

**BEFORE THE
ZONING HEARING BOARD OF
LOWER MERION TOWNSHIP, MONTGOMERY COUNTY
PENNSYLVANIA**

APPEAL NO. 3433

IN THE MATTER OF: : **Applicant - Appellant**
AKIBA HEBREW ACADEMY : **223 North Highland Avenue,**
: **Merion, PA 19066**

MEMORANDUM, FINDINGS, OPINION AND ORDER

Akiba Hebrew Academy ("Akiba") operates a private educational institution on a 4.8 acre parcel of property at 223 N. Highland Avenue in Merion ("parcel 1"). The institution is housed in an old mansion house, a large classroom wing and a gymnasium. Parcel 1 also contains a parking lot and athletic field.

Akiba also owns an adjoining 1.3 acre parcel known as 280 Melrose Avenue ("parcel 2"). Parcel 2 is improved with a dwelling, swimming pool and several outbuildings. The dwelling is currently rented to a third party for a residence.

Previously, on April 28, 1994, the Lower Merion Township Zoning Hearing Board ("Board") denied Akiba's request for a special exception and for several variances to build a large addition to the building on parcel 1. *See, In the matter of Akiba Hebrew Academy*, Appeal No. 3313. That decision is on appeal to the Court of Common Pleas of Montgomery County.

Thereafter, on July 6, 1995, Akiba submitted a new, scaled-down application to expand its facility. Akiba sought a special exception and variances to increase the educational facility by approximately 15,220 square feet and to exceed the maximum impervious surface and building coverage restrictions. Akiba's 1995 application also sought a variance to expand the facilities

without providing additional off-street parking. The Board docketed this application at Appeal No. 3378 and held several hearings on it. The matter was then continued generally at Akiba's request.

On April 18, 1996, Akiba submitted an "amendment" to its application. That amendment has been docketed at the present Appeal No. 3433. The most significant change in Akiba's plans is the proposed development and use of parcel 2 for parking in connection with the expansion of the educational facility.

The Board held a hearing on Akiba's amended application on June 20, 1996. At the hearing, the Board incorporated (with the parties' agreement) the entire record from Appeal No. 3378. Akiba also presented engineering testimony supporting its calculations of building coverage and impervious coverage resulting from the combined development of parcel 1 and parcel 2. A number of objectors testified at the hearing in opposition to the appeal. These neighbors expressed concerns regarding existing problems with traffic, storm water management and soil conditions in the area - all of which the objectors blamed on Akiba's development of parcel 1.

For the reasons that follow, the Board grants the application for a special exception, subject to certain conditions, and denies the requested variances from the parking requirements and coverage limitations.

A special exception is not an exception to the zoning ordinance but rather is a use to which an applicant is entitled unless the Board determines, according to standards in the zoning ordinance, that the proposed use would adversely affect the community. *East Manchester Township Zoning Hearing Board v. Dallmeyer*, 147 Pa. Cmwlth. 671, 609 A.2d 604 (1992). Once the applicant satisfies its burden of proving that the proposed use meets the specific and objective criteria under the zoning ordinance, a presumption arises that the use is consistent with the public health, safety and welfare. *Id.* The burden then shifts to the objectors to present evidence of a high degree of probability that the use will substantially affect the health and safety of the community. *Id.*

Akiba's proposed expansion in this matter is plainly for a "private educational institution"

and related parking facilities, uses allowed by special exception by Code Section 155-11(S)(3). Akiba's evidence also proved that allowing the special exception will not be contrary to the public interest within the meaning of Code Section 155-114(A)(2).

The Board further finds that the grant of the special exception will not adversely affect the public health, safety and welfare within the meaning of Code Section 155-114(C). The neighbors testified to existing traffic congestion on and near Akiba's property. An existing traffic problem, however, is insufficient to deny a special exception. *In re O'Hara's Appeal*, 389 Pa. 35, 131 A.2d 587 (1957). Moreover, Akiba's plan does not entail any increase in traffic. Instead, as will be more fully discussed below, Akiba's development will provide additional parking areas and buffers over those presently provided. As a matter of law, in order to refuse a special exception on the grounds urged by the objectors, the evidence must show a high probability that the use will generate traffic problems **not normally generated** by this type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community. *Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board*, 139 Pa. Cmwlth. 206, 590 A.2d 65 (1991). Akiba's plans in this matter show that the proposed expansion would affect no change in the magnitude of vehicles on a site, but that the existing detrimental effect on the neighbors resulting from those vehicles will be mitigated.

