic. As a matter of law, in order to refuse a special exception on traffic grounds, the evidence must show a high probability that the use will generate traffic problems not normally generated by this type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community. *Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board*, 139 Pa. Cmwlth. 206, 590 A.2d 65 (1991). The evidence here established that the proposed expansion would affect no change in the traffic to and from the site. [Exhibit A-21] The Board credits the testimony of the Applicant's expert traffic engineer that the proposed expansion will not have a detrimental effect on the existing levels of service at the surrounding intersections.

A major concern of the immediately adjoining neighbors is stormwater management. The Board may not, however, deny an application for a special exception based on those concerns:

[A]n application for a special exception is not required to address [storm water management, water supply requirements and building codes]. Such issues are to be addressed further along in the permitting and approval process. Zoning only regulates the *use* of land and not the particulars of development and construction.

Schatz v. New Britain Township Zoning Hearing Board of Adjustment, 141 Pa. Cmwlth. 525, 596 A.2d 294, 298 (1991) (emphasis in original).

The Board may only consider whether an applicant can supply the disputed facilities, not whether those facilities would meet the applicable criteria for a permit. *East Manchester Township Zoning Hearing Board v. Dallmeyer, supra*. The Board credits the testimony of Mr. Momenee, Applicant's expert engineer, who stated that the stormwater management features of the development will be adequate to handle the proposed improvements. [N.T. 06/24/04, pp. 74-77]

Larry S. Waetzman testified as an expert land planner on behalf of the neighbors regarding the negative effects of institutions in residential districts. He also gave his opinion regarding the proper interpretation of the spacing and density provisions (and a number of other provisions) of the zoning ordinance. The Board respectfully disagrees with Mr. Waetzman's regarding the interpretation of the spacing, density and open space provisions of the ordinance. And the Board does not deem his testimony regarding the potential effects of the expanded Akiba facility on the surrounding residential neighborhood sufficient, even considering the neighbors' description of the existing problems in the area, to carry the burden to prove that this particular proposed expansion would have a substantial negative effect not normally generated by an educational use.

For all of the foregoing reasons, the Board grants the special exception, subject to the conditions stated in the Board's order.

ORDER

AND NOW, this 21st day of October, 2004, it is hereby ORDERED that the application of Akiba Hebrew Academy (the "Applicant") for a special exception under Code §155-11 S(2) to construct additions to the principal education building on the property at 223 N. Highland Avenue ("Parcel 1"), Merion Station, PA is GRANTED. It is FURTHER ORDERED that the Applicant's request for a special exception under Code §155-11 S(2)(b) to convert the existing building at 280 Melrose Avenue, Merion Station, PA to administrative offices to be used by the Applicant in connection with its educational use is GRANTED.

The relief is based on and is conditioned on adherence to the plans and testimony presented at the hearings in this matter. The relief is further conditioned on:

1. Parcel 1 and Parcel 2 will be merged into one lot prior to any construction;
2. The use of the building on Parcel 2 is limited to administrative offices for the educational use, which use shall end daily by 7 p.m.;
3. The parking area on Parcel 2 shall be closed by 6 p.m. and the Applicant shall provide a sufficient barrier to prevent vehicular access after that time;
4. The pool, flagstone, greenhouse, garage, storage sheds and other existing impervious areas designated for removal on Applicant's plan will be removed from Parcel 2;
5. Use of the property by parties other than the Applicant (including the uses by Gratz Community Hebrew High School and the Main Line Reform Temple described in the testimony) shall not be permitted; any additional use and/or additional users of the property must be approved by the Board as a special exception;
6. The Applicant shall, during peak drop-off/pick-up hours, close the 5 parking spaces on the internal loop driveway to allow for safer pedestrian and vehicle circulation; and

7. Applicant shall provide sufficient personnel to monitor and direct on-site traffic flow during peak hours to insure that vehicle queues do not block the N. Highland Avenue entrance drive aisle;

Chairman Aaron and Member Morris participating, both voting "aye."

Attest:

Michael Wylie
Secretary