

IN RE: APPLICATION OF : BEFORE THE ZONING HEARING BOARD
WEST CHESTER AREA : OF WESTTOWN TOWNSHIP
SCHOOL DISTRICT : CHESTER COUNTY, PENNSYLVANIA
(Bayard Rustin High School) : WT-ZHB-5-02

OPINION

This is an application by the West Chester Area School District, the legal and equitable owner of a tract of land situate on the northwest corner of Street Road (Pa. Rte 926) and Shiloh Road, this Township, containing 177 acres more or less, designated on the Tax Maps of the Assessor of Chester County as Tax Parcels Nos. 67-5-6 and 67-5-9 and commonly known as Maple Shade Farm. (Hereinafter the "Premises") The Premises is situate in an area designated on the Zoning Map of Westtown Township as an A/C Zoning District.

The Applicant requests a special exception pursuant to the provisions of §170-501B(3) of the Westtown Township Code of Ordinances to construct, maintain and operate a secondary school to be known as the Bayard Rustin High School. The Applicant also requests variance relief with reference to the maximum height of the building proposed to be erected and such other relief as may be necessary to construct, use and occupy the Project Proposed.

Pursuant to the application filed, a hearing was scheduled and held on Tuesday, August 27, 2002 commencing at 7:00 P.M. at the Westtown Township Municipal Building, 1039 Wilmington Pike, this Township.

The hearing was duly advertised according to law by publication in the Daily Local

News, a newspaper of general circulation in the Township, on August 12 and August 19, 2002. Notices were sent to the Applicant, those persons whose names are on file with the Township to receive such notices and to adjacent property owners. The property was posted on August 12, 2002.

At the hearing there appeared Dr. Robert Garrett, Chairman of the Zoning Hearing Board and Ronald C. Nagle, Esq., and A. Pierson Sill, members of the Board, constituting the entire Zoning Hearing Board and Felice S. McElwaine, Alternate Member of the Board. Also appearing were Ronald M. Agulnick, Esquire, Solicitor to the Zoning Hearing Board, Robert F. Adams, Esq., Solicitor for Westtown Township and Ross Unruh, Esq., Attorney for the Applicant.

The testimony not being then concluded, the hearing was continued to subsequent dates certain of October 2, October 16, October 29, November 6, and December 2, 2002. On December 2, the parties agreed that the record would be held open to receive two additional exhibits, i.e. a review by the Township expert of a lighting plan submitted by the Applicant and a stipulation to be entered into between the Township and the Applicant. The comment on the lighting plan was received on December 17, 2002. The last item, the stipulation was received on the 21st day of January, 2003, whereupon the record was closed. The time within which the Board must render its decision commenced on January 21st, 2003 and the Decision, in order to be timely would be required on or before the 7th day of March, 2003.

Pursuant to applications made, those persons whose names and addresses are set forth in Annex "A" attached to this Opinion and Order were granted leave to intervene as parties to

the proceedings.

The parties offered such testimony as they deemed necessary for disposition of the matter and public comment was received. The matter is now before the Board for disposition

From the testimony and exhibits received the Board makes the following

I. FINDINGS OF FACTS

1. Applicants are the legal and equitable owners of the subject tract of land (hereinafter, the "Premises").
2. The Premises contains 177 acres of land, more or less, and is located at the northwest corner of Street Road (Pa Rt. 926) and Shiloh Road, in an area designated on the Zoning Map of Westtown Township as an A/C Zoning District.
3. The Applicant desires to construct, maintain and operate on the Premises a secondary school to be known as the Bayard Rustin High School.
4. A secondary school is a use that is permitted by special exception in the A/C Zoning District.
5. The Applicant has brought itself within the definitional ambit for which the special exception sought may be granted.
6. Except for the height of the proposed building, the Applicant has demonstrated compliance with the objective standards relevant to the special exception sought.
7. The Applicant has requested a variance from the constraints of §170-702E(9) which limits the height of a building to 38 feet measured from the mean level of ground surrounding the building to the highest point on the roof line. The building proposed by the Applicant would have a building height of 60 feet. In part, the variance is justified by the Applicant because of the functional need

created by the necessary height of the Gymnasium, the Auxiliary Gymnasium and the Auditorium. As to the requested additional height beyond that needed for the proper functioning of those three rooms, the Applicant candidly admits that the school could be built, theoretically, within the constraints of the ordinance, but would lack architectural interest and would leave the roof-mounted mechanicals exposed. The improved appearance of the building is purely aesthetic in nature and does not impair its functionality or structural integrity. In the agreement referenced in finding number 9, the Township has undertaken to address by way of an Ordinance Amendment the deviation from the regulated height of the building, and to the extent the proposed building can be accommodated within the parameters of the zoning amendment, the construction as proposed presents no detriment to the public interest.

8. Certain of the Protestants indicated a desire to reorient the building so that the pedestrian paths would be moved away from the easterly lot line adjacent to the development where they reside, but the orientation of the building has no materially adverse impact upon the public health, safety, morals or welfare and rests within the sound discretion of the School District and it is not for the Zoning Hearing Board to assume the function of the Applicant's land planner.

9. Many of the issues the Board would address with regard to the Project Proposed have been addressed by an agreement entered into between the School District and the Township setting forth mutual undertakings by those parties. They have stipulated that the agreement may be made a part of this order as a condition to the grant of the special exception. The Board finds the agreement consistent with its analysis of the impacts created by the Project Proposed and adopts the facts set forth therein as its findings and the terms thereof as appropriate conditions to the grant of the special exception.

10. The rail system of an operating railroad abuts a portion of the western property line of the Premises and to the extent that access to the school by crossing the railroad tracks there is a clear danger to the public and the students attending the school, it is imperative that access be restricted or channeled along the tracks by a cyclone fence or other obstruction.

11. There was also some indication that the northerly portion of the Premises may be leased to a farmer for agricultural use. If this is done, a fence or impenetrable hedge should be installed and continuously maintained between the school and the agricultural use to prevent damage to crops or injury to trespassing students and to prevent farm animals from entering the school property.

12. The Applicant has elected not to address the possibility of stadium lighting for night events. Should the Applicant, in the future, elect to install such lighting, the Board deems this to be a material deviation from terms of the special exception herein to be granted, and if such lighting is to be installed it will be necessary not only to meet the standards of the Ordinance then extant, but to apply to this Board for a modification of the special exception granted.

II. DISCUSSION

A. The Special Exception: A special exception is, essentially, a use by right which may only be denied when either, the adverse impacts upon the public interest are substantively different at the location of the Project Proposed from those that would normally be anticipated for the use within the district, or in those cases where there is a violation of the objective requirements of the relevant portions of the Zoning Ordinance.

In the instant case, the Applicant has brought itself within the definitional ambit of the provision authorizing the secondary school to be located in an A/C Zoning District (§170-501B(3)). The Applicant has presented testimony which the Board finds credible that more than the 38 foot

maximum building height is required for the Gymnasium, the Auxiliary Gymnasium and the Auditorium. Recognizing this, the Board has granted a variance from the height requirement to accommodate this need as more fully discussed below. The architectural facade may have to be redesigned to bring the Applicant within the maximum building height limitations to the extent the proposed elevations otherwise exceed this limit unless the deficiency is cured by ordinance amendment. But this is merely an architectural change that does not impact upon the objective limitations of the use. The changes to the height of the various portions of the building, therefore, do not constitute substantive changes to the Project Proposed. In all other respects the Applicant has brought itself within these objective standards and the building facade change does not disqualify the Project Proposed.

Finally, there must be no finding by the Board that the use, if approved, would be contrary to the public health, safety, morals or general welfare (the "public interest"). The Board of Supervisors, in their enactment of the Zoning Ordinance authorized this use within the Zoning District and the provision constitutes a legislative determination that absent extraordinary circumstances or conditions, such a use is consistent with the public interest. In this respect, the burden of proof is upon the Protestants to prove the adverse impact. The evidence must demonstrate more than the "undesirable impacts" that are normally associated with a secondary school. Rather, it is incumbent upon the Protestants to show that there is some serious and substantial impact, separate and distinct from the normal attributes of a senior high school that arise from placing this use at this particular location and that those impacts are materially more intrusive and dangerous than would be associated with the use at a location anywhere else in the Zoning District.

The only evidence presented by the Protestants in this respect was a petition (Exhibit P-1)

which stated in relevant part "Our group of homeowners feels that we are being snowballed by this school construction process - with no consideration for the impact of this construction on our property values, our water quality, or our quality of life." Further, a spokesperson for the Protestants testified that the impact upon their properties would be lessened by the rotation of the building by 90 degrees. We must reject each of these issues raised.

The Board expressly rejects the concept that the Township and its residents are being "snowballed" by the process. Rather the entire process of these hearings, the detailed negotiations between the Applicant and the Township (as reflected in the Agreement made a condition of this Order) and the entire land development process attendant to the site plans absolutely refute the concept of disregard of relevant issues and impacts. The existence of concerns by the neighbors with respect to impacts on property values, water quality and quality of life is proper and understandable, but those issues either have been or are being addressed by the Township in the overall review process, of which this hearing is only a part. Further, the expression of "concerns" is not a substitute for substantial evidence of the existence of adverse impacts. No evidence was presented to demonstrate unique and substantial impacts with respect to any of these three issues nor that these impacts, if they will occur, are unique to the Project Proposed as distinguished from a high school at any location. It would be absurd to even consider a finding that a "high school" in general is contrary to the public interest and we make no such finding. If there are any peculiar impacts on water supply or property values, those impacts must be demonstrated to a high degree of certainty and no such showing has been made. The burden, in this respect, was upon the Protestants and has not been met by a mere suggestion that such issues are a concern to the neighbors. Further, all of these issues have been addressed at this hearing or will be addressed at other stages of the approval process.

B. Variance Relief: The Applicant has applied for variance relief from the terms of §170-702E(9) of the Zoning Ordinance which provides: Maximum building height: three stories, not to exceed 38 feet. Building height is a defined term which provides as follows:

HEIGHT, BUILDING - A Building's vertical measurement from the mean level of the ground surrounding the building to the highest point of the roof, provided that chimneys, spires, towers, elevator and other unoccupied utility penthouses, tanks, and similar projections shall not be included in calculating the height.

As is shown in Exhibit A-31, the height of the building is not uniform because the ground is not level over the horizontal run of the building and the building roof is not uniform since the roof line is broken to accommodate the various segments of the building with interior height requirements dependent on the respective uses and also for aesthetic reasons. Exhibit A-31 shows a mean height from the highest point on the roof line to the mean grade level to be 60 feet. This exceeds the maximum permitted under the terms of the ordinance of 38 feet by 22 feet. This clearly is not a minimus deviation. Part of this deviation is necessitated by the needs of three interior areas: (i) the gymnasium, which has a height of 54 feet 4 inches from its grade to the ridge line of the roof; (ii) the auxiliary gymnasium with a height of 42 feet 6 inches from its grade to its ridge line and (iii) the auditorium with a height of 51 feet 6 inches. In each of these cases, the height is dictated not by the aesthetics but by the functional needs of the facility. While it is perhaps possible to relocate these facilities, their respective locations on the floor plan of the school are dictated by the layout of the floor plan which is designed for the efficient functioning of the building and its respective parts and not by ordinance constraints. The layout of the building is within the discretion of the School District and not this Board.

It follows, therefore, that there is a reasonable necessity that these three areas be of a height in excess of the ordinance provision in order to make the facilities fully functional. With respect to these

areas, the variance request falls comfortably within the relaxed standards enunciated by our Supreme Court in *Hertzberg v. the Zoning Board of Adjustment of the City of Pittsburgh* and variance relief is not dependent upon satisfying the more restrictive criteria of §910.2 of the MPC.

With respect to the building heights of other portions of the building, the functional necessity is not present, but rather the variance request is driven by aesthetic considerations. While we can understand and are sympathetic to the reasons for the requested relief for the remainder of the building, the Applicant presents no legal or functional necessity impelling relaxation of the ordinance standards. Aesthetics alone will not justify the grant of variance relief. Our Supreme Court was careful to point out in *Hertzberg, supra*, that the relaxed standards were not to be interpreted as declaring "open hunting season" on the dimensional variance standards of the Ordinance. More than a mere desire must impel variance relief, even under the relaxed standards. Particularly, the relief granted must not be more than the minimum relief necessary to satisfy the practical necessity that created the need for the relief sought. To this end we will grant the requested variance relief only with respect to the 3 segments of the building housing the gymnasium, the auxiliary gymnasium and the auditorium and require that the remainder of the building comply with the ordinance mandate of 38 feet.

However, in the Agreement between the Township and the Applicant, the Township has undertaken to amend the ordinance to increase the maximum permitted building height to some degree to accommodate the Applicant's design as proposed. To the extent the Supervisors amend the height limitation the Applicant is free to elect as to the remainder of the building to comply with the more liberal standards of such ordinance amendment.

We specifically find, however, that the denial in part of the variance sought is not motivated

by any finding that the grant thereof would be contrary to the public health, safety, morals or general welfare. We make no such adverse finding. On the contrary the variance sought would not, in its entirety be in derogation of the public interest. We so act merely because to do otherwise would be impinging upon the legislative discretion vested in the Board of Supervisors and substituting our judgement for theirs. The denial in part of this relief is motivated solely by reason of the absence of impelling, non-aesthetic reasons.

C. The Applicant's Agreement with the Township: The Applicant and the Township have engaged in good faith, protracted negotiations and the result of those negotiations has been reduced to an Agreement. At the request of the parties, this Agreement has been entered into evidence as Exhibit A-41. The terms of the Agreement represent material mutual benefits to the respective parties and the public in general. At the request of both the Applicant and the Township we will incorporate the terms of the Agreement and compliance therewith by the Applicant and the Township as conditions to the approval of the special exception sought. In particular, without limiting the generality of the foregoing, the off-site road improvements will materially assist in the operation of school busses serving the high school and create a safer traffic environment for the general public. So too, the lighting standards incorporated therein represent a more liberalized lighting requirement for the school and will materially serve both the needs of the school and the needs of the public. Where the terms of the Agreement are inconsistent with any special conditions attached hereto, the terms of the special conditions shall apply.

D. Fencing: As previously noted in the finding of fact number 10, there is an active SEPTA railroad with a right of way adjacent to a major portion of the westerly property line of the Premises. Unrestricted access across the railroad tracks to the school represents a substantial safety risk to the

students and a material interference with the operation of the railroad. The Board will, therefore, require that an eight foot high cyclone fence or a fence of similar capability be erected and continuously maintained by the School District along the common property line of the Premises and the Railroad right-of-way. Any access gates to the Premises in the fencing shall be self-closing and self-locking and shall be continuously locked unless then being utilized. Further the access gate shall be supervised at any time it is not closed and locked.

There was also testimony to the effect that the northern portion of the Premises is presently surplus ground and that it may be leased or otherwise made available to a farmer for agricultural purposes. If this course of action is taken, an 8' fence or an impenetrable hedge should be installed and continuously maintained between the two uses to prevent damage to the crops by trespassing students, to contain farm animals within the agricultural use and to prevent injury to persons and property that might otherwise occur.

E. Stadium Lighting: The Project Proposed does not envision a lighted stadium for evening use. Therefore, the issue of stadium lighting has neither been addressed either through testimony nor evaluated as to impact. The lighting of that facility can have a major impact upon the surrounding neighborhood and the adjacent roadways and railway. Therefore, any lighting of the stadium or other areas for nighttime events shall constitute a substantial modification of the plan approved and the special exception granted. Any installation of outdoor lighting for evening events shall, prior to installation, require an application to the Zoning Hearing Board for a modification of the special exception herein granted and a finding that all external impacts have been sufficiently mitigated. This requirement shall be in addition to compliance with any then applicable ordinance regulating such lighting and shall be deemed a condition in addition to the compliance with the lighting

standards set forth in the Agreement, Exhibit A-41.

In light of the foregoing, we enter the following

III. ORDER

AND NOW, this 31st day of *January*, 2003, upon consideration of the Testimony adduced and Exhibits presented, it is

ORDERED that the variance sought from the maximum building height as set forth in §170-702E(9) shall be and hereby is granted to and only to the extent necessary to accommodate those segments of the building housing the Gymnasium, Auxiliary Gymnasium and Auditorium and not otherwise. All other segments of the building shall conform to the mandates of §170-702E(9) or such greater height as may be permitted in any amendment to that section ordained by the Board of Supervisors pursuant to the Agreement (Exhibit A-41) or otherwise. To the extent the relief requested is in excess of the relief herein granted the variance shall be deemed denied. And it is

FURTHER ORDERED that the special exception sought to construct, maintain, use and occupy a secondary school on the Premises shall be and hereby is GRANTED, in and only in accordance with (i) the testimony adduced and exhibits herein presented, (ii) the terms and conditions of this ORDER, (iii) compliance with the terms and conditions of Exhibit A-41, (iii) compliance with all other applicable conditions of the Zoning Ordinance not otherwise the subject of variance relief, (iv) compliance with and obtaining final land development approval under the Subdivision and Land Development Ordinance of Westtown Township and (v) compliance with all other applicable laws, ordinances, rules and regulations of all entities having jurisdiction over the Project Proposed, and not otherwise. And it is

FURTHER ORDERED that the special exception herein granted is subject to the following

special conditions:

- a. That an eight foot high cyclone fence or a fence of similar capability be erected and continuously maintained by the School District along the common property line of the Premises and the Railroad right-of-way. Any access gates to the Premises in the fencing shall be self-closing and self-locking and shall be continuously locked unless then being utilized. Further the access gate shall be supervised at any time it is not closed and locked.
- b. If the northern portion of the Premises is leased or otherwise made available to a farmer for agricultural use, an 8' fence or an impenetrable hedge should be installed and continuously maintained between the two uses to prevent damage to the crops by trespassing students, to contain farm animals within the agricultural use and to prevent injury to persons and property that might otherwise occur.
- c. That any lighting of the Stadium or other athletic fields or other areas for areas for use for nighttime events or assemblies shall constitute a substantial modification of the plan approved and the special exception herein granted. Any installation of outdoor lighting for evening events shall, prior to installation, require an application to the Zoning Hearing Board for a modification of the special exception herein granted. At the hearing on that Application the burden shall be the Applicant to demonstrate that all external impacts have been sufficiently mitigated. This requirement shall be in addition to compliance with any then applicable ordinance regulating such lighting and shall be deemed a condition in addition to the compliance with the lighting standards set forth in the Agreement, Exhibit A-41.
- c. That the Agreement executed by and between Westtown Township and the West Chester Area School District received in evidence as Applicant's Exhibit A-41 and appended hereto is

incorporated herein by reference as fully as if set forth at length. The special exception hereby granted is expressly conditioned upon the faithful performance by the Applicant of each and all terms and conditions made obligatory upon the Applicant to perform.

UPON COMPLIANCE with all of the foregoing, payment of proper fees, receipt of the requisite land development plan final approval and filing of proper applications, the Zoning Officer is authorized and directed to issue the necessary permits for the construction, maintenance, use and occupancy of the Premises as a secondary school, in and only in accordance with the plans, exhibits and testimony made a part of this record and the terms of this Order and not otherwise.

WESTTOWN TOWNSHIP ZONING HEARING BOARD

Robert R. Barnett

Ronald C. Nagle

A. Pearson, Sec.