

BEFORE THE LEET TOWNSHIP ZONING HEARING BOARD

Re: Application of Quaker Valley School District for Special Exception
200-210 Camp Meeting Road

Pre-Hearing Brief

A. Background. By way of an informal pre-hearing conference with the Solicitor of the Zoning Hearing Board, Quaker Valley School District was invited to provide this Pre-Hearing Brief. Without waiving the right to submit further briefs or memoranda relating to issues that may arise during the hearing, Quaker Valley School District submits this brief on some preliminary issues.

B. What is a Special Exception?

In the context of zoning, the phrase “special exception” is a term of art. Unfortunately, the words do not accurately describe the concept, as a “special exception” is neither “special,” nor an “exception” to the Ordinance. See Ryan on Zoning, Section 5.1.1.

A “special exception” is a permitted use under the zoning ordinance. The only difference between an “as of right” permitted use and a special exception use is the procedure followed. In an “as of right” situation, the zoning officer reviews compliance with the zoning ordinance and issues a permit. In the case of a special exception, a hearing is required before the Zoning Hearing Board to review compliance with the zoning ordinance. If the applicant meets the criteria, then the “special exception” use must be approved.

The concept is more fully explained in Ryan on Zoning, Section 5.1.1. The following is a pertinent excerpt from Section 5.1.1:

Designating a use as a special exception use or conditional use, each being a type of permitted uses, represents a determination by the legislative body that the use is consistent with public health, safety and welfare, like any other permitted use. Boards and courts will, and indeed must, defer to the legislative judgment that a compliant application will have no adverse effect on the public health, safety and welfare. Boards and courts have no legal power to override the legislative judgment of the municipal governing body that adopted the ordinance making a use a special exception use or conditional use and setting the requirements and considerations for that use. This is one sense in which the special exception and conditional use must be viewed as a permitted use.

For the same reason, objectors may not successfully argue, and courts do not have discretion to decide, that a use allowed by special exception or conditional use, and complying with the ordinance's specific and general requirements and considerations, should not be allowed in the zoning district designated for that use in the zoning ordinance.

Conclusion: A special exception is a **permitted use**.

C. What specific criteria under the Leet Township Zoning Ordinance applies to a review of a special exception approval for a school use?

In the context of special exceptions, specific criteria are objective requirements in a zoning ordinance that a specific use must meet. Special setbacks are one form of specific criteria. For example, under the Leet Township Zoning Ordinance, Motels (as a Special Exception) are required to comply with a 50 foot setback to the front, side and rear lot lines.

Although the Leet Township Zoning Ordinance sets forth detailed, and at times very lengthy, specific criteria for numerous special exception uses, the ordinance does not establish any specific criteria for schools. Accordingly, a special exception school use has been designated as a permitted use, without specific criteria or any express conditions, in the Residential AAA Zoning District.

D. What general criteria under the Leet Township Zoning Ordinance applies to review of a special exception?

General criteria are non-specific or non-objective requirements in a zoning ordinance related to special exceptions. A requirement that a particular use must not be detrimental to the health, welfare or safety of the community is an example of a general requirement. When properly established by the zoning ordinance, general criteria apply to all special exceptions.

The Leet Township Zoning Ordinance does not set forth any general criteria to be applied to the review of special exception requests. Rather, Part 6, Special Exceptions and Conditional Uses, Section 2, Subparagraph A requires that a written application be filed, wherein the applicant must address 13 separate “items.” Some of those items are purely procedural requirements to be followed by the Zoning Hearing Board, and others simply require the applicant to include a statement addressing general issues. In essence, the 13 items are a “mix” of requirements, observations and procedural steps.

Accordingly, the only requirement to be fulfilled by Quaker Valley School District is to file a written application for approval. Quaker Valley School District filed a written application compliant with the zoning ordinance.

Notwithstanding the foregoing, the issue relating to general criteria is further addressed below in the context of the burden of proof and standard of review.

