

# FAYETTE LEGAL JOURNAL

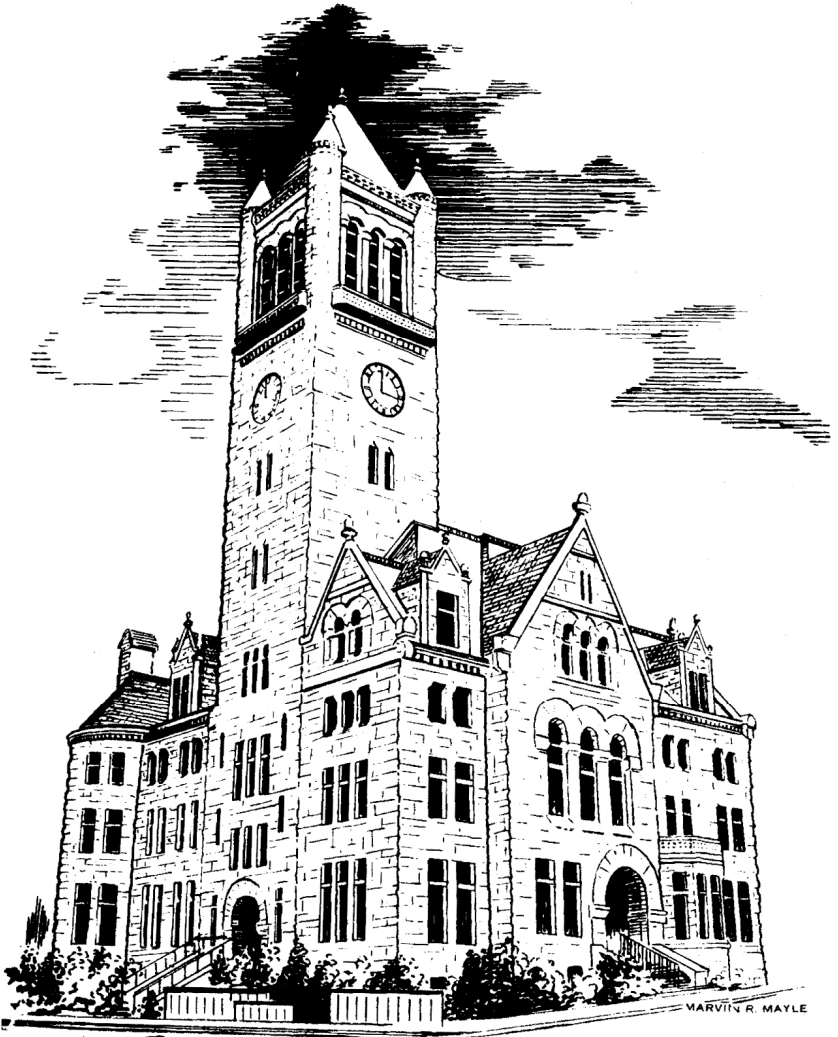
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## FAYETTE LEGAL JOURNAL

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## LEGAL NOTICES

\*\*\* NO LEGAL NOTICES\*\*\*

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**JUDICIAL OPINION**

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA  
CIVIL DIVISION

FAYETTE RESOURCES, INCORPORATED,	:	
Plaintiff,	:	
v.	:	
FAYETTE COUNTY ZONING	:	
HEARING BOARD,	:	
Defendant,	:	
v.	:	
SMITHFIELD BOROUGH,	:	No. 1543 of 2016, G.D.
Intervenor	:	Honorable Steve P. Leskinen

**OPINION & ORDER**

Leskinen, J.

December 31, 2020

This matter comes before the Court on the appeal of Fayette Resources, Incorporated (hereinafter FRI) from the decision of the Fayette County Zoning Hearing Board (ZHB or Board). The current decision of the ZHB denied FRI's special exception request by way of Resolution 16-15, dated July 13, 2016. The appeal was filed by FRI on August 8, 2016. Smithfield Borough, where the proposed "Group Residence" is located intervened as a party on November 14, 2016. Oral argument before the Court without the presentation of any new evidence was held on October 9, 2018.

