

pIN RE: APPLICATION O F : BEFORE THE ZONING HEARING BOARD pp
SPENCER QUALLS : OF WESTTOWN TOWNSHIP
: CHESTER COUNTY, PENNSYLVANIA

OPINION

This is an application by Spencer J. Qualls, legal and equitable owner of a tract of land known as 1646 West Chester Pike, this Township, which parcel is identified on the maps of the Assessor of Chester County as Tax Parcel 67-3-132 (hereinafter, the Appellant’s Land). The Appellant’s Land is located in an area designated on the Zoning Map of Westtown Township as an R-3 Residence Office Zoning District.

There are presently extant upon Appellant’s Land, in addition to the building the subject of this application, several buildings presently dedicated to office use, a permitted use in the district. These buildings are not in controversy nor are they a part of this application. Rather, the application before us deals only with an existing building (herein, the Premises) wherein the Applicant seeks to restore and operate an ice hockey rink, a use not authorized in the R-3 Zoning District. The Applicant seeks permission so to do as a change of the use preserved under the provisions of the Zoning Ordinance relating to nonconforming use (ZO Article XIX).

Pursuant to the Application filed with this Board, a hearing was scheduled and held on Thursday, March 22, 2018, at the Westtown Township Municipal Building, 1039 Wilmington Pike, this Township, commencing at 7:30 pm. The hearing was duly advertised according to law by publication in the Daily Local News, a newspaper of general circulation in the Township, on March 1 and March 8, 2018. Notice of the hearing was sent to the Applicant by Certified Mail on March 8, 2018. Timely notices were sent to those persons entitled to receive notice in

accordance with the terms of the Ordinance on March 8, 2018. The property was posted on March 1, 2018.

At the hearing there appeared David Scaggs, Chairman of the Zoning Hearing Board, Laura M. Scanlon, Esquire, Vice Chairperson, and Jeffrey House, member of the Board, constituting the entire Board. Also appearing were Ronald M. Agulnick, Esquire, Solicitor to the Zoning Hearing Board, William Ethridge, Zoning Officer and Secretary to the Board, and Joseph J. Dougherty, Esq. as attorney for the Applicant. Also appearing pro se were Manisha Borwankap and Abdvay Borwankap, adjacent property owners (hereinafter, "The Borwankap's"). The Borwankaps sought to intervene as parties to the proceedings and were, by virtue of the proximity of their lands to the Premises, granted party status.

The application and explanatory material was submitted to the Township Director of Planning and Zoning and to the Township Planning Commission for their respective review and comment. These reports were received and copies thereof sent to the Applicant and made a part of the record.

The hearing having been duly convened, the Board received testimony and exhibits from the witnesses present and the record was thereupon closed. The matter is now before the Board for decision.

From the testimony and exhibits presented the Board makes the following

I. FINDINGS OF FACT

1. Applicant is the legal and equitable owner of the Premises and has standing to bring this application.

2. The Applicant's tract contains 12.335 acres of land, more or less, of gross area (net of restricted areas, 9.15 acres).

3. The tract has road frontage along West Chester Pike and along Green Lane.

4. The entire tract is essentially fully developed and contains four buildings dedicated to use for offices and a large one story rectangular shaped building of clear span construction containing 30,400 square feet of floor area and having a ceiling height of approximately 34 feet. It is this building only with its accessory parking and access areas that constitute the premises the subject of this application and is hereinafter referred to as the "Premises".

5. History of Use of the Premises: Until some time in 1986, the Premises was equipped and used by the general public for ice skating and ice hockey. The premises was known as the Westtown Ice Hockey Rink. In September of 1986, the Premises was renovated and dedicated to the use as health and fitness center known as the Kirkwood Fitness & Racquetball Club (hereinafter, "Kirkwood"), a lawful nonconforming use in the R-3 Zoning District. This use was actively operated on the Premises through March of 2015 at which time Kirkwood ceased operation. The Appellant then preserved his nonconforming rights by obtaining from the Board of Supervisors a "Certificate of Continuance" pursuant to the provisions of Section 170-1901(E) of the Zoning Ordinance. The Certificate of Continuance was extended by action of the Supervisors on two occasions, the current Certificate extending until September 1, 2018. The Applicant proposes to remove the Kirkwood equip the Premises and restore its use as an ice hockey rink as it was originally designed and used for several decades.

6. The Application as submitted demonstrates that the project will fully comply with the objective standards articulated for the implementation of the project proposed.

7. There is no evidence that the granting of the application would be violative of any subjective standard nor be contrary to the public health, safety, morals or general welfare.