The Board likewise appreciates the objector's concerns regarding storm water management.

The Board may not, however, deny an application for a special exception based on those concerns:

[A]n application for a special exception is not required to address [storm water management, water supply requirements and building codes]. Such issues are to be addressed further along in the permitting and approval process. Zoning only regulates the *use* of land and not the particulars of development and construction.

Schatz v. New Britain Township Zoning Hearing Board of Adjustment, 141 Pa. Cmwlth. 525, 596 A.2d 294, 298 (1991), *emphasis in original*.

The Board may only consider whether an applicant **can** supply the disputed facilities, not

whether those facilities would meet the applicable criteria for a permit. *East Manchester Township Zoning Hearing Board v. Dallmeyer, supra*. The evidence in this matter showed that storm water management facilities can be provided for the site. Whether Akiba's particular plans will be adequate for that purpose will be addressed in the land development plan approval process before the township board of commissioners.

As a condition on the grant of the special exception to expand the educational facility, parcel 2 is to be merged into parcel 1.¹ Given this merger requirement, the Board denies Akiba's request for a variance from the parking provisions of Code Section 155-95(G). With the planned removal of the swimming pool, greenhouse, garage and other outbuildings on parcel 2, Akiba can provide the required additional spaces on that part of the property.

Likewise, Akiba's requested variances from the maximum building coverage and maximum impervious coverage limitations are denied as moot. Once Akiba merges parcel 1 and parcel 2 and removes the designated buildings on parcel 2, the total impervious coverage on the combined parcels will be less than presently exists - even after the additions and the new parking spaces are constructed.² Although the combined impervious coverage will still exceed the 21% limitation in the Code, this nonconforming condition must be allowed to continue. Code §155-99(A). The proposed building coverage on the combined parcel will increase slightly from 30,039 square feet (12.9%) to 30,553 square feet (13.2%), but will not exceed the Code's 15% limitation. Code §155-20(B).

Akiba's alternative request for a special exception to use the dwelling on parcel 2 for administrative offices is granted, for the reasons set forth above. The use is limited to administrative offices in connection with the educational institution, as described at the June 20,

¹ Additional conditions on the relief granted in this opinion are stated below.

² The impervious coverage will decrease from a combined 82,569 square feet (35.5%) to 77,784 square feet (33.5%).

1996 hearing.

The relief granted in this appeal is subject to the following conditions to protect the public health, safety and welfare:

1. Parcel 1 and parcel 2 will be merged into one lot;
2. No outdoor educational, recreational or athletic activities will be staged on any portion of parcel 2;
3. The new parking areas on parcel 2 will be set back 40 feet from the southeast side of parcel 2 (bordering on the property currently owned by the Zauderers);³
4. The pool, flagstone, greenhouse, garage, storage sheds and other existing impervious areas designated for removal on Akiba's plan will be removed from parcel 2; and
5. A planted buffer area of 20 feet in width will be provided between the new parking areas on parcel 2 and adjacent properties, as well as between the new parking areas and Melrose Avenue.

³ Akiba will have to relocate on parcel 2 the seven parking spaces it proposed to construct in this area.

ORDER

AND NOW, this 6th day of August, 1996, it is hereby ORDERED that the application of Akiba Hebrew Academy for a special exception to expand the private educational institution on the property at 223 North Highland Avenue, Merion, PA, is GRANTED. A special exception to use the property at 280 Melrose Avenue for administrative offices for the educational institution and for related parking is GRANTED. The application for variances from the additional parking requirements and from the restrictions on impervious coverage and building coverage are DENIED.

The special exceptions are granted subject to the following conditions:

1. Parcel 1 and parcel 2 will be merged into one lot;
2. No outdoor educational, recreational or athletic activities will be staged on any portion of parcel 2;
3. The new parking areas on parcel 2 will be set back 40 feet from the southeast side of parcel 2 (bordering on the property currently owned by the Zauderers);
4. The pool, flagstone, greenhouse, garage, storage sheds and other existing impervious areas designated for removal on Akiba's plan will be removed from parcel 2; and
5. A planted buffer area of 20 feet in width will be provided between the new parking areas on parcel 2 and adjacent properties, as well as between the new parking areas and Melrose Avenue.

Chairman Ryan and Member Aaron participating, both voting "aye".

ATTEST:

Robert E. Duncan
Secretary