E. Who has the burden of proof?

There are 3 separate categories to consider: a) the burden of demonstrating compliance with express (specific) criteria; b) the burden of demonstrating compliance with general criteria; and c) the burden of demonstrating compliance with general policy concerns. Judge Craig summarized the standard in *Bray v. ZBA of Philadelphia*, 410 A.2d 909, 912-13 (Pa. Commw. Ct. 1980) as set forth in italics below:

In outline form, the rules concerning initial evidence presentation duty (duty) and persuasion burden (burden) in special exception cases may be restated as follows:

a. Compliance with Express (Specific) Criteria

Specific requirements, e.g., categorical definition of the special exception as a use type or other matter, and objective standards governing such matter as a special exception and generally:

The applicant has both the duty and the burden.

In this case, the ordinance does not establish any specific requirements. Accordingly, this section does not apply in this case.

b. Compliance with General Criteria

General detrimental effect, e.g., to the health, safety and welfare of the neighborhood:

Objectors have both the duty and the burden; the ordinance terms can place the burden on the applicant but cannot shift the duty. (citation omitted)

As argued above, the ordinance does not clearly set forth any general criteria. In any event, this rule clearly provides the duty to present evidence identifying a specific detrimental effect beyond the effect expected from a school use falls on the objectors. If objectors raise a substantial, specific detrimental effect beyond that normally expected, then Quaker Valley School District would bear the burden of responding to that specific issue. The case law makes clear that the applicant cannot be burdened with proving a negative. An objector must raise a legitimate substantial concern that is a result of an impact beyond the impact normally expected before the applicant has any duty to respond.

c. Compliance with General Policy Concerns

General policy concern, e.g., as to harmony with the spirit, intent or purpose of the ordinance:

Objectors have both the duty and the burden; the ordinance terms cannot place the burden on the applicant or shift the duty to the applicant. (citation omitted)

General policy concerns are very wide ranging. An objector must identify an issue, present substantial evidence and persuade the Board. This is an extremely high burden.

Summary: Although the above quotations fairly state the law, the real issue will not be who bears any particular burden, but rather what standard must be applied in reviewing a special exception request. That most important issue is covered next.

F. What is the standard of review for approval of a Special Exception?

As discussed earlier in this brief, the mere existence of a special exception use reflects the Township's recognition that the use is acceptable in the zoning district where authorized. In authorizing the use (as a special exception), the Township made a legislative decision to accept the impacts normally associated with the use authorized.

Ryan on Zoning (§5.26) makes the following observation:

Accordingly, if a zoning ordinance is drawn rationally, a decision to permit a use by special exception reflects a legislative judgment that the degree of impact necessarily flowing from the use does not materially affect the public interest, and will not justify a denial of the use. The most common error of protestants and of zoning boards in special exception cases is the failure to recognize that the existence of the special exception itself represents a legislative determination that degree of impact is permissible.

The PA Supreme Court recognized this rule many years ago in Archbishop O'Hara's Appeal:

[T]he ordinance which classifies this area as an 'AA' residential district specifically provides that land situated therein may be used for 'educational, religious, and philanthropic' purposes. The use of the land for any such purpose would naturally result in an increase in traffic and the framers of this ordinance certainly must have taken heed of this factor in the preparation of the ordinance... Archbishop O'Hara's Appeal, 131 A.2d 587, 596 (Pa. 1957).

The PA Commonwealth Court has followed, and ratified, this rule over the ensuing years. The following provide a sampling of Commonwealth Court holdings on the issue.

The Legislature in providing for special exceptions in zoning ordinances has determined that the impact of such a use of property does not, of itself, adversely affect the public interest to any material extent in normal circumstances, so that a special exception should not be denied unless it is proved that the impact upon the public interest is greater than that which might be expected in normal circumstances. Zoning Hearing Board v. Konyk, 290 A.2d 715, 718 (Pa. Commw. Ct. 1972).

An applicant, by showing the proposed use is permitted by special exception and that it complies with the specific requirements of the ordinance, identifies the

proposal as one which the municipal legislative body has determined to be appropriate in the district and therefore presumptively consistent with the health, safety and general welfare of the community (citation omitted). Kern v. Zoning Hearing Board of the Township of Tredyffrin, 449 A.2d 781, 783 (Pa. Commw. Ct. 1982), cited with approval in Appeal of Martin, 529 A.2d 582 (Pa. Commw. Ct. 1987).