8. The prior use by the Kirkwood facility consisted, inter alia, of racquetball courts, exercise facilities, and other facilities typically provided for exercise and recreation. The facility and its use clearly fell within the Zoning Ordinance definition which provides as follows:

Recreation, Active: Those recreational pursuits which require physical alteration to the area in which they are performed. Such areas are intensively used and include, but are not limited to, playgrounds, ball courts, golf courses, and swimming pools.

9. So, too, the activity proposed to be conducted on the Premises as described by the Applicant is the construction of a rink for playing ice hockey which clearly fits within the definitional ambit of "Recreation, Active". The facility will be made available to youth hockey teams for training and competition.

10. The entire building was dedicated to the active recreation when used by Kirkwood and the entire building will be dedicated to active recreation as described by the Applicant. The use will not be enlarged.

11. Applicant's Exhibit 11, "Kirkwood Fitness and Racquetball Club Versus Quaker Ice Hockey Organization Comparison of Parameters" demonstrates the similarity of the two uses of the facility and the intensity and impacts.

12. The Building is so constructed with its high ceiling and open interior cannot reasonably be converted to a conforming use. The Premises has been offered for sale or lease for the past two years and no interest has been shown in such conversion. Based upon the testimony of Mr. Qualls, which the Board finds entirely credible, and Exhibit 11 in particular, all impacts on adjoining properties and the zoning district will be characterized by the same or

permit the use. The Appellant has not alleged error by the Zoning Officer nor appealed therefrom. Neither was any such challenge advertised in the notice of the hearing.

II. DISCUSSION

The unique aspect of this application is that the desire of the Board is not to prevent the resumption of the skating rink activity, but rather the form in which the permission is granted. The proposal of the Applicant does not involve the expansion of the use. The project will be implemented within the same footprint as previously existed, i.e. within the same walls and foundation which marked the confines of both the original skating rink and the Kirkwood activity. Therefore, the scope of the activity does not constitute an “enlargement or extension” of the nonconforming use. There is nothing in the record to require the imposition of any additional conditions beyond those set forth in sections 170-1901C and 170-2108C. The question before the Board, therefore, is whether the project proposed constitutes a “resumption of the prior use” or a “change of use”.

The answer to this issue lies in the classification of the use. In the instant matter before us, if we define the uses as “Racquetball Courts and Fitness Center” on one hand and an “Ice Skating Rink” on the other, there are two different uses and therefore there is a change of use requiring special exception analysis. If we define both uses as an “Active Recreation” facility (i.e. defining the uses by their respective category as set forth in the Ordinance), both uses are the same, there is no change of use and the permits requested should issue as permits by right. A third form of analysis adopted by some courts is approached by inquiring how closely akin are the two uses. Using the categorical analysis leads to an absurd result. It is hard to argue that

converting a children's playground with swings, slides, etc. into a commercial football stadium would not constitute a change of use.

The original use as a skating rink was clearly terminated when the rink facilities were removed and the fitness club and racquet ball facilities installed. Thus, if the Kirkwood activities and the Skating Rink use are discrete uses, the project proposed constitutes a change of the Kirkwood nonconforming use to another nonconforming use which would require a special exception. The Applicant has brought himself within the definitional ambit for which the special exception sought may be granted and demonstrated compliance with all of the objective standards relevant thereto and there is no evidence demonstrating that the project proposed will violate any subjective standards or be contrary to the public interest.

If, on the other hand, both activities are deemed an "active recreational use" as defined in the Zoning Ordinance, the use will not change and a building permit to make the required changes to accommodate the ice skating activity should issue as of course on submission of proper plans and application and payment of necessary fees, all without intervention by this Board.

A third approach taken by most courts is apply an initial ad hoc analysis by the Zoning Officer of the similarities and distinctions of the respective uses. The Zoning Officer could then determine whether the changes proposed create sufficient similarities as to constitute the same use. If he so determines, he can issue the permit. If he deems the differences and their impacts significant, he can deny the permit. The Applicant or any person aggrieved could then appeal to the Zoning Hearing Board from the action of the Zoning Officer or seek a special exception. While this approach leads to less certainty in its administration, it is the approach

that the change from the prior use as a racquetball club and fitness center to an ice skating rink does not constitute a change in use, in that both activities fall within the definitional ambit of "Recreation, Active" or that the uses are so closely related as to constitute the same use, the Building Permit and Occupancy Permit shall issue as of course.

Therefore, it is ORDERED that upon submission of proper application and payment of proper fees and the demonstrated compliance with other relevant ordinances of Westtown Township, the Zoning Officer is authorized and directed to issue the necessary permits for the construction, use and occupancy of the Project Proposed.

WESTTOWN TOWNSHIP ZONING
HEARING BOARD:




