

Akiba did not construct the additions approved in 2004, but elected instead to move its school to Radnor Township. It did so in 2008. At about the same time, Akiba sold the property to the Jewish Federation of Greater Philadelphia, which had an arrangement with the Applicant's founder to convey the property to the Applicant as soon as practicable after the Applicant's own foundation had been established. [N.T. 11/9/09 pp. 29-31] The Applicant would then lease the property to the Stern Hebrew High School (the "SHHS") to operate a private high school for Judaic and general college preparatory studies on the property. It was the Applicant's plan to set up the SHHS as soon as Akiba vacated the site, but various impediments have prevented that. [N.T. 11/19/09 pp. 30-32; 58-59]

While the conveyance from the Jewish Federation to the Applicant was pending, the Applicant applied (as lessee) for a special exception to expand Akiba's prior use by constructing a 3836 square-foot addition and to reconfigure the on-site parking and traffic circulation. [Exhibit A-17, Proposed Development Plan] The Board held hearings on the application on November 19 and December 3, 2009 and January 26, 2010. On February 22, 2010, the Jewish Federation conveyed the property to the Applicant.¹

For the reasons that follow, the Board grants the special exception, subject to the conditions set forth in the accompanying order.

The Special Exception Standard

A special exception is not an exception to a zoning ordinance, but rather is a use to which an applicant is entitled unless the zoning board determines, according to standards set forth 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); 53 P.S.

¹ The Board takes judicial notice of the deed to the Applicant, recorded in the Office of the Recorder of Deeds for Montgomery County at Deed Book 5759 Page 01033, *et seq.*

§10912.1. Once an applicant for a special exception 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 any objectors to present evidence of a high degree of probability that the use will substantially affect the health, safety and welfare of the community. *Id.*

The objectors' burden is more than merely showing an adverse impact. When the municipality permits a use by special exception, it is exercising its legislative judgment that such uses, in the ordinary case, will not negatively impact the public welfare. The objectors' evidence, therefore, "must show a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community." *Appeal of Michael Dippolito*, 833 A.2d 336 (Pa. Cmwlth. 2003); *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038, 1045 (Pa. Cmwlth. 2002).

The Proposed Addition is Permitted by Special Exception

Applicant's proposed addition in this matter is the expansion of an accredited educational institution use on the property, permitted under the Lower Merion Zoning Ordinance by special exception. Code §§155-11 S(2), 155-11 X. The addition will house a Beit Midrash, a worship and study space unique to an orthodox Jewish school. The existing facilities will continue to be used, as Akiba had used them, for classrooms and for administrative offices supporting the educational use. [N.T. 11/19/09 pp. 36-37; Exhibit A-7, Floor Plans] The only pertinent differences between Akiba's use and the Applicant's proposed use are the grade levels (Akiba's were 6-12, while the SHHS's will be 9-12) and the number of students (Akiba's approved enrollment was 350, while the Applicant's request is for 180 students). These differences do not diminish the fact that the use of the property will continue to be an accredited educational institution, permitted by (and permitted to expand by)

special exception. *See, Appeal of St. Joseph's University*, No. 4011 (March 16, 2006) (university's proposed use of former private K-12 school property constituted the continuation of an accredited educational institution use).

As required by the Lower Merion Zoning Ordinance,² the Applicant submitted a summary of the proposed intensity of the use in terms of hours of operation, number of students and staff, and the number of regularly scheduled annual events. [Exhibit A-9, Use Chart; *see also*, N.T. 11/19/09 pp. 55-63] These annual events include 1-2 open houses held on a Sunday, one parent night held in the evening, one back-to-school dinner, one graduation ceremony, 1-2 weekend basketball tournaments, and two fundraising events. [Exhibit A-9, Use Chart; N.T. 12/3/09 pp. 11-18] The Board finds that all these events are permitted as part of the accredited educational institution use.

The question nevertheless arose during the course of the hearings as to whether the Board could grant a special exception for the use as an accredited educational institution when the school had not yet received a license from the State Board of Private Academic Schools to operate on the property. [N.T. 11/19/09 pp. 15-22]³ The Commonwealth Court has generally required that an applicant for a special exception demonstrate that its proposed use complies with (not that it can or will comply with) all the objective criteria in the operative zoning ordinance. *Elizabethtown/Mt. Joy Associates, LP v. Zoning Hearing Board of Mount Joy*, 934 A.2d 759 (Pa. Cmwlth. 2007). In those cases where a proposed special exception use requires a permit or license from a Commonwealth agency, the appellate decisions have gone both ways on the question of whether the applicant must first obtain the state license before the zoning board can approve the use.

