

IN RE: APPLICATION O F : BEFORE THE ZONING HEARING BOARD
MARSHALL and CAROLYN BINGHAM : OF WESTTOWN TOWNSHIP
: CHESTER COUNTY, PENNSYLVANIA

OPINION

This is an application by Marshall and Carolyn Bingham, legal and equitable owners of a tract of land known as 931 Sage Road, this Township, which parcel is identified on the maps of the Assessor of Chester County as Tax Parcel 67-1-4.24 (hereinafter, the Premises). The Premises is located in an area designated on the Zoning Map of Westtown Township as an R-2 Residential Zoning District.

There is presently erected upon the Premises a single family detached dwelling with an attached garage, an inground swimming pool and other accessory structures. The swimming pool, as an accessory structure, is clearly a permitted facility under the terms of the Zoning Ordinance. For some time the Applicant has conducted, on the premises, swimming lessons for a fee for two distinct classes of persons: (i) individuals desiring normal swimming instruction and (ii) to children with physical, mental or emotional disabilities. Pursuant to a complaint received, the Zoning Officer conducted an inspection of the premises and met with the Applicant. As result of the inspection and interview, the Zoning Office determined and so informed the Applicants that the activity constituted a home occupation and the activity had been conducted without a zoning permit. Accordingly the Applicant filed an application for a permit to conduct the swimming lessons as a home occupation. Upon review of the application the Zoning Officer determined that the use as described constituted a major home occupation and would require the grant of a special exception by the Zoning Hearing Board. The Applicant

now seeks a special exception and such other relief by way of variance, or otherwise to permit the continuation of the activities described.

Pursuant to the Application filed with this Board, a hearing was scheduled and held on Thursday, May 16, 2019, at the Westtown Township Municipal Building, 1039 Wilmington Pike, this Township, commencing at 6:30 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 April 22nd and April 29th, 2019 . Notice of the hearing was sent to the Applicant by Certified Mail on April 16, 2019 and by e-mail on April 15, 2019. Notices were sent to those persons entitled to receive notice in accordance with the terms of the Ordinance on April 19th. The property was posted on April 29th.

At the hearing there appeared David Scaggs, Esquire, Chairman, Laura M Scanlon, Esquire, Vice Chairperson and Jeffrey R. House, a member of the Board, constituting the entire Zoning Hearing Board. Also appearing were Ronald M. Agulnick, Esquire, Solicitor to the Zoning Hearing Board, Marita Malloy Hutchinson, Esquire, Attorney for the Applicant and Will Ethridge, Zoning Officer, on behalf of the Township. The matter not being concluded the hearing was adjourned of record to a date and time certain, to wit: Thursday, May 23, commencing at 6:30 pm.

The hearing reconvened at the time, date and place designated, at which time all persons previously present were again present, except that James Tupitza, Esquire was present as substitute Solicitor in place of Ronald M. Agulnick, whereupon the Board received the additional testimony and the hearing was duly 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. Applicants are the legal and equitable owners of the Premises and have standing to bring this application.

2. The Premises is improved by the construction of a single-family dwelling with an attached garage, an in-ground swimming pool and other accessory structures not here relevant.

3. The Applicants reside on the premises as their primary residence.

4. Applicant, Carolyn Bingham, has for some time utilized the swimming pool for the conduct of swimming lessons for non-disabled children and for training of children with disabilities, i.e. autistic children. The instruction is done on a "one-on-one" bases and there are no organized classes.

5. The Applicant's use does not fall within any of the prohibited uses set forth in section 170-1605E.

6. The Applicant never obtained a permit for the activity as required by Section 170-1605A(2) of the Zoning Ordinance. The Zoning Officer determined that such a permit was required and directed the Applicant to make such an application.

7. The Applicant thereupon submitted an application for a permit to operate the proposed facility as a home occupation.

8. In accordance with the provisions of Section 1605B the Zoning Officer determined that the proposed use constituted a "major home occupation" and thus required that the permit could only be granted when authorized by the Zoning Hearing Board as a special exception.

9. The Applicant did not appeal the determination that the requested use constituted a major home occupation, but rather applied to the Zoning Hearing Board for this special exception for leave to conduct swimming lessons on the premises as a major home occupation.

10. General Standards for all Special Exceptions (Section 170-2108(C)). The standards enumerated in the referenced sections are all subjective standards and thus the burden of proof is upon the protestants. But not only has that protestant's burden to go forward with the evidence of disqualification not been met, there is absolutely no affirmative evidence of the violation of any of the enumerated standards nor of factors that would demonstrate that the special exception, if granted, would be contrary to the public interest.

11. The conduct of the swimming lessons as described by the Applicant has brought herself within the definitional ambit of a major home occupation for which a special exception may be granted under the terms of the Ordinance.

12. Applicant's compliance with the standards of section 170-1605F relating to Minor Home Occupations: As noted below, the Applicant's use is conducted primarily out of doors. There is no evidence that the activities conducted by the Applicant are inconsistent with the normal appearance of activities normally associated with a recreational swimming pool.

13. Applicant does on occasions employ one or two non-resident persons who assist in the instruction of the students.

14. In light of the facts so found, Zoning Officer was correct in his determination that the activity constituted a Major, not a Minor Home Occupation.

15. Conformity to the Standards set forth in Section 170-1605G.

a. No products or materials are stored outside.

b. There is no need for screening of any parking areas.

c. The Applicant's use is conducted almost entirely out of doors in the pool area. The Applicant maintains her office in the dwelling. The office occupies an area 8 feet by 8 feet, or 64 square feet of habitable area. The dwelling contains approximately 3000 square feet of habitable floor area. Thus the Applicant's use falls well within the limits set forth in section 170.1605G(2)(a) and (c). The Applicant does not intend to subdivide the area dedicated to the home occupation from the premises.

d. The evidence reveals no indication that the Applicant does not comply with all environmental performance standards and the Board so finds.

e. No articles are offered for sale on site.

f. There will be no commercial delivery or pickup of goods exclusive of normal postal and parcel service typically serving a residential area.

g. There are no use of show windows, business displays or advertising visible from outside the premises. Applicant has one small sign identifying the facility which appears to comply with the terms of section 170-1605G(2)(m).

h. The use will not generate the parking of commercial vehicles on the site.

i. The activities described by the Applicant are compatible in all respects with the residential use of the premises and surrounding residential uses.

j. There is no outside appearance of a business use, including, but not limited to, parking, signs or lights. The Pool and its surroundings are not visible from the road.

k. The activity does not generate any solid waste or sewage discharge in volumes or type, which is not normally associated with residential use in the neighborhood.

l. The Applicant complies with the parking space requirements of two spaces for the dwelling and two additional spaces for the home occupation.

m. The Applicant employs two non-resident assistants to assist in the teaching of swimming.

16. Trip Generation Standards: The Ordinance sets forth a mandate of compliance with the enumerated standards *where applicable*. Because of the nature of Applicant's activity, we believe the standard relating to trip generation cannot apply as a numerical limit on the use of a public road. The lessons are spread out over the course of the day and each student is below the driving age. Thus each must arrive and leave in a separate vehicle. The classes are separated in time, so that any large concentration of vehicles arriving or leaving at any given time will not impact traffic on the road. The Ordinance requires only "substantial compliance". The Trip Generation Tables cited in the Ordinance are only statistical averages and are not intended as a per-day limitation on the use of the public roads. Since the lessons are given serially and not simultaneously, the rigid application of only three trips per day (one arriving and two leaving or two arriving and one leaving) would thus limit the Applicant to only one lesson per day. The vehicle trips generated by the Applicant are insignificant when compared to the highway capacity of the road. The Applicant does not conduct her teaching activities on a seven day per week 52 weeks per year basis. We believe the trip generation of the present use substantially complies *on average* with the terms of the Ordinance. Further, substantial compliance is for the discretionary judgment of the Board and is to be treated as a basis for

rejection or, where appropriate, by modification through conditions imposed upon the special exception granted.

17. Most of the students of the Applicant are children with disabilities within the meaning of the Americans With Disabilities Act and therefore, we are required to make reasonable accommodations as to the number and makeup of the children in each class. Each child with disability requires individual attention. The makeup of the classes, as testified to by the Applicant, constitutes reasonable accommodation for addressing those disabilities. The "Reasonable Accommodation" requirement is a statutory requirement of Federal Law and not a matter of variance. Therefore, the strict elements of a variance have no application. Rather the test is merely that of "reasonableness" and not of confiscation.

II. DISCUSSION

We have addressed compliance with each of the relevant standards set forth in the Ordinance. Generally, except for (i) parking, (ii) number of students at any given time and (iii) trip generation, no further discussion is required.

As noted above, the standard for compliance as set forth in the Ordinance is "substantial compliance" rather than "strict or total compliance". The Ordinance is ambiguous in two respects: First as to the meaning of the limitation of the area to not more than 25% or 600 square feet of the gross square footage of the dwelling, including all floors and habitable basement areas. One interpretation would measure all space dedicated to the use and a second reasonable interpretation would equate the square footage to both the numerator and the denominator, i.e. habitable area which is the area within the dwelling. Since this language must be interpreted in favor of the landowner, we view the degree of compliance measures

only the habitable area, i.e. the area within the dwelling. The Board has wide discretion in the interpretation of its own ordinance. The Ordinance neither includes nor proscribes, in hoc verbae, an outdoor swimming pool as a home occupation. We believe that limiting a swimming pool to an area 25% of the size of the habitable floor are of the house or 600 square feet (20' by 30') area would produce an absurd result and be an abuse of that discretion and violate the landowner's right to the most liberal interpretation of the use of his land.

So, too, the limitation on trips per day is subject to interpretation as either a single limit standard or an average. The strict interpretation of either of these standards would lead to an absurd result. Thus the areas of non-compliance do not implicate the need for the rigid standards mandated for variance relief. This is particularly true when addressing clients with disabilities since Federal Law requires reasonable modifications to accommodate the disability. Students may arrive as a group or be taken together when the joint training enhances, rather than aggravates the impact. For example, three siblings and a driver may arrive together. Scheduling them at different times increases the trip generation and parking requirements rather than mitigating them. We will, therefore limit the number of students to five at any given time, and require that not more than two are without relevant disabilities and require a thirty minute time gap between sessions to prevent overlap of students, parents and automobiles at the site.

With respect to on-street parking, the premises has a steep driveway which makes parking of vehicles inconvenient. There is no general prohibition of parking on Sage Road, except during late-night hours when classes are not conducted at the site. The Applicant can accommodate parking of four vehicles along the frontage the premises. Since others are free to

park there, there does not seem to be any logical reason why the property owner should not be accorded the same rights.

We recognize that a use by special exception is a permitted use when the applicant brings herself within the definitional ambit set forth in the Ordinance and demonstrates compliance with the applicable objective standards. The burden then shifts to the protestants to show non-compliance with subjective standards or that the use if granted would be contrary to the public health, safety, morals or general welfare. No such burden has been met by the protestants. The sole remaining issue raised by protestants is that parking on the street interferes with her children playing in the street and placing their sports equipment in the roadway. The roadway is for vehicle travel and access to the abutting properties, not for a public park.

Accordingly, we will enter the following order with the conditions herein imposed:


III. ORDER

AND NOW, this 8th day of July, 2019, it appearing that the Applicant has brought herself within the definitional ambit for which a special exception may be granted: to wit, the tutoring and instructional services, and has demonstrated substantial compliance with the objective conditions as set forth in the Ordinance or otherwise made a part of this Order and there being no evidence that the application if granted would violate subjective standards or be violative of the public interest, the Special Exception sought to conduct swimming lessons as tutoring and instructional services on the premises shall be and hereby is GRANTED, subject to the following conditions:

- a. There shall be no more than five students at any one session, not more than two of which shall be students without a recognized disability under the ADA.
- b. There shall be no more than three vehicles transporting students on the premises at any one time. These vehicles may be parked on the premises or on the street adjacent to the premises.
- c. There shall be a 30 minute interval between the end of one session and the beginning of the next to prevent overlap of vehicles.
- d. Instruction shall be limited to the hours of 9 a.m. and 7 p.m.

Upon compliance with all of the foregoing, and (i) the payment of proper fees, (ii) demonstration conformity to the terms of this Order and the conditions set forth herein and in other relevant provisions of the Zoning Ordinance and (iii) the filing of proper application, the Zoning Officer is authorized and directed to issue the necessary permits for the use of the premises for the uses and purposes herein provided.

WESTTOWN TOWNSHIP ZONING
HEARING BOARD:



Laura M. Scanlon