...once the applicant for a special exception has met the burden of persuading a zoning hearing board that the proposed use satisfies the objective requirements of the ordinance, this Court has stated that a presumption arises that the proposed use is consistent with the health, safety and general welfare of the community (citation omitted). The burden then shifts to the objectors to rebut that presumption by proving to the zoning hearing board that to 'a high degree of probability that the proposed use will substantially affect the health, safety and welfare of the community' greater than what is normally expected from that type of use and not just speculation of possible harms. (citation omitted). Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board, 739 A.2d 644, 650 (Pa. Commw. Ct. 1999).

Our review of the record reveals further, that the Township did not meet its burden of proving that the proposed use will have an adverse effect on the general public. The evidence presented by the Township amounted to the fears of the neighboring residents, and such speculation of harm, without more, cannot sustain the objectors' heavy burden. "Mere speculation is not sufficient. The objectors must prove that there is a high degree of probability that a result not normally generated by this type of use will obtain." (citation omitted) Schatz v. New Britain Twp. Zoning Hearing Board, A.2d 294, 298 (Pa. Commw. Ct. 1991).

Summary: To deny a special exception for a school based on grounds of general detriment, an objector must demonstrate to a **high degree of probability** that the school use will present a **substantial detriment greater than what is normally expected** from a school use. In this case, the very use proposed by Quaker Valley School District (a public school) is the most typical and expected type of school use. The operation of the Quaker Valley School District High School, under supervision by the PDE, will be no different than any other public high schools in Pennsylvania. As the use proposed by Quaker Valley School District is the very use contemplated by the zoning ordinance, the use as a public high school cannot create an impact greater than what is expected.

G. Does Quaker Valley School District’s intended use as a public high school meet the definition of school?

The Leet Township Zoning Ordinance does not define “school.” Accordingly, the term “school” must be interpreted in a manner most favorable to the landowner. Pa. MPC, at §603.1 sets forth the standard to be applied in interpreting a zoning ordinance:

Section 603.1. Interpretation of Ordinance Provisions. In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

The Pennsylvania School Code defines a public school as follows:

“Public School.” Any or all classes or schools within this Commonwealth conducted under the order of superintendence of the Department of Education including, but not limited to: all educational classes of any employer charged with the responsibility of public education within this Commonwealth as well as those classes financed wholly or in part by the Federal Government, State-owned colleges and universities, the Pennsylvania State University, community colleges, area vocational-technical schools, intermediate units, the State Board of Education, Scotland School for Veterans’ Children, Thaddeus Stevens State School of Technology, and the Pennsylvania State Oral School for the Deaf.

Quaker Valley High School is a public school and Quaker Valley School District operates as a governmental entity. The Pennsylvania Department of Education designates Quaker Valley High School as a Regular School under the laws of the Commonwealth of Pennsylvania. Quaker Valley High School and District operate under the order and superintendence of the Pennsylvania Department of Education.

The quintessential definition of a school must include primary or secondary schools operated by a governmental entity in accord with the Pennsylvania Public School Code, under the supervision of the Pennsylvania Department of Education.

Summary: Quaker Valley School District’s proposed use of the site for a regular public high school meets the definition of a school under the Leet Township Zoning Ordinance.

H. Are the Leet Township Subdivision and Land Development Ordinance (SALDO) provisions pertinent to a review of a Special Exception application?

As set forth above, the only criteria to be reviewed in considering an approval of a special exception use are the specific or general criteria set forth in the zoning ordinance relating to the use.

Requirements set forth in the SALDO relate to **design** of the site to support the **use**. The design requirements (storm water, geotechnical, road improvements/access, building location, etc.) are reviewed as part of the land development review process by the Planning Commission and Commissioners.

