

STATEMENT OF JURISDICTION

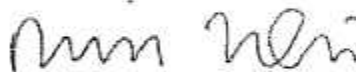
This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S.A. §762 (a)(4)(i) which provides that the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in cases involving zoning code matters.

ORDER IN QUESTION

ORDER

AND NOW, this 20th day of January, 2009, upon consideration of the Record, the comprehensive briefs and oral argument of counsel, Appellants' appeal is DENIED and Borough Council's approval of the preliminary land development plan application is hereby affirmed.

BY THE COURT:



David F. Bortner, J.

SCOPE OF REVIEW AND STANDARD OF REVIEW

Where the trial court does not take additional evidence, the Commonwealth Court's scope of review in an appeal concerning a subdivision land development application is limited to determining whether the governing body abused its discretion or committed an error of law. An abuse of discretion exists if the governing body's findings are not supported by substantial competent evidence. Rouse/Chamberlin, Inc. v. Board of Supervisors of Charlestown Township, 94 Pa.Cmwlth. 413, 504 A.2d 375 (1986).

This case involves a question of law and the statutory construction of a zoning ordinance for which the standard of review is plenary. See Commonwealth v. Hockenbury, 549 Pa. 527, 701 A.2d 1334, 1336 n. 3 (1997).

QUESTIONS INVOLVED

I. DOES A PROPOSED PARKING GARAGE CONSTITUTE A "MUNICIPAL USE" PURSUANT TO THE BOROUGH WEST CHESTER ZONING CODE WHEN THE GARAGE WILL BE BUILT ACCORDING TO A UNIVERSITY PLAN, ON GROUND OWNED BY THE UNIVERSITY, FOR THE SOLE FINANCIAL BENEFIT OF THE UNIVERSITY, AND PRIMARILY AND PREDOMINANTLY FOR USE BY THE UNIVERSITY AND ITS STUDENTS?

Answered in the negative below.

II. IS THE DECISION OF THE WEST CHESTER BOROUGH COUNCIL TO APPROVE ITS OWN APPLICATION FOR A PROPOSED PARKING GARAGE ILLEGAL CONTRACT ZONING OR SPECIAL LEGISLATION WHEN THE BOROUGH GRANTED APPROVAL ONLY UNDER THREAT OF CIVIL ACTION FOR BREACH OF CONTRACT BY THE WEST CHESTER UNIVERSITY?

Answered in the negative below.

III. IS THE DECISION TO APPROVE THE RESUBMISSION APPLICATION PRECLUDED BY THE DOCTRINE OF *RES JUDICATA* WHEN THE SAME PROPOSED GARAGE WAS PREVIOUSLY DENIED WITH SPECIFIC PLANNING FINDINGS THAT THE GARAGE WAS NOT A "MUNICIPAL USE"?

Answered in the negative below.

STATEMENT OF THE CASE

1. Form of Action and Procedural History of Case

This appeal concerns two discrete land development applications for the same parking garage. On April 10, 2007, West Chester Borough (the "Borough") filed its first land development application to itself to construct a parking garage on land owned by The West Chester University of Pennsylvania (the "University"). Borough Council voted to deny approval of the first land development application on November 21, 2007.

Borough Council on December 19, 2007 then voted to "re-file" the same land development application for the identical parking garage. On February 13, 2008, the Borough filed its second land development plan application, with the same plans, for the same parking garage. On May 21, 2008, Borough Council voted at a public meeting to conditionally approve the resubmitted second application (herein the "Resubmission Application").

The Appellants appealed the Borough's decision to the Chester County Court of Common Pleas. On January 20, 2009, the Judge David F. Bortner denied the appeal and affirmed the decision of the Borough Council to approve the Resubmission Application. On February 17, 2009, the Appellants filed their Notice of Appeal appealing the Order of Judge Bortner. A copy of the Order and Opinion of the trial court are attached in **Appendix "A."** Appellants preserved the issues on appeal when they filed their Notice of Appeal from the lower court's Order and filed a concise statement of issues on appeal.

2. Chronological Statement of Facts

The Borough of West Chester ("Borough") and The West Chester University of Pennsylvania (the "University") cooperatively seek to construct a multi-story parking garage upon ground owned by the University.¹

A. The Proposed Garage.

The Proposed Garage will be situated on an approximately 1.85 acre parcel of land located at the southwest corner of the intersection of West Nields Street and South New Street, in the Borough of West Chester, Chester County, Pennsylvania (the "Property"). The property is literally a peninsula bounded on three sides by residential homes and a neighborhood park. (R.R. 7a. and 8a.).

The Proposed Garage is planned as a multi-level structure, averaging thirty eight feet in height and will contain a total of 452 parking spaces. Currently, the University operates a ground level parking lot for approximately 180 parking motor vehicles, which is commonly referred to as "F-Lot." This ground level lot is actually below grade in areas, which minimizes its current impact on homes to the south and west.

B. The Neighborhood Conservation District.

F-Lot is located entirely within the Borough's NC-1, Neighborhood Conservation District, which allows, as of right, "any one of the following uses *and no other*":

- (1) Single-family detached dwellings.
- (2) *Municipal uses.*
- (3) Family day-care homes in accordance with Section 112-98H.
- (4) Single-family detached dwellings, under the traditional neighborhood development option of Section 112-15.
- (5) Neighborhood park.
- (6) Forestry, on lots of 10 or more acres.

¹ The Property was acquired by The Pennsylvania General State Authority by condemnation in June 1967. Upon information, title to the Property was thereafter conveyed from the Pennsylvania General State Authority to the Department of General Services in June 1989.

(R. Zoning Ordinance, § 112-12(A) (emphasis added).) Admittedly, if allowed as a “municipal use,” the Proposed Garage will conform to all bulk and area requirements of the Borough’s zoning code. However, if the Proposed Garage is not a “municipal use,” the University concedes that it would need variances from the front yard set-back, the rear yard set-back, the maximum building coverage ratio, and the maximum impervious coverage requirement as well as zoning relief to expand a nonconforming use. (R.R. 44a-45a; University Statement in Support of Application at pp. 3-4.).

The proposed 452 space garage is an abrupt departure from the intended residential uses in the NC-1 Zoning District. The purpose of the NC-1 District is stated in the Borough Zoning Ordinance, as follows:

The NC-1 District is designed to encompass the *lower-density neighborhoods* of the Borough which comprise single family detached houses. The district, which relates to such neighborhoods in the northern and southwestern parts of the borough, is also designed to provide opportunities for the *traditional neighborhood development* (TND) option as set forth on §112-15.

(R. Zoning Ordinance, § 112-11 (emphasis added).) The Borough defines “Traditional Neighborhood Development as:

Traditional neighborhood development (TND) is intended for the following purposes: to *recognize the heritage of town planning* in the Borough of West Chester ... to promote an effective form for *neighborhood conservation, the namesake of the NC-1 District...*; ...and, to *promote the objectives of the Growth Management Plan for the Borough of West Chester* and the West Chester Open Space, Recreation, and Environmental Resources Plan. (Emphasis added)

(R. Zoning Ordinance, § 112-15 (emphasis added).)

The F-Lot is contiguous to existing residential neighborhoods and a neighborhood park situated to the west, south and north—all of which are manifested by a system of streets and

alleys, driveways, off-street parking, sidewalks, dwellings placed on a build-to line, front porches, shade trees and private detached garages typically accessible from an alley and/or street. The Proposed Garage, if built, will tower over many of the residences. This proposed industrial building will insert all of the typical negative influences of noise, trash, security issues and traffic literally into the back yards of the surrounding neighbors.

F-Lot is separated from the University "Superblock," by South New Street. (R.R.7a-8a) The Superblock is an area of the Borough encompassing several contiguous city blocks, improved with University facilities including high rise dormitories, administrative office buildings, industrial facility buildings with incinerators, a coal fired power plant, recreation buildings and public streets. (R.R. 7a, 8a). The Superblock is bounded by Sharpless Avenue, South New Street, Rosedale Avenue and South High Street. The Superblock is zoned IS-Institutional. (R.R. 8a.) A map depicting the location of F-Lot and the Superblock is found on page 8a of the Reproduced Record.

The evident intent and literal purpose of the preliminary plan for the Proposed Garage is to impermissibly extend the University's institutional and industrial uses beyond the Superblock, across the street into the residential community that the Borough has legislatively promised to protect as a Traditional Neighborhood. In essence, the University wants to jump zoning and position an industrial use facility into a residential neighborhood.

C. The Memorandum of Understanding.

In order to construct the Proposed Garage, the Borough and the University entered into a contract known as the Memorandum of Understanding ("MOU") on June 28, 2006, for the purpose of allocating the costs, reciprocal obligations and liabilities relating to the Proposed Garage.