² Code §155-11 Y(2).

³ The Zoning Ordinance requires an accredited educational institution to have been licensed by the State. A "certified educational institution," on the other hand, may be unlicensed. *See*, Code §155-4 B ("Accredited Educational Institution" and "Certified Educational Institution"). Certified educational institutions, however, are permitted only in existing structures and may not expand beyond certain percentage limitations. Code §155-11 S(1)(e).

In *Maier v. East Norriton Township Zoning Hearing Board*, 764 A.2d 98 (Pa. Cmwlth. 2000), the Court held that an applicant for a special exception to install a heliport on its firehouse had to first obtain a license from the Commonwealth Department of Transportation for the heliport before the zoning board could grant the requested relief. Later, in *Lehigh Asphalt Paving and Construction Co. v. Board of Supervisors of East Penn Township*, 830 A.2d 1063 (Pa. Cmwlth. 2003), the Court distinguished *Maier* and held that a permit from the Commonwealth Department of Environmental Protection was not required before a zoning board granted a special exception to expand a quarry use. The panel in *Lehigh Asphalt* reasoned that neither the MPC nor the decisions prior to *Maier* required Commonwealth agency permits before action by a zoning board. And to the extent that *Maier* suggested a different rule, the *Lehigh Asphalt* Court limited *Maier* to the specific facts of that case. 830 A.2d at 1074, footnote 11. The Court then adopted the "well-established premise" that a special exception can be approved in these kinds of cases to become effective only after issuance of any required state agency permits. *Id.*

Here, the Applicant claims to be caught in a "catch-22" in which the Department of Education will not issue the license to prove the use is "accredited" unless the applicant first produces an occupancy permit, but an occupancy permit will not be issued until after the Board grants a special exception for an "accredited educational institution." [N.T. 12/3/09 pp. 20-21] To resolve this problem, the Board will grant the special exception, based on *Lehigh Asphalt* and the particular facts of this application, but conditioned on the issuance of a license by the State Board of Private Academic Schools.

The Other Objective Criteria of the Zoning Ordinance Are Met

Among the other objective criteria applicable to the Applicant's proposed use, the Lower Merion Zoning Ordinance limits the size of administrative offices for accredited educational institutions to 10 percent of the habitable floor area of the principal building on the lot. Code §155-11 S(2)(b). According to Applicant's architect, the SHHS administrative offices will occupy a total of 2864 square feet out of a total habitable floor area of 42,500 square feet – 6.7 percent. [N.T. 11/19/09 pp. 38-39; Exhibit A-7] The Board finds that the areas of the Assistant Principal's office and the office of the Head of School should also have been included in the calculation of administrative office space. With those offices included, the administrative space will still be less than 10 percent of the total floor area.⁴

The spacing and density regulations of the Zoning Ordinance limit the number of special exception uses, such as Applicant's proposed use, that can be located in a residential neighborhood. Code §155-11 Y(3). The Board reiterates its conclusion, affirmed by the Commonwealth Court in *Kleinman*, that an accredited educational use on this property does not violate the spacing and density regulations.

The other limitations applicable to the use will also be met. The existing 39 percent impervious coverage on the property is lawfully nonconforming to the 21 percent limit in the Zoning Ordinance. Code §155-20 F; *Kleinman*. Although the proposed addition will increase the amount of impervious surface on the property, the Applicant proposes to eliminate portions of existing impervious, so that there will be no net increase after the improvements are completed.

⁴ The architect testified that room number 207, the office for the Head of School, is 175 square feet. He did not testify regarding the size of room number 231, the Assistant Principal's office, but it appears on the plans to be slightly more than half the size of room 207. [N.T. 11/19/09 pp. 42-43; Exhibit A-7, Plan A1.2] Adding those square footages to the 2864 square feet already identified amounts to substantially less than the 4250 square-foot limit.

[N.T. 12/3/09 pp. 66-67; Exhibit A-5, Impervious Transition Plan] The property is also lawfully nonconforming to the requirement that educational uses front on and provide ingress and egress solely from a primary, secondary or tertiary arterial road. Code §155-11 W. *Kleinman, supra*.

