

PAUL L. KREMSER and CARMEN J.	:	IN THE COURT OF COMMON PLEAS OF
KREMSER, ROBERT E. LAUDIG and	:	LYCOMING COUNTY, PENNSYLVANIA
VIRGINIA LAUDIG, MICHAEL MELLOY:	:	JURY TRIAL DEMANDED
HARRY L. DIEFFENBACHER and	:	
MARION DIEFFENBACHER, CLYDE	:	
LAUCHLE, TODD A. KREMSER and	:	
BRENDA A. KREMSER, RICHARD W.	:	
EGLI and SYLVIA EGLI, JAMES DRAKE,;	:	
and LINDA DRAKE, JOHN CARNEY and	:	
MARY CARNEY and PAUL W. LAUDIG	:	
and JUNE LAUDIG,	:	
Appellants	:	
	:	
vs.	:	NO. 03-01,413
	:	
MONTOURSVILLE BOROUGH and	:	CIVIL ACTION
MONTOURSVILLE BOROUGH	:	
ZONING HEARING BOARD,	:	
Appellee	:	
	:	
vs.	:	
	:	
SUSQUEHANNA VALLEY	:	
DEVELOPMENT GROUP, INC.,	:	
Appellee-Intervenor	:	LAND USE APPEAL

Date: November 4, 2003

OPINION and ORDER

Before the Court for determination is the Appellants Paul L. Kremser *et al's* (collectively Kremser) Land Use Appeal filed August 27, 2003. The Court will grant Kremser's appeal. It was an error of law for the Montoursville Borough Council (Borough Council) to approve the conditional use with fifteen units.

The following are the relevant facts of the case. On May 10, 2003, Intervener Susquehanna Valley Development Group, Inc. (Susquehanna) filed a conditional use application with the Montoursville Borough to permit the construction of a fifteen-unit elderly

apartment complex on property located at 1093-95 Broad Street, Montoursville, Lycoming County, Pennsylvania (hereafter the “Property”). The Property is located in a Residential R-1 zoning district. On July 7, 2003, the application was addressed at a public hearing before the Montoursville Borough Council. On July 29, 2003, the Borough Council rendered its decision approving the conditional use application. In approving the application, the Council stated that the housing complex was not to exceed 15 units.

In its decision, the Borough Council requested the Montoursville Zoning Hearing Board to interpret the Montoursville Zoning Ordinance for the “purpose of determining the number of multi-units that may be placed on the lot in question as a conditional use.” July 29, 2003 Borough of Montoursville, Notice of Decision Application for Conditional Use Susquehanna Valley Development Group, Inc., 3. The Borough Council’s decision further stated that the, “. . .determination of the Zoning Hearing Board will be made a part of this Decision with the proviso that the maximum number of units approved by Council under this request is fifteen (15).” *Ibid*. The reason given for requesting that the Zoning Hearing Board (ZHB) make the determination was that the Borough Council could not identify a clear standard in the Zoning Ordinance regarding the number of multi-units that could be placed in a R-1 district. Specifically, the decision stated that:

As Council could not identify a clear standard or provision in the Zoning Ordinance governing the number of multi-units that may be placed on a lot in the R-1 District as a conditional use and, as both the Zoning Ordinance and the Pennsylvania Municipalities Planning Code specify that the Zoning Hearing Board as the body charged with the authority and responsibility to interpret the provisions of the Zoning Ordinance, Council requests the Zoning Hearing Board to make the following determination:

A. The applicable standard which should be utilized to determine the number of multi-dwelling units which may be placed on a corner lot in the R-1 District; and in applying that standard, how many units the Applicant may place on the lot in question.

Id. at 6.

On August 19, 2003, the ZHB considered the request of the Borough Council at its regular public meeting. In a letter dated August 20, 2003, the ZHB issued its decision. The ZHB determined it could discern no reason to change the decision of the Borough Council in granting a conditional use for a fifteen unit elderly housing complex in a R-1 zoning district. The ZHB also stated that provisions of the Zoning Ordinance governing multi-family housing in a R-2 zoning district could not be applied to a parcel of land in a R-1 district. The ZHB concluded that R-1 zoning district regulations would need to be applied to a multi-unit facility in a R-1 district.

On August 27, 2003, Kremser filed the Land Use Appeal presently before the Court.

