

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nedco Madison Avenue, LLC	:	
	:	
v.	:	
	:	
Lackawanna College and Betton House, LLC	:	
	:	
v.	:	
	:	
The Zoning Hearing Board of the City of Scranton	:	
	:	
v.	:	No. 820 C.D. 2007
	:	Argued: December 11, 2007
The Lackawanna Institute and Paul Mansour	:	
	:	
	:	
Appeal of: Nedco Madison Avenue, Lackawanna College, and Betton House, LLC	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: January 15, 2008

Appellants appeal from the order of the Court of Common Pleas of Lackawanna County that granted in part and denied in part Appellants' land use/zoning appeal from a decision of the City of Scranton Zoning Hearing Board. The issue before it was whether activities taking place at 501 Madison Avenue, the subject property owned by Nedco Madison Avenue (Nedco), violated or exceeded the scope of the use variance granted to Lackawanna College on October 13, 2004 to build a dormitory and parking garage at the property.

The original application for the variance stated that a dormitory would provide 144 residents and 144 parking spaces and that the dormitory's second floor would be occupied by the Family School. The entire subject property was leased to Lackawanna College, which subleased the second floor to Betton House, LLC, a wholly-owned subsidiary of the Family Foundation, Inc., which is a not-for-profit corporation. The Board found that Betton House's website indicated that it is a transitional program for young adults aged 18 - 24 who have completed their rehabilitation or a wilderness or therapeutic high school program and who want to maintain a sober lifestyle as they enter college or begin a job.

Michael Wallace, the Zoning Enforcement Officer, issued a notice of violation to Nedco on October 5, 2005 stating that the subject property was being used as a "transitional living center" in violation of the "Zoning Ordinance Council Section 74 of 1993: Section 202[,] 306(B), 402.17 and 409.49; operating a treatment center/transitional living center in an R-2 Zone." Section 202 of the Ordinance defines "dormitory" as: "Residential facilities that are only inhabited by teaching faculty and/or full-time students of an accredited college, university, medical training facility, or State-licensed teaching hospital, or approved 'Care and Treatment Center for Children' or an accredited public or private primary or secondary school and which are owned and operated by such principal use to which the dormitory serves."

Nedco appealed the violation notice to the Board, which made many findings after which it upheld the Zoning Officer's determination that the property was being used in part as a treatment center/transitional living center. The Board concluded that Betton House's uses exceeded those defined in the Ordinance to qualify as a dormitory, and as such Nedco was in violation of the Ordinance and the variance granted in October 2004.

Nedco appealed to the trial court, which took no additional evidence. The trial court rejected the Board's narrow reading of Section 202 of the Ordinance as it failed to analyze the specifics of the violations and "sweeps" the College students with the same broad brush as the other residents of Betton House. The trial court agreed that some of the students enrolled in a GED program cannot qualify as a full-time student of an accredited college as required by the Ordinance but that no legal basis existed for determining that the receipt of services from Betton House by the full-time students of the College would be in violation of the variance, particularly where they paid tuition to the College. According to the trial court, the record does contain substantial evidence, however, to show that some of the activities cited went beyond the scope of the use variance for a dormitory. It granted Nedco's appeal in part as to the full-time college students, but it denied the appeal as to the remaining violations upheld by the Board.

Appellants raised the following three questions in their appeal to this Court: whether it was error to uphold the notice of violation based upon testimony that showed a denial of due process resulting from the Board's prejudgment of the matter; whether the Board erred in finding that the use was not as a dormitory; and whether the Board waived any right to object to the Betton House use since the Board was aware at the time the variance was granted that part of the subject property would be used by third parties to house students. The Court's review in zoning cases, where, as here, the trial court took no additional evidence, is limited to determining whether the zoning hearing board committed an error of law or an abuse of discretion. *Finn v. Zoning Hearing Board of Beaver Borough*, 869 A.2d 1124 (Pa. Cmwlth. 2005).

The Court has examined the record and has considered the parties' arguments, and it is satisfied that the trial court was correct in determining the core issue presented in this case, *i.e.*, whether substantial evidence exists to prove that

Betton House's use exceeded the use variance granted to Lackawanna College in October 2004. The Court finds no merit to the arguments presented regarding the remaining questions related to the Board's alleged prejudgment of the case and whether it waived any objection to Betton House's use since it was aware that the subject property would be used by third parties to house students. Suffice it to say that the trial court's reversal in part of the Board's decision shows that the trial court resolved any questions pertaining to the Board's alleged bias. Furthermore, the Board did not grant a use variance for a treatment or transitional living center; it granted a variance for a dormitory as defined by Section 202 of the Ordinance, which clearly does not include such facilities. Because the trial court thoroughly resolved the core issue presented in this case and the Court agrees with the trial court's analysis, it affirms on the basis of the opinion by the Honorable Carmen D. Minora in *Nedco Madison Avenue, LLC v. Lackawanna College and Betton House, LLC v. Zoning Hearing Board of the City of Scranton and Lackawanna Institute and Paul Mansour*, (Lackawanna County, No. 2005 CV 5141, filed March 26, 2007).

DORIS A. SMITH-RIBNER, Judge

MARY F. RINALDI
LACKAWANNA COUNTY

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NEDCO MADISON AVENUE, LLC.,

: IN THE COURT OF COMMON PLEAS
: OF LACKAWANNA COUNTY

Appellant

vs.

: CIVIL ACTION – LAW

LACKAWANNA COLLEGE and
BETTON HOUSE, LLC.,

: ZONING APPEAL

Intervenors

vs.

THE ZONING HEARING BOARD OF
THE CITY OF SCRANTON,

Appellee

THE LACKAWANNA INSTITUTE and
PAUL MANSOUR,

Intervenors

: 2005 CV 5141

MEMORANDUM AND ORDER

MINORA, J.

I. INTRODUCTION

Currently before the Court is the Notice of Land Use Appeal filed by Appellant, NEDCO Madison Avenue, LLC (hereinafter "NEDCO") to the decision of Appellee, The Zoning Hearing Board of the City of Scranton (hereinafter "ZHB"). Lackawanna College and Betton House, LLC are Intervenors of Right as per Pennsylvania's Municipalities Planning Code, 53 P.S. §11004-A.

Intervenors, Lackawanna Institute and Paul Mansour were granted permissive intervention per Court Order of our learned colleague, the Honorable Trish Corbett on February 21, 2006.

This Land Use Appeal was fully briefed and argued by all parties in interest. In addition, a transcript of the ZHB testimony has also been made of record. We consider the matter ripe for disposition.

By way of background, the issue in this case originally arises out of a use variance granted to Lackawanna College on October 13, 2004. The variance allowed for construction of a dormitory and parking garage (§306.B of the Scranton Zoning Ordinance) at 501 Madison Avenue, Scranton, Pennsylvania. [See Exhibit "B" to Appellant's Notice of Land Use Appeal].¹

More recently relevant, a hearing was held on November 16, 2005 before the ZHB of the City of Scranton regarding the subject property at 501 Madison Avenue. The owner of the property is NEDCO Madison Avenue, LLC. NEDCO had leased the entire property to Lackawanna College. Lackawanna College on October 13, 2004 was granted the aforesaid variance by the ZHB for construction of a dormitory and a parking garage. Thereafter, Lackawanna College took possession of the first floor and an entity known as Betton House took possession of the second floor pursuant to a sublease with Lackawanna College. According to the appeal taken by NEDCO, Betton House provides a dormitory for students in local colleges. (See paragraph 8 of the Appeal). On or about October 5, 2005, the zoning enforcement officer for the City of Scranton issued a

¹ Other dimensional variances were granted not at issue in this instant appeal.

Notice of Violation to NEDCO alleging that it was in violation of the original zoning variance which had been awarded on October 13, 2004.

Specifically, at issue before the ZHB at the resultant November 16, 2005 hearing was whether the ZHB should grant the appeal from the Notice of Violation issued by the zoning officer. In his October 5, 2005 letter to Fred Rinaldi as attorney for NEDCO (a copy of which is attached to Appellant's Appeal as Exhibit "C"), the zoning officer, Michael Walsh, wrote the following:

A transitional living center being operated at 501 Madison Avenue by Betton House is a violation of the Scranton Zoning Ordinance Council Section 74 of 1993:202 306.B, 402.17 and 409.49; operating a treatment center/transitional living center in an R-2 zone. **The above use is in direct violation of the zoning variance number 20476 granted by the Scranton Board to Lackawanna College on October 13, 2004.** [Emphasis added].

The appeal of NEDCO was denied by the ZHB on November 23, 2005 and Findings of Fact were issued by the Zoning Board for the City of Scranton.

The ZHB made the following findings:

Finding of Fact 9.

Dr. Sidney Parham testified as Director and owner of Betton House. He stated Betton House entered into a sublease with Lackawanna College for the second floor of the dormitory after construction was substantially completed. This floor can hold up to 48 students, although presently only three students are housed there. Betton House arranges for structured living arrangements, has curfews, mandatory group meetings and meals, has onsite "house parents", runs a "sober dorm" and is a privately run organization.

Dr. Parham described this program as a transition from adolescence to adulthood, not a transition from criminal behavior, although possible that the students could have criminal problems in their past. Many residents are on medication but not on illegal substances or drugs.

Finding of Fact 10.

Attorney Paul Kelly and Attorney Matthew Barrett , on cross examination of Dr. Parham brought out that each resident of Betton House pays a tuition of \$21,000.00 per semester and is self pay. Betton House has a psychologist on site and has administrative officers on site. Of the three residents presently there, one is from a wilderness program and one is from a rehabilitation program.

Finding of Fact 19.

Michael Losicco, Director and resident along with his wife, testified for Betton House. He said the facility is very safe, each student has a swipe card to both enter and exit the facility; there is a strict curfew and many other rules Betton House residents must follow. The residents are not allowed to have a vehicle for the first six months, there is weekly random drug testing and the residents are typically the same as other dorm students but are coming from drug or alcohol programs.

Of the three present residents, one is a full time student at Lackawanna College since September 2005; one is just completing GED classes at the school; and one will be beginning classes at Lackawanna College next week. In December, ten (10) students are expected to attend Lackawanna College and one to enroll at Johnson College.

Finding of Fact 20.

On cross examination, Attorney Kelly and Barrett stress that Mr. Losicco is a resident at the dorm and is an employee of Betton House; is not on staff at Lackawanna College or any area college; that the same holds true for his wife; that a GED student does not qualify as a full time college student; that while the Betton House website states that there is an in-house medical staff at the residence, there is actually none.

Finding of Fact 21.

Mark Volk, a Vice President of Lackawanna College, testified the first floor is full of Lackawanna College students. Mr. Volk admitted that a full time college student must have a high school degree or completed a GED program.

The ZHB ultimately determined that activities which have taken place at the subject property were beyond the scope of the variance that was granted to Lackawanna College on October 13, 2004. The ZHB held pursuant to

Conclusion of Law 29, that the only use variance granted by the ZHB on October 13, 2004 was for a dormitory. The ZHB further found in Conclusion of Law 30 that the use being made of the facility at Betton House goes beyond the definitions of a dormitory.

In its timely appeal to this Court, NEDCO asserts that the decision of the ZHB was arbitrary, capricious and an abuse of discretion and contrary to law. (See paragraph 12 of NEDCO's appeal).

II. Issue

Was the Zoning Board of the City of Scranton's decision that the current use cited went beyond the use granted for a dormitory on October 13, 2004 supported by substantial competent evidence and not the result of an abuse of discretion or error of law?

III. Discussion

A. Standard and Scope of Review in Zoning Appeals

Where the trial court takes no additional evidence in a zoning appeal, the scope of judicial review is limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law. Rural Route Neighbors v. East Buffalo Township Zoning Hearing Board, 870 A.2d 388, 392 n.4 (Pa. Cmwlth. 2005).

An abuse of discretion will be found only in those instances where the zoning hearing boards' findings of fact are not supported by substantial evidence

in the record. Kightlinger v. Bradford Township Zoning Hearing Board, 872 A.2d 234, 237 n.3 (Pa. Cmwlth. 2005). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Doris Terry Revocable Living Trust v. Zoning Hearing Board of City of Pittsburgh, 873 A.2d 57, 61 n.11 (Pa. Cmwlth. 2005).

Questions of credibility and evidentiary weight are solely within the province of the zoning hearing board as fact-finder. Broussard v. Zoning Board of Adjustment of City of Pittsburgh, 831 A.2d 764, 772 (Pa. Cmwlth. 2003). In that regard, the zoning board is free to accept or reject, in whole or part, the testimony of any witness. Broussard, supra.; Domeisen v. Zoning Hearing Board, O'Hara Township, 814 A.2d 851, 858 n.5 (Pa. Cmwlth. 2003).

A reviewing Court may not substitute its own judgment for that of the zoning hearing board and instead is bound by the board's findings which result from resolutions of credibility and conflicts in evidence rather than capricious disregard for evidence. Zoning Hearing Board of Sadsbury Township v. Board of Supervisors of Sadsbury Township, 804 A.2d 1274, 1278 (Pa. Cmwlth. 2002); See also Lamar Advertising of Penn, LLC v. Zoning Hearing Board of Borough of Deer Lake, 915 A.2d 705 (Pa. Cmwlth. 2007).

With those reviewing principles in mind, we now examine the particular case before us.

B. Was there substantial evidence of record to support the Zoning Board's determination that the Betton House use exceeded the variance originally granted to Lackawanna College on October 13, 2004?

If we focus on the core question at hand, the sole issue before the Zoning Board at the November 16, 2005 hearing was whether or not the ACTIVITIES [i.e. USE] which had taken place at the subject property were in violation or beyond the scope of the variance which was granted to Lackawanna College on October 13, 2004 for a dormitory. (See paragraph 22 of the ZHB decision Exhibit "D" to Appellants Notice of Land Use Appeal). [Emphasis added].

In that regard Section 202 of the Zoning Ordinance of the City of Scranton defines "dormitory" as:

"Residential facilities that are only inhabited by teaching faculty and/or full time students of an accredited college, university, medical training facility or state licensed teaching hospital, or approved "care and treatment center for children" or an accredited public or private primary or secondary school, which are owned and operated by such principal use to which the dormitory serves."

Appellees argue that it indeed was the Appellant's own witness at the November 16, 2005 hearing which provided substantial evidence of record that the Betton House went beyond the use variance granted for a dormitory on October 13, 2004.

Appellees also argue that Dr. Sidney F. Parham testified that Betton House is a privately run organization which entered into a sublease with Lackawanna College for the second floor of the building. Dr. Parham's testimony that the tenant is a privately run organization allegedly takes it out of the

Ordinance's definition of "dormitory" which must be "owned and operated by such principal use to which the dormitory serves."

Appellees also argue that the testimony revealed that the residents of Betton House pay tuition to Betton House, not to Lackawanna College, per Dr. Parham's testimony, allegedly further providing substantial competent evidence demonstrating that Betton House and Lackawanna College are two separate and distinct entities, owned and operated separately.

In addition, Appellees point out that Michael Losicco, Director in residence at Betton House along with his wife, testified that he is an employee of Betton House, not Lackawanna College; that the residents at the subject property were working toward their GED classes; that a GED student does not qualify as a full time student and that typically Betton House residents are coming from drug or alcohol rehab programs.

Appellees also stress that, Mark Volk, a Vice President at Lackawanna College, admitted that a full-time college student must have a high school degree or completed a GED program.

We agree that some residents of Betton House who are enrolled in a GED program and have not completed said GED program cannot qualify as a "full-time student of an accredited college" as required by the Ordinance's definition of "dormitory."

We are also mindful of the Appellant's skillful and passionate arguments concerning the alleged bias of the ZHB and the social utility of a program like the Betton House, but we are also mindful of the fact that there seems no legal basis

or reason why a full time student of Lackawanna College receiving services from Betton House would be in violation of the variance granted for a dormitory, especially if they also paid tuition to Lackawanna College.

As indicated above, the record is supported by substantial evidence that some of the activities cited went beyond the scope of the USE variance for a "dormitory" originally granted to Lackawanna College on October 13, 2004.

[Emphasis added].

However, the ZHB painted the violations with too broad a brush in also lumping full-time Lackawanna College Students into the same category as the other residents of Betton House.

The full-time Lackawanna College students certainly are full-time students using residential facilities which are essentially owned and operated by Lackawanna College as a primary tenant in possession. The ZHB's narrow reading of the definition of Section 202 of the Zoning Ordinance of the City of Scranton fails to analyze the specifics of the violations at issue and "sweeps" the Lackawanna College students with the same broad brush as mentioned above.

This is an error of law that needs to be corrected as to the full-time Lackawanna College students receiving services at Betton House.

We will do so with the following Order.

NEDCO MADISON AVENUE, LLC.,

Appellant

vs.

LACKAWANNA COLLEGE and
BETTON HOUSE, LLC.,

Intervenors

vs.

THE ZONING HEARING BOARD OF
THE CITY OF SCRANTON,

Appellee

THE LACKAWANNA INSTITUTE and
PAUL MANSOUR,

Intervenors

: IN THE COURT OF COMMON PLEAS
: OF LACKAWANNA COUNTY

CLERK OF
LACKAWANNA COUNTY

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CIVIL ACTION - LAW

CLERK OF
JUDICIAL RECORDS

ZONING APPEAL

2005 CV 5141

ORDER

AND NOW TO WIT, this 26th day of March 2007, upon due consideration of Appellants' Land Use Appeal and the able written and verbal arguments of counsel, and in accordance with the foregoing Memorandum, the Appellants' Land Use /Zoning Appeal is **GRANTED in part and DENIED in part.**

The Land Use/Zoning Appeal is granted as to full-time Lackawanna College students but denied as to the remaining violations upheld by the Zoning Hearing Board.

Concurrently, the Zoning Hearing Board of the City of Scranton's decision of November 23, 2005 is **REVERSED** as it applies to the full-time Lackawanna College students but **AFFIRMED** in all other aspects.

BY THE COURT


_____, J.

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R.Civ.P. 236 (a)(2) by mailing time-stamped copies to:*

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