With regard to the required traffic study,⁵ Greg Richardson, P.E., Applicant's traffic engineer, testified that the traffic generated by the proposed use will not result in a level of service lower than C on adjacent streets and intersections. [N.T. 12/3/09 pp. 29-33; Exhibit A-13, Traffic Impact Study] Mr. Richardson also testified that the loading/queuing requirements of the Zoning Ordinance⁶ would be met. [N.T. 12/3/09 pp 35-37]

The Parking Requirements Are Met

Akiba's 68 on-site parking spaces became legally nonconforming to the 264 spaces that would have been required Akiba's educational use when the 1998 amendments to the Zoning Ordinance were adopted. [Exhibit A-10, Parking Analysis Chart] *See* Code §155-95 AA. The Board finds that the educational use of the property was not abandoned when Akiba moved to Radnor Township and that the Applicant is, therefore, entitled to continue the parking nonconformity. Code §155-99 A.

In this regard, Mr. Magerman testified that plans were under way to locate a Jewish school on the property as soon as Akiba put the property on the market. He donated the funds that enabled the Jewish Federation to purchase the property, with the intent of moving the SHHS from Philadelphia to the Akiba property. And even after Akiba moved its educational functions to Radnor, Akiba continued to use the property for administrative purposes. In the meantime, Mr. Magerman arranged to organize a foundation to purchase the property and the Applicant formulated its plans to renovate the structures and add the Beit Midrash. [N.T. 11/19/09 pp. 26-

⁵ Code §155-11 Y(1).

⁶ Code §155-11 Y(4). This provision requires loading/queuing only for the expanded portion of the use.

32] Consequently, the Applicant's educational use is entitled to the benefit of the continued nonconformity with respect to parking.

Determining whether any additional parking spaces are necessary on account of the Applicant's proposed expansion requires an analysis of the various parking regulations for educational uses:

AA. Educational uses, including student residence halls, day care and nursery schools.

(1) Number of space[s] required.

(a) One and one-half spaces per two students/participants of driving age;

(b) One space per faculty/staff member or volunteer;

(c) One visitor space per 25 students/participants; and

(d) One space per five seats, or 50 square feet of floor area where seating is not installed, for the largest place of public assembly on the site, except that parking for assembly places to be used no more than six times a year may be accommodated on unpaved areas, if their availability can be demonstrated.

(2) Reserved.

(3) The expansion of any use regulated by this subsection shall be required to meet these parking standards only for the additional students/participants or additional place of assembly.

(4) ...

Code §155-95 AA (emphasis supplied).

As the Board noted in *Kleinman*, the expanded use on this property must be measured from 1998, the year that the definition of "expanded use" was adopted. Using that date, and analyzing the specific aspects of the Applicant's proposed expansion, the Board determines that no additional parking is required under the Zoning Ordinance.

Parking is not required on account of the addition. The gymnasium will remain the largest place of public assembly. [N.T. 11/19/09 p. 46] The Board's previous determination that the Zoning Ordinance does not require additional parking for each new place of public assembly, but only for the largest area of public assembly has been affirmed by the courts. *See, Appeal of Baldwin School from the Decision of the Zoning Hearing Board of Lower Merion Township*, 932 A.2d 291 (Pa. Cmwlth. 2006); Code §155-95 AA(1)(d).

Applicant is also not required to provide any additional parking on account of an increase in the number of faculty and staff. Code §155-95 AA(1)(b). The number of faculty and staff is proposed to be 63. [Exhibit A-10, Parking analysis Chart] That is less than the 74 members of Akiba's faculty and staff in 1998.

Nor is the Applicant required to provide any additional parking on account of an increase in the number of students or the number of students of driving age. Code §155-95 AA(1)(a) and (c). To the contrary, the Applicant's proposed enrollment will be half of Akiba's. In 1998, there were 368 students attending Akiba, 120 of driving age. *See, Appeal of Akiba Hebrew Academy*, No. 3909, October 21, 2004, p. 9. The Applicant proposes to cap enrollment at 180 students, with 90 of driving age.