Initially, the Court finds that it was error for the Borough Council to request that the ZHB determine the number of units that Susquehanna could place in the complex. If the trial court does not take additional testimony as in this case, the standard of review regarding a governing bodies' decision is limited to determining whether there was an abuse of discretion or an error of law. *Commonwealth, Bureau of Corrections v. Pittsburgh*, 532 A.2d 12, 13 (Pa. 1987); *Ruf v. Buckingham Twp.*, 765 A.2d 1166, 1168 (Pa. Cmwlth. 2001). A conditional use falls within the jurisdiction of the municipality's legislative or governing body, and not the zoning hearing board. *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324, 1326 (Pa. Cmwlth. 1997). Under 53 P.S. §10603(c)(2), the governing body has "the authority to grant conditional

uses pursuant to the express standards and criteria set forth in the zoning ordinance.” *Clinton County Solid Waste Auth. v. Wayne Twp.*, 643 A.2d 1162, 1168 (Pa. Cmwlth. 1994). The governing body is also given authority to attach conditions and safeguards in addition to those set forth in the zoning ordinance in order to implement the purposes of the Municipalities Planning Code and the zoning ordinance. *Ibid.* Therefore, it is the governing body that must decide whether to grant the conditional use and what conditions to attach.

The Borough Council violated this rule. While the Borough Council did decide to grant the conditional use application with a maximum of fifteen units, it gave the ZHB the authority to change that condition and establish a different number. It has been argued that the Borough Council was only asking for an interpretation of the Zoning Ordinance. However, the Borough Council’s written decision stated that the “. . .determination of the Zoning Hearing Board will be made part of this decision.” The decision also requested the ZHB to not only determine the proper number of multi-dwelling units that could be placed on a corner lot in a R-1 zoning district, but that the determination made by the ZHB should be applied to determine how many units Susquehanna could place on the Property. Such a direction gave the ZHB authority to set a lower number of units if it determined that such a number was required in a R-1 district.

This was impermissible because it allowed the ZHB to establish a condition that would be attached to the conditional use - the number of units. Only the governing body has the authority to determine what conditions will be attached to the conditional use. Therefore, it was an error of law for the Borough Council to give the ZHB the authority to determine the number of units that could have been placed in the complex.

As such, the determination of the ZHB is void and of no merit. However, the decision of the Borough Council granting the conditional use still remains. The question now becomes whether the decision to allow fifteen units was correct. The Court concludes that it was not.

The Montoursville Zoning Ordinance states that a conditional use is to be allowed or denied by the Borough Council. Montoursville Zoning Ordinance §10.073. The Borough Council's decision is to be based upon the "general and specific standards and criteria set forth in [Article 10]." *Ibid*. Section 10.074 states that, "The Borough Council may require more restrictive standards than the minimum standards listed in this Ordinance for permitted uses of any zone in which a conditional use may be requested" Section 10.075 states that, "Pertinent standards set forth in other sections of this Ordinance shall be considered minimum standards,"

Section 10.073 of the Zoning Ordinance grants the Borough Council authority to go beyond the minimum standards when dealing with a conditional use. Section 10.073 only allows the Borough Council to place other restrictions in addition to the minimum standards. This section does not allow the Borough Council to pull standards out of thin air. The Borough Council must still apply the minimum standards to the conditional use. Determining what those standards are can be accomplished by reading §10.075.

In the case *sub judice*, the most pertinent and relevant standards would be those specifically addressing the use at issue. The minimum dimensional requirements for a multi-family attached dwelling are established in §6.01 of the Zoning Ordinance. Under those

standards, a multi-unit dwelling would be required to have a minimum lot width of 140 feet for the first two units and 20 feet for each additional unit.

Applying those standards to the proposed project, it is clear that a conditional use permitting a fifteen-unit elderly apartment complex does not conform to the minimum standards of the Montoursville Zoning Ordinance. A fifteen-unit elderly apartment complex would require a minimum lot width of 400 feet ($140 + (13 \times 20) = 400$). The property for the proposed complex has a lot width of 300 feet. As such, the Borough Council committed an error by not applying the minimum standards applicable to a multi-unit dwelling and by granting the conditional use application with a fifteen-unit plan.

As would pertain to the alleged violation of §10.072(a)(7) of the Zoning Ordinance regarding the technical requirements of an application for a conditional use, the Court finds that the issue is of no significance. The alleged error is that Susquehanna has not obtained the signature of all necessary lot owners in the vicinity of the Property on a letter or petition indicating that they oppose or do not oppose the conditional use application. Kremser has not, and is not, raising an issue that the notice was inadequate. In fact, Kremser has had an opportunity to litigate the issues and has taken full advantage of that opportunity.

The Court concludes that the approval of the conditional use was an error of law. It was an error for the Borough Council to authorize the ZHB to determine the number of units that could be placed on the property. It was also an error of law for the Borough Council to allow 15 units when the minimum standards applicable to multi-unit dwellings would not permit such a result. Therefore, the Court must grant Kremser's appeal

ORDER

It is hereby ORDERED that Appellants Paul L. Kremser *et al*'s Land Use Appeal filed August 27, 2003 is granted. The decision of the Montoursville Borough Council granting the conditional use is reversed.

BY THE COURT,

William S. Kieser, Judge

cc: Garth D. Everett, Esquire
Malcolm S. Mussina, Esquire
George E. Orwig, II, Esquire
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