The Zoning Ordinance (Part 6, Special Exceptions and Conditional Uses, Section 1, 2. F.) recognizes that land development plan approval is reviewed by the Planning Commission:

F. If land development plan approval is required for the use by special exception, the application for approval of a land development plan required by the Township Subdivision and Land Development Ordinance shall be submitted to the Township Planning Commission following approval of the use by special exception by the Zoning Hearing Board.

Schatz v. New Britain Twp. Zoning Hearing Board, 596 A.2d 294 (1991), at 298 confirms that a review of a Special Exception **use** cannot require a review of **design** criteria under general criteria:

*Finally, according to the Township, Schatz's application does not address the best interests of the Township, the convenience of the community, or the public welfare, because it does not have adequate sewage capacity, and it does not address the storm water management, water supply requirements, and may not meet the building code. We again agree with Common Pleas that an application for special exception is not required to address such issues. 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. "Zoning is the legislative division of a community into **areas** in each of which only certain designated **uses** of land are permitted so that the community may develop in an orderly manner...." Best v. Zoning Board of Adjustment, 393 Pa. 106, 110, 141 A.2d 606, 609 (1958)(emphasis added)*

Summary: The sole issue to be determined by the Zoning Hearing Board is whether the proposed **use** (not **design**) creates a substantial negative impact beyond the impact normally expected from a school use. As set forth above, the proposed use is precisely the type of use contemplated.

I. Who has standing to object to QVSD's application for a Special Exception?

MPC Section 913.3 provides that "any person aggrieved" may contest a zoning approval. Commonwealth Court has established the scope of what constitutes a "person aggrieved."

In re: Appeal of Broad Mountain Development Co., LLC, 17 A.3d 434, at 440, (2011), cited and ratified by Lorenzen v. West Cornwall Twp. Zoning Hearing Board, 222 A.3d 893 (2019), explains standing, in the context of zoning challenges, as follows:

To establish "aggrieved" status for purposes of standing, a party must have a substantial, direct, and immediate interest in the claim sought to be litigated. Laughman v. Zoning Hearing Bd. of Newberry Twp., 964 A.2d 19 (Pa.Cmwlth.2009). In order to have a substantial interest, there must be some discernible adverse affect to some interest other than the abstract interest of all citizens in having others comply with the law. Pilchesky v. Doherty, 941 A.2d 95 (Pa.Cmwlth.2008). The interest must be immediate and not a remote consequence of the judgment. Id. A person has standing where he has suffered or will suffer "injury in fact" and the interest he seeks to protect is arguably within the zone of interest sought to be protected or regulated by the statute or constitutional guarantee in question. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Aesthetic evaluation cannot be equated with a substantial interest in the issuance of a zoning permit. Miller v. Upper Allen Twp. Zoning Hearing Bd., 112 Pa.Cmwlth. 274, 535 A.2d 1195 (1987). An objector who is located in close proximity to the land involved in a zoning application normally has standing to contest the application. Active Amusement Co. v. Zoning Bd. of Adjustment, 84 Pa.Cmwlth. 538, 479 A.2d 697 (1984).

Accordingly, any resident objecting to the Special Exception request must demonstrate that property owned by the resident will be substantially, directly and immediately harmed by the approval of the Special Exception. The Board must inquire as to the affected interests prior to allowing participation. Pertinent areas of inquiry include:

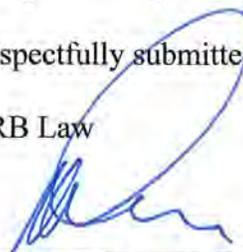
1. Identify the location of the property owned by the resident.
2. Identify the distance of the affected property from the project.
3. Identify the specific, substantial negative impact on the resident's property.

The project must have a discernable adverse affect on the resident's property, not merely an abstract or general impact that generally affects all citizens.

Summary: Protestants should be limited to individuals owning land in near proximity to the project, and who demonstrate some substantial, adverse specific impact on their land.

Respectfully submitted,

GRB Law

By: 

Donald J. Palmer, Esquire
Daniel F. Gramc, Esquire
Solicitor for Quaker Valley School District
Waterfront Corporate Park
2100 Georgetowne Drive, Suite 300
Sewickley, PA 15143
Phone: (724) 935-4777