Although no additional on-site parking is required, the Applicant plans to reconfigure the parking area and add 3 more spaces to bring the total on-site parking to 71 spaces. In addition, the Applicant has agreed with one of its neighbors to require all faculty, staff and students to park on the property, and not on any of the neighboring streets. [Exhibit A-11, Memorandum of Understanding]

The Proposed Expansion Will Not Result in Extraordinary Negative Impacts

As noted above, Pennsylvania law provides that when the Township Board of Commissioners legislated that educational uses are permitted in residential districts by special exception, they made the determination that such uses will not ordinarily negatively impact the public health, safety and welfare. Consequently, the objecting neighbor, Dr. Bert Zauderer, had the burden in this case to prove "a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community." *Appeal of Michael Dippolito*, 833 A.2d 336 (Pa. Cmwlth. 2003); *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038, 1045 (Pa. Cmwlth. 2002).

Dr. Zauderer has been actively opposing Akiba's proposed expansions since 1990. [N.T. 1/26/10 p. 22] His most recent appeal of the Board's grant of a special exception to allow Akiba to expand in 2004 (not acted on by Akiba) was denied by the Court of Common Pleas and the Commonwealth Court. *Appeal of Bert and Dvorah C. Zauderer from the Decision Dated October 21, 2004 of the Zoning Hearing Board of the Township of Lower Merion*, No. 278 C.D. 2006 (September 29, 2006). As he has in previous applications involving Akiba, Dr. Zauderer opposed the Applicant's plans in this matter based on the existing problems with water on his property and water penetrating his basement, which problems Dr. Zauderer attributed to the development of the Applicant's property by Akiba. [See, gen., N.T. 1/26/10 pp. 39-58] As we indicated during Dr. Zauderer's testimony, the Board is sympathetic to his concerns, but we are constrained by the law to find that Dr. Zauderer did not meet his extraordinary burden of proving that the proposed expansion would have an adverse impact not normally generated by such a use.

The Applicant's engineer, David Fiorello, P.E., testified that the stormwater management plan for the property (a groundwater recharge system) will meet the requirements of the applicable township ordinances. [N.T. 12/3/09 pp. 65-69; N.T. 1/26/10 pp. 75-78] That is all that a special exception applicant needs to prove:

[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 stormwater management, not whether those facilities would meet the applicable criteria for a permit. *East Manchester Township Zoning Hearing Board v. Dallmeyer, supra*.

On the other hand, while there is little doubt that a current water problem exists in the vicinity of the Applicant's property, Dr. Zauderer did not produce an expert witness to testify (or produce any competent evidence to prove) that the construction of the proposed addition would have an extraordinary adverse impact on his property in terms of stormwater management, despite the Board's grant of a continuance to allow Dr. Zauderer to prepare his case. [N.T. 12/3/09 pp. 79-86]

Mr. Fiorello did agree that there are existing stormwater issues in the general neighborhood, resulting from a high water table. [N.T. 1/26/10 pp. 68-70] Representatives from his office met with Dr. Zauderer at the property and discussed the possibility of providing a pipe and drain behind Dr. Zauderer's property to allow him to connect to the stormwater system installed along Akiba's property in the late 1990s. [N.T. 1/26/10 pp. 62-68] Whether or not that

would ameliorate the problems Dr. Zauderer is experiencing, the Board does not have the authority to deny the special exception if that accommodation is not provided. And as is the case with the Applicant's separate agreement with another neighbor to park only on the property, the Board cannot attach a condition to the special exception that would require the extraordinary step of installing a stormwater management system serving Dr. Zauderer's property.

In short, as was the case in 2004, the owner of this property has met its limited burden of proof on the stormwater management issue and Dr. Zauderer, concomitantly, has not met his.

O R D E R

AND NOW, this 18th day of March, 2010, it is hereby ORDERED that the application of The Kohelet Foundation (the "Applicant") for a special exception under Code §155-11 S(2) to construct an addition to the principal education building on the property at 223 N. Highland Avenue Merion Station, PA is GRANTED.

The relief is granted conditioned on the following:

1. Use of the property by parties other than the Applicant and SHHS shall not be permitted; any additional use and/or additional users of the property must be approved by the Board as a special exception;
2. Enrollment is capped at 180 students; the number of faculty/staff/volunteers is capped at 63; any increase in these amounts must be approved by the Board as a special exception;
3. The Applicant shall provide the Township Zoning Officer with a current license from the State Board of Private Academic Schools to operate a school on the property; use of the property for an accredited educational institution shall not commence until the license is provided; and
4. The Applicant's final plans and subsequent construction shall adhere to all applicable Township codes and ordinances.

Chairman Aaron, Member Brier, and Alternate Member Davidson participating, all voting

"aye."

Attest:

Michael Wylie
Secretary