On this appeal, FRI challenges the denial of the special exception, and asserts both that the use they propose (and have been actually using for five years) is a Permitted use, and that no "Special Exception" is required and that they met all the requirements for grant of a Special Exception. In addition, FRI asserts that FRI met all the standards required by that Ordinance and that the ZHB did not find that FRI "failed to meet the standards for the Special Exception approval Fayette County Ordinance (sic)." FRI also asserted that the objectors to the special exception "did not meet any burden of proof and/or establish a detrimental effect on the public health, safety and welfare different than any other residence in the community." Finally, FRI asserts that the Fayette County Zoning Ordinance, to the extent it applies to bar the use FRI is seeking, "is unconstitutional and violates the Federal Fair Housing Act in that it discriminates on the basis of disability. ..."

**BACKGROUND**

FRI originally filed their petition for Special Exception with the ZHB on March 15, 2016 after being denied a permit as a "permitted use" in a prior proceeding. That decision was not appealed, and this Court is not empowered to revisit that issue at this time. This argument was not developed with any statutory or case law citations, and with no specific reference to the Ordinance, so this Court considers the argument to be abandoned.

The Petition sets forth that the property (32-7-0012) is zoned R-2, and the Petitioner wishes to use this property as: "To Provide a service for Group Home." Unfortunately, while "Group Home" is a use that is defined in the Ordinance, it is not specifically listed as a permitted or special exception use in any zone. This is clearly just poor draftsmanship, however, as "Group Residence" is also a defined term, and the only appreciable difference between the two terms is that a "Group Home" has 8 or fewer residents, while a "Group Residence" has 13 or fewer residents.

A "Group Residence" is defined as: "A residence, where room and board are provided to a maximum of thirteen (13) permanent residents of any age who are mentally challenged or physically handicapped and who are in need of supervision and specialized services, including necessary staff who may or may not reside in the dwelling and who provide health, social and/or rehabilitative services to the resident; such services being provided by a governmental agency, its licensed or certified agents or any other responsible nonprofit organization meeting the minimum requirements of the sponsoring agency." Fayette County Zoning Ordinance, Resolution #06-9-28-7, effective November 1, 2006 (hereinafter "Ordinance"), Section 1000-108.

In turn, a "Group Residence" is a "Special Exception" use only in R-2 (High Density Residential District) and AH (Airport Hazard Overlay) zones. It is not a "Permitted" use in any zone. Ordinance § 1000-203, Table 1.

Article VIII, Section 1000-805 of the ordinance imposes four specific conditions on the grant of a Special Exception for a Group Residence. In addition to the specific conditions noted, subsection E provides:

The Zoning Hearing Board may attach additional conditions pursuant to this section, in order to protect the public's health, safety and welfare. These conditions may include but are not limited to increased setbacks.

The ZHB conducted hearings regarding FRI's Petition on April 20, 2016, June 15, 2016, and June 22, 2016. Subsequently, the ZHB issued Resolution 16-15, dated July 13, 2016, which denied FRI's request.

## STANDARD OF REVIEW

A court reviewing the decision of a Zoning Hearing Board is bound by a narrow standard of review. It is well settled law in Pennsylvania that when a trial court takes no additional evidence the standard of review is limited to determining whether the board "committed an abuse of discretion or an error of law." *Lombardo v. Millcreek Township Zoning Hearing Board*, 829 A.2d 779, 781 (Pa. Cmwlth. 2003). An abuse of discretion can be established if the ZHB's factual findings are not supported by substantial evidence. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 639 (Pa. 1983). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

### Requirements for Denial of Special Exception

The Courts have routinely recognized that: "[a] special exception is in fact not an

exception to the zoning ordinance, rather it is a use expressly permitted by the ordinance provided specifically enumerated standards are met." Citing Appeal of Dippolito, 833 A.2d 336, 342 (Pa. Cmwlth. 2003); In re: Appeal of Brickstone Realty Corporation, 789 A.2d 333, 340 (Pa. Cmwlth. 2001). A use that qualifies for a special exception is already presumed to satisfy local concerns for the general health, safety, morals and general welfare of the community. In re: Appeal of Brickstone Realty Corp., at 340. Once the applicant for a special exception shows compliance with the specific requirements of the zoning ordinance, a presumption arises that the proposed use is consistent with the health, safety, and general welfare of the community. *Id.* The burden then shifts to the objectors to the application to prove that the proposed use will have a detrimental effect on the health, safety, and general welfare of the community. *Id.* The objectors cannot meet their burden by merely speculating as to possible harm, but instead must show a high degree of probability that it will substantially affect the health and safety of the community. *Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board*, 590 A.2d 65, 71 (Pa. Cmwlth. 1991).

## RESOLUTION

The ZHB resolution denied the Special Exception for three basic reasons:

1. Inadequate parking: Petitioner claimed there were four off-street parking spaces and three "on-street" parking spaces available. The Board found that service providers "continually park along the street, blocking the intersection." Further the parking related congestion "routinely" prevents garbage trucks, plow trucks, and school buses from safely using the roadway. While specific instances were not cited in the Resolution, there was competent testimony that the inadequate off-street parking meant that fire-trucks and other emergency vehicles could not clear the intersection. In addition, the Smithfield Borough parking ordinance was made part of the record, and the Resolution indicated that employees, guests and service providers associated with the Group Residence "continue to violate the parking ordinance. §1000-805A of the Ordinance requires adequate off-street parking. (Additional parking regulations are contained in §1000-303, specifically requiring that each off-street parking spot be 9' by 19', and clearly contemplating that no off-street parking involve one vehicular parking spot blocking access to another vehicular parking spot.) Finally, §1000-800 B. 1. requires that a "land development plan" be submitted whenever an application for special exception is submitted, and no land development plan is part of this record. A land development plan would have shown the exact location of off-street parking, and would not have shown "on-street" parking as part of the required parking spots where such would violate local parking ordinances, interfere with required "sight triangles" at intersections, and/or prevent access by garbage trucks, school buses, snow plows, fire or other emergency vehicles.
2. No adequate disposal of garbage: The Board found that-since garbage trucks could not travel the street due to the parking issues recited above- garbage was not picked up and "often" garbage was left "outside for weeks at a time." §1000-8050. of the Ordinance provides specific requirements for dumpster use if one is located on the lot, indicating that adequate arrangements for garbage removal are contemplated for a Group Residence.
3. Routine public disturbances: The Resolution also recites numerous police calls and



disturbances, that neighbors are scared to be alone in their homes, and that "occupants, employees, residential guests and service providers... routinely disturb the neighbors with excessive noise, profanity and threatening gestures towards the neighbors." §1000-805 B. and C. of the Ordinance require the Petitioner "to file a detailed statement of intent" which will "detail the proposed number and nature of the anticipated occupants." If required licensure does not exist, "the applicant shall demonstrate to the Zoning Hearing Board that the proposal satisfies a demonstrative need and shall be conducted in a responsible manner without detriment to surrounding properties." (emphasis supplied.)

As a result of the above findings, the Board determined that FRI had not met its burden of proof of showing compliance with the requirements for the Special Exception.

### TESTIMONY AND EXHIBITS

The first witness for the Petitioner was Tony Rose, who is the director of maintenance for all of FRI's local facilities. Conveniently, Mr. Rose was the previous owner of the subject premises. He testified that there four "off-street" parking spots and three "on-street" parking spots. However, the photographs show that parking only two vehicles could be parked "off street," because parking two more would block the first two vehicles in. In addition, the three "on-street" parking spots are well within the Borough's street right-of-way, and Rose acknowledged that "in the wintertime it's kind of tough for the snowplow truck to get around. ..."

Rose acknowledged that there had been a problem with garbage, saying: "No, we-in the past we've had issue with our staff, and we've been on them just recently for this week that-it's normal but it's now getting to a proper weekly basis which has been addressed internally."

Rose also authenticated a blanket "Certificate of Compliance" from the Pennsylvania Department of Human Services that approved FRI to provide "Community Home Services" to a maximum of 154 residents. These premises are not specifically referred to in that Certificate. In addition, K-2 Engineering issued a document captioned "Certificate of Occupancy," but that was clearly specific to compliance with the Uniform Construction Code. (It is unfortunate that the Zoning Ordinance refers to issuance of an "occupancy permit," which is confusing, but is clearly a document that is to be issued by the County Zoning Office, not by a construction inspector.) While relevant to showing some level of safety, that is not the type of license or certification that would negate the requirement of §1000-8058. that the applicant show that the proposal "shall be conducted in a responsible manner without detriment to surrounding properties." No other license or certificate specifically pertaining to these premises was furnished.

Timothy Pearl was the next witness for FRI. He was their chief operating officer at that time. He testified that the residents of the subject home were required to have an IQ under 70, and that the purpose of housing them in this location was so they could "become more a part of the community and help them to live as normal a life as possible."

Mr. Pearl acknowledged that one of the residents in the facility may have threat-

ened a neighbor "twice, maybe three times," resulting in calls to the State Police. Pearl also acknowledged that there is a van permanently located on premises, that there are always two staff members present, causing there to be five vehicles there at shift changes, which can last fifteen minutes, and that other employees visit the premises on irregular occasions. He also testified that the Prospect Street home was currently licensed by the Commonwealth for two residents, but that it could be licensed for up to four residents by the Department of Public Welfare.

Rae Mikesic testified against approval of the Special Exception. She lives in the home next door and stated that the driveways were so close that she could touch her own vehicle and one parked at 9 Prospect Street at the same time. She asserted that staff was rude and threatening, that the garbage went three weeks without being removed. She stated that the garbage removal personnel had to walk to the home to pick up the trash because of the excess staff parking, and that the street was not properly plowed all winter because of the excessive number of vehicles blocking street access. She testified that there were regularly seven vehicles parked for persons in 9 Prospect Street.

The Borough Council President, Larry Leech indicated that the "on-street" parking reduced the street from two lanes to only one. Ms. Mikesic described an incident where one of the residents hit a vehicle with a shovel, shattering a window, and then ran down the street with the shovel. She also suggested that that she had seen a number of cars that would park for short times, engage in some type of hand to hand transaction with a staff member, and then drive off. In addition, several photographs were authenticated and admitted that clearly demonstrated excessive vehicular parking on the street, all of which was associated with 9 Prospect Street. She indicated that her own cars had been blocked in on several occasions.

She further complained that the residents of 9 Prospect Street behaved "more like a frat house than a group home" because "there were seven men playing cornhole in the side yard till dark. They were using profane language, drinking from plastic cups. ..." Further, she stated that despite her having two young children in her very nearby home, "yet there's always someone on that side porch over there on their phone or talking with each other using profane language."

Mr. Pearl was asked if the residents could have visitors, and he testified: "They can have any visitors they want just like you and I can have visitors at your house at any time."

The second hearing was held on June 15, 2016. At that time, FRI finally submitted a three sentence "detailed statement of intent" that was admitted into evidence. In addition, copies of police reports indicating that "MS" was a resident of the home, and that staff was unable to control his violent propensities, which resulted in police encounters on at least three occasions, including confirmation of the "shovel" incident and reciting incidents where "MS" threw heavy objects at staff members and bit one staff member on the leg, drawing blood. FRI acknowledged that this required them to increase the staffing level so that three staff members would be present during every shift, 24 hours a day, seven days a week. They also erected some privacy fencing in an effort to insulate the neighboring property from their activity. Mr. Pearl again testified, and indicated that they maintain homes for 400 consumers in eight or nine counties, and that "at any given

week we probably have three or four investigations going on that would require a corrective action plan from us." Mr. Rose again testified, and admitted that he chose the home for purchase by the agency even though he was the previous owner, that he believed it was well suited for its intended use, and that he did not have any conflict of interest in making the selection.

William Moser testified for the objectors. He is a member of the Council, a member of the volunteer fire department, and a life long resident of Smithfield. He testified that the on street parking use made by FRI prevented garbage truck, fire trucks and snow plows from making the turn onto Prospect Street. He indicated that the vehicles parked by persons associated with FRI were regularly violating the parking ordinance since there was a specific sign directing that vehicles not be parked on the street that close to the corner.

Additional photographs were admitted by the objectors showing numerous vehicles parked on the street blocking normal traffic even when the driveway was available. In addition, photos were admitted showing trash that was allowed to remain scattered on the ground for weeks at a time, as well as overflowing garbage containers. Finally, photos were admitted showing a lot of social activity that did not appear to be centered on the disabled residents of the facility.

Ms. Mikesic again testified, and she indicated that her objection was not based on the fact that the residents had mental disabilities, but that it was their uncontrolled violent behavior, as well as the irresponsible actions of the employees of FRI, that caused her to object to the use.

Mary Armstrong testified as an objector. She resides at 10 Prospect Street. She indicated that the school bus stop is very near the property, and she has observed one of the residents running up the street, out of control, "with two or three staff members chasing him." She also witnessed two incidents when the police had to come, one where there were six police cars and eight officers. She testified to three other specific incidents on February 20, April 23 and May 8. She confirmed that the garbage truck cannot service the street because of the illegal on-street parking by the employees and their friends. She complained that she couldn't even sit and read on her front porch because of the constant noise and profanity coming from 9 Prospect Street. She has a blind brother who can no longer visit her because of the disturbing incidents and the noise.

## DISCUSSION

As noted above, the initial burden is on the applicant to show compliance with the specific Ordinance requirements. This burden was not met, as the original Petition for Special Exception did not have a land development plan attached, and it did not have a "detailed statement of intent," although a three-sentence "detailed statement of intent" was submitted at the second hearing.

Off-street parking is required for every full-time staff member, and with three staff members working on each shift, and coverage seven days a week, twenty-four hours a day, there are the equivalent of twelve full-time staff members. The Ordinance does not state anything about how many staff members are on duty at one time, it simply states

that there must be one "off-street" parking spot for every full-time staff member. While the applicant asserted that there were seven available parking spaces, including three "on-street," without the required "land development plan," it is impossible for this Court to disagree with the competent testimony presented to the Board and the conclusions they reached based on that testimony.

In this instance, the applicant began operating this Group Residence before applying for the special exception, so there was ample testimony proving that the available parking is absolutely insufficient for the use being made on the property, and that the obstruction of fire trucks, snow plows and garbage trucks creates an obvious and unacceptable problem to the public health, safety and welfare.

In addition, there was ample evidence from the objectors to establish that this particular property is being operated in an irresponsible manner, with the staff members benefiting more from the property than the "consumers." The multiple disturbances, the scattered garbage, the noise and the traffic are all inherently inconsistent with the existing character of this single-family residential neighborhood. While there is no law prohibiting FRI from purchasing a home from their director of maintenance, it is impossible to avoid the conclusion that this home was purchased because of the relationship, and not because it was an ideal property for use as a Group Residence-because it clearly is not an ideal property for that use.

In that regard, counsel for FRI argued strenuously that any denial of the requested special exception would be unconstitutional and a violation of the Federal Fair Housing Act. No specific citation or case law was provided for either assertion, so those arguments are waived. The objectors testified that they had no problem with housing handicapped persons on the property, but that the problem was with the uncontrolled behavior of the persons actually housed there, as well as with the excessive number of staff members, their behavior, and the traffic and parking issues referenced above. The Board evidently found that testimony credible, and there is no reason to disturb that finding since it is logical and based on competent evidence.

The Board concluded that the applicant, FRI, had not met its initial burden of establishing literal compliance with the Ordinance requirements, and this Court finds that the Board had ample competent evidence to establish that conclusion.

Moreover, even if that burden had been met, the objectors presented overwhelming evidence that the "proposed use" did create an unusual interference with public health, safety and welfare, such that the proposed use was inconsistent with the existing neighborhood, and that there were no conditions that could reasonably be placed on the use to make it consistent with public health, safety and welfare.

Counsel cited the Court to the case of *Children's Service Center v. City of Wilkes-Barre Zoning Hearing Board*, 2016 WL 640635 (Cmwlth. 2016), and this Court finds the reasoning of that case persuasive even though it is not binding precedent.

For all of the above reasons, this Court enters the following:

## ORDER

AND NOW, this 31st day of December, 2020, for the reasons set forth in the preceding Opinion, the appeal contesting the validity of Fayette County Zoning Hearing Board Resolution 16-15 is hereby DENIED, and the Resolution is upheld as being legally valid and enforceable.

BY THE COURT:  
LESKINEN, J.

ATTEST:  
PROTHONOTARY

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- Date: **Wednesday, March 17th** from 12:00 p.m. to 1:30 p.m.
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topics: **Lawyers Concerned for Lawyers**
- Presenters: Laurie Besden, Esquire - Executive Director Lawyers Concerned for Lawyers and the Honorable Judge Linda R. Cordaro

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**\*\* All fees to be paid at the door \*\***

A light lunch will be provided.

### **RSVP**

If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to [cindy@fcbbar.org](mailto:cindy@fcbbar.org) on or before Monday, March 15th.

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