IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1621 C.D. 1976

In Re: Appeal of BETHESDA LUTHERAN SOCIAL SERVICES; COMMONWEALTH OF PENNSYLVANIA: and JOHN D. KEPHART, HAROLD KAI and DENNIS C. THOMPSON from the Decision of the ZONING BOARD OF ADJUSTMENT OF THE CITY OF MEADVILLE.

Appeal of Cynthia Kightlinger and Joan M. Stallard, Trustees ad Litem for the Cullum Street Civic Association, Intervening Respondent.

BRIEF FOR APPELLEE COMMONWEALTH OF PENNSYLVANIA AND SUPPLEMENTAL REPRODUCED RECORD

Appeal from the Order Entered September 20, 1976 of the Court of Common Pleas of Crawford County, Pennsylvania, Civil Action - Law Division at No. 110 May Term, 1976

Thomas F. Halloran
Assistant Attorney General
Katherine L. Fein
Assistant General Counsel
Robert P. Kane
Attorney General
Community Advocate Unit
906 Fifth Avenue, Second Floor
Pittsburgh, Pennsylvania 15219
Attorneys for Appellee Commonwealth of Pennsylvania

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COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Is a group home for mentally retarded adults a permitted use in a Multiple-Family Residential District (hereinafter R-MF District), under the Zoning Ordinance of the City of Meadville?

   Answered in the affirmative by the Court below.

2. Would an interpretation of the Zoning Ordinance of the City of Meadville that a group home for mentally retarded adults is not a permitted use in R-MF Districts be a violation of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S.§951 et seq., Supp. 1975-1976 (hereinafter PHRA)?

   Not specifically addressed by the Court below.

COUNTERSTATEMENT OF THE CASE

This is an appeal from the August 27, 1976 Order of the Court of Common Pleas of Crawford County, Pennsylvania reversing the June 23, 1976 decision of the Zoning Hearing Board of the City of Meadville (hereinafter Zoning Board) that the use of 636-638 Cullum Street as a group home for mentally retarded adults is not permitted in a R-MF District under the Zoning Ordinance of the City of Meadville.

On December 11, 1975, the Zoning Board ruled in favor of the appeal of Bethesda Lutheran Social Services (hereinafter Bethesda) from the Zoning Officer's denial of a permit for the use of 636-638 Cullum Street as a group home for mentally retarded adults in an R-MF District.

On March 10, 1976 a Petition to Allow the Filing of a Zoning Appeal Notice was filed by numerous individuals of the City of Meadville. On April 12, 1976 the Petition was granted, vacating the December 11, 1975 decision and remanding the matter to the Zoning Board for re-hearing. Appeals from that remand Order were filed and subsequently quashed by this Court on June 22, 1976.

On May 17, 1976, the zoning re-hearing was held and on June 23, 1976 the Zoning Board denied the appeal of Bethesda Lutheran Social Services. In July, 1976, Bethesda, the Commonwealth of Pennsylvania (hereinafter Commonwealth) and John D.

Kephart, Harold Kai and Dennis C. Thompson, would-be residents of the group home, appealed the decision of the Zoning Board to the Court below.

On August 27, 1976 the Court below reversed the decision of the Zoning Board and directed a permit be issued as applied for by Bethesda.

On September 21, 1976 this appeal was filed by the Cullum Street Civic Association.

SUMMARY OF ARGUMENT

1. A group home for eight mentally retarded adults is a permitted use in a R-MF District. The decision of the Zoning Board was legally erroneous and manifested an abuse of discretion when it found that the group home was a small institution; that it would not preserve the residential character of the neighborhood, nor promote the harmonious development of the district; that it would be injurious to the neighborhood; and that it violated the preamble of the R-MF Article. The record in this case is devoid of any evidence to support these findings and therefore the decision of the Court below reversing the Zoning Board must be affirmed.

2. The only apparent basis for the decision of the Zoning Board seems to be because of the handicap or disability of its prospective residents. Such an interpretation of the Zoning Ordinance is prohibited by the PHRA. The decision of the Court below reversing the Zoning Board was therefore correct and must be affirmed.

ARGUMENT

I. A GROUP HOME FOR MENTALLY RETARDED ADULTS IS A PERMITTED USE IN A R-MF DISTRICT UNDER THE ZONING ORDINANCE OF THE CITY OF MEADVILLE.

The Mental Health and Mental Retardation Act of 1966, Special Sess. No. 3, Oct. 20 P.L., Art. I §101, 50 P.S. §4101 et seq. (hereinafter the MHMR Act) requires the Commonwealth, through its Department of Public Welfare, to provide total service to the mentally retarded. The failure of institutions to meet the needs of many retarded people is outrageously evident. The unavailability of group homes for the mentally retarded denies retarded citizens of Pennsylvania the level of service to which they are entitled. Many of the people presently institutionalized could better be served in such group homes. Thus, there is a need to provide these homes for the mentally retarded as a part of a total or continuum of service. To meet this need and in accordance with the MHMR Act, the Department of Public Welfare has committed itself to provide group homes for the mentally retarded.

The Commonwealth recognizes its obligation under the law to provide service to the mentally retarded as expeditiously and economically as possible. The mentally retarded persons is the one who suffers most in delays in establishing these homes.

In its Opinion the Court below recognized the importance of its decision and the need for group homes for the mentally retarded as follows:

> Because of the increasing interest in and use of the group home concept not only in Pennsylvania but also nationwide we are aware that our decision may have some impact, not only locally, but possibly statewide. The current issue of U.S. News and World Report (August 30, 1976) points out:
>
> > 'Throughout the country, mentally retarded children are being assisted in leading normal lives in schools with our children, while group homes and sheltered workshops are providing opportunities for retarded adults to live and work in the community.
> >
> > 'Institutions themselves are being reformed for the purpose of releasing inmates for reintegration into the community as soon as possible.' (R.190a)

The standard of review of the Court below was ". . .limited to a determination of whether the Board committed a manifest abuse of discretion or an error of law. (Citing cases.)" (R.188a). The Court below, then, in a well thought Opinion, addressed the bases of the decision of the Zoning Board, found them to be totally erroneous and unfounded and reversed the decision of the Zoning Board.

The standard of review for this Court is the same. Did the Zoning Board decision reflect a manifest abuse of discretion or an error of law? V.S.H. Realty v. Zoning Hearing Board of Sharon Hill, ____ Pa. Commonwealth ____, 365 A.2d 670 (1976).

It is the position of the Commonwealth that it did and that the Court below properly reversed the decision of the Zoning Board. A succinct summary of the findings upon which the Zoning Board based its decision was stated by the Court below as follows:

> . . .(1)that, although the proposed group home fits the definition of family as used in the Ordinance, the proposed use creates a small institution; or (2) that such use would not preserve the residential character of the neighborