PAN AM CORP. v. BOROUGH OF CHAMBERSBURG ZONING HEARING BOARD, C.P. Franklin County Branch, Vol. X, Page 395

Zoning - Appeal from Zoning Hearing Board - Mentally Retarded Living as "Family" - No Public Policy Requiring Placement of Mentally Retarded

1. A Court of Common Pleas is limited to reviewing the decision of a municipalities' zoning hearing board to determine if an abuse of discretion or an error of law as committed.

2. Where a zoning ordinance restricts use of properties in an R-1 district to one-family detached dwellings and a "dwelling" is defined as not including a lodging or boarding house which include buildings with more than two but not more than ten guest rooms provided for compensation, a group home for the mentally retarded is precluded where compensation is received for the support of members of the living unit.

3. The Mental Health and Mental Retardation Act of 1966, Act of October 20, 1966, P.L. 96, 50 P.S. Sec. 4101 et. seq. was not intended to have priority over other public policies of the Commonwealth as expressed in other statutes so as to require the placement of mentally retarded in the least restrictive setting in a community.

Welton J. Fischer, Esq., Attorney for Appellee

David W. Rahauser, Esq., Attorney for Appellant

OPINION AND ORDER

EPPINGER, P.J., January 16, 1981:

Pan Am Corp., the Appellant, is engaged in the business of caring for mentally retarded adults. The Corporation established a home at 550 Weaver Avenue in Chambersburg and was about to set up another at 1740 Alexander Avenue, only to be notified that the proposed use of 1740 Alexander Avenue was not permitted in an R-1 One-Family Residential District as defined in the Chambersburg Zoning Ordinance of 1956. Later, a similar notice was given as to the Weaver Avenue Property. Borough Zoning Officials suggested that such use might constitute a special exception.

Pan Am appealed to the Zoning Hearing Board saying this use was permitted in an R-1 District or that a special exception should be granted. The Zoning Hearing Board denied the special exception and did not answer the question of whether the use was a permitted use, believing that matter had not been brought before the board.

Pan Am appealed to this court. The case was presented on the record before the Zoning Hearing Board and no additional testimony was taken. [1] At argument the Board persisted in its view that it was not called upon to decide whether the use was permitted or not and therefore that the matter was not before the court. In the end, however, it was stipulated that the facts were all in the record and that if the court ignored the question, it could be raised in a later proceeding and that it was expedient to decide it at this time. [2] So the principal question is: Does Pan Am's use of residential premises in Chambersburg constitute a "Family" use permitted under the R-1 One-Family Residential Use Regulations of Chambersburg's Zoning Ordinance?

The narrower question is whether the living arrangement Pan Am fosters is a family use under the ordinance. If so, it is permitted in an R-1 district. We stated earlier that Pan Am is a business corporation which sets up these homes to make a profit. Their mentally retarded clients enter into contracts with the corporation and pay fees from their own income, from Social Security, or are supported by the Commonwealth. In return, Pan Am provides room and board and attempts to train its clients to function in the community and better handle social contacts. In the minds of many, such an arrangement would be called a Group Home.

At the Weaver Avenue home, the residents are supervised by one full-time resident supervisor. It is proposed that at the Alexander Avenue property there would also be a supervisor, assisted by a part-time supervisor, on duty when the clients are at home. We understand that there are arrangements for supervisors to be relieved on weekends. These people are Pan Am's employees. In its Franklin/Fulton County operation, the corporation employs approximately 31 people, including a staff of caseworkers, to supervise its 16 clients. The plan is to have three clients at each home in Chambersburg. To have more would require compliance with Department of Labor & Industry standards promulgated for such homes.

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[1] Our task is limited to reviewing the decision of the zoning hearing board to determine if an abuse of discretion or an error of law was committed. *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

[2] Generally, the matters not raised before or considered by the Zoning Hearing Board cannot be considered on appeal. *Culter v. Newtown Twp. Zoning Hearing Board*, 27 Pa. Cmwlth. 430, 433, 367 A.2d 772, 775 (1976).

Section 52 of the Borough of Zoning Ordinance restricts the use of properties in an R-1 district to one-family detached dwellings. A "dwelling" is a building used as the living quarters for one or more families, but does not include hotels, *lodging or boarding houses*, or tourist homes. Sec. 201 (Italics ours.) "Lodging or boarding houses" are buildings with more than two but not more than ten guest rooms where lodging with or without meals *is provided for compensation.* Sec. 202.15 (Italics ours.) A "one-family detached dwelling" is a building designed for and used exclusively as a residence for one family. Sec. 202.7a. A "family" is defined as one or more persons living together and occupying a single housekeeping unit having only one cooking facility. Sec. 202.8.

Pan Am has emphasized the ordinance's definition of a family, saying that the units house one or more persons living together and occupying a single housekeeping unit with only one cooking facility. However, the ordinance restricts use of properties in R-1 districts to one family detached dwellings and a dwelling does not include a lodging or boarding house where lodging, with or without meals, is provided for compensation.

The Commonwealth Court, albeit in a footnote, has spoken on this very issue. In *St. Luke Evangelical Lutheran Church vs. The Zoning Hearing Board of Easttown Township, et al.*, 43 Pa. Cmwlth. 159, 403 A.2d 128 (1979), the church wanted to use a residence for a group home for children. The lower court declined to consider whether the group home would fall within the ordinance's definition of "single family detached dwelling," but the Commonwealth Court said, in note 1:

> Although a determination of this issue is not relevant to the resolution of this case, it would appear from a reading of all of the relevant provisions of the ordinance that the definition of "single family detached dwelling" permissible in an R-1 district as a "building, on a lot, designed and occupied exclusively as a residence for one family" precludes the use of a dwelling as a group home where compensation is received for the support of members of the living unit. *Cf.* the definition of "Boarding House," Section 103 of the ordinance, a use excluded from R-1 districts under the ordinance. Thus, we believe the Board correctly determined the group home did not fall within the ordinance's definition of "single family detached dwelling." *See also Pennsylvania George Junior Republic v. Zoning Hearing Board*, 37 Pa. Commonwealth Ct. 15, 389 A.2d 261 (1978).

43 Pa. Cmwlth, at 162, n.1, 403 A.2d at 130, n.1.

Pan Am has cited *Paxtang Borough vs. Keystone Residences, Inc.*, 100 Dauphin 477 (1978), where the court permitted the establishment of a home for three retarded children with house parents and their child in a family dwelling in an R-2 zone. In such zones single and two family dwellings, churches, schools, and professional offices in, or in a building accessory to, a building occupied by the practitioner were permitted. "Family" was not defined in the ordinance and there is nothing in the opinion which indicates that boarding houses and the like were not permitted in the area. In addition, Keystone Residences, Inc. was not a for profit business. Instead it was a nonprofit corporation under contract with the Dauphin County Mental Health and Mental Retardation Program to provide community living arrangements for the mentally retarded. While Judge Dowling's decision is well-reasoned, because of the distinguishing facts, we cannot rely upon it for our decision here.

A case discussed by the court in *Paxtang* and mentioned by appellant, *In re Zoning Appeal of Bethesda Lutheran Social Services*, 15 Crawford L.J. 236, (1976), *aff'd per curiam*, 31 Pa. Cmwlth, 430, 376 A.2d 679 (1977), is of little help to us because of its factual differences. Similarly, *Oliver v. Zoning Commission of Town of Chester*, 31 Conn. Supp. 197, 326 A.2d 841 (1974), is not authority in the case before us because there the State of Connecticut was providing services directly and because the zoning classification permitted in single family dwellings up to eight roomers and boarders.

So we conclude that the Zoning Hearing Board did not err in finding that the proposed use was not consistent with the ordinance's provisions related to one-family detached dwellings. Therefore, the use is not permitted as of right in R-1 One-Family Residential Districts.

Pan Am has also argued that if its actual and proposed use of the residential properties is not permitted as a matter of law under the Ordinance, it is entitled to use the premises as a special exception., The Chambersburg Zoning Ordinance does permit certain uses as special exceptions in R-1 areas. These include hospital, nursing or convalescent home, or philanthropic uses such as an orphanage, home for the aged, YMCA, and similar use, provided that no portion of any such building is within fifty (50) feet of any adjoining property line.

It is unnecessary to discuss whether the proposed use is one of those contemplated or so nearly like one that it should be permitted by special exception, because the buildings on both sites are within 50 feet of an adjoining property line. We

see no error in the Board's finding that appellant is not entitled to a variance from this 50 feet setback requirement. Pan Am did not establish that strict application of the Zoning Ordinance to the properties would so unreasonably and unnecessarily interfere with the continued use of the properties or would present such a practical difficulty to the continued use of those properties under the ordinance.

The final argument made by Pan Am is that public policy requires the least restrictive environment to provide adequate care for mentally retarded individuals. This environment, according to Pan Am's argument, is a one-family residential district. We have carefully reviewed the cases cited by appellant. We conclude that the Legislature did not intend that the Mental Health and Mental Retardation Act of 1966, Act of October 20, 1966, P.L. 96, 50 P.S. Sec. 4101 et seq., have priority over other public policies of the Commonwealth as expressed in other state statutes, for example the Municipalities Planning Code, Act of 1968, July 31, P.L. 805, 53 P.S. 10101 et seq. Furthermore, in the community, the required environment is that environment which, in compliance with other laws, is the least restrictive. There is nothing to suggest that the Chambersburg Zoning Ordinance totally excludes rooming houses or group homes from residential areas. They are only excluded from R-1 districts. Therefore, the fact that Pan Am may not set up a home in an R-1 district does not mean, as suggested in its brief, that mentally retarded people will remain subject to custody in state insitutions. So the Chambersburg Zoning Ordinance does not frustrate Commonwealth policy regarding placement of mentally retarded adults.

In accordance with the foregoing, we conclude that the Zoning Hearing Board neither abused its discretion nor commited an error of law. We therefore affirm its action in denying Pan Am the relief sought in its appeals.

ORDER OF COURT

January 16, 1981, the order of the Chambersburg Zoning Hearing Board is affirmed. The costs of these proceedings shall be paid by Pan Am Corp.

HERSHBERGER CHEVROLET, INC. v. ROMALA CORP., SUCCESSOR IN INTEREST TO ROMALA INVESTMENT CORPORATION, C.P. Franklin County Branch, A.D. 1979 - 229 In Trespass

Discovery - Pa. R.C.P. 4012 - Ex Parte

1. The court is not given authority under Pa. R.C.P. 4102 to grant ex parte discovery.

Michael E. Farr, Esq., Counsel for Plaintiff

Wayne F. Shade, Esq., Counsel for Defendant

Donald L. Kornfield, Esq., In Propria Persona

OPINION AND ORDER

KELLER, J., January 16, 1981:

On February 1, 1980, the plaintiff filed its complaint alleging a cause of action against the defendant in trespass for malicious abuse of civil process, and based upon the defendant's wrongful confession of judgment which had been stricken by Order of Court. On March 14, 1980, counsel for the defendant presented its petition for rules to be issued upon Donald L. Kornfield, Esq., defendant's counsel at the time of the confession of judgment, and the plaintiff herein to show cause why the respondent-Kornfield should not be required to respond to interrogatories set forth in paragraph eight of the petition with responses to be filed directly with the Court and counsel for the defendant herein to preserve the attorney-client privilege in favor of the defendant herein, and to show cause why the time for joining the respondent-Kornfield under Pa. R.C.P. 2253 should not be extended for twenty (20) days after the filing of responses to the interrogatories set forth in the petition or after any alternative disposition of the petition. An order was signed on the same date directing the issuance of the rule. Answers to the petition and rules issued thereon were filed by the respondent-Kornfield, and plaintiff herein on April 2 and 3, 1980, respectively praying for the discharge of the rules. The answer of the plaintiff herein specifically denies that the information requested in the interrogatories is privileged or protected by the attorney-client privilege rule; that if the information was privileged the defendant herein waived that privilege by seeking discovery from respondent-Kornfield; and there is no authority for the taking of exparte discovery.

The matter was placed on the Argument List and is ripe for disposition.

We note that respondent-Kornfield did not file a brief in support of his answer to the rule and prayer that it be dismissed; nor did he appear at oral argument. We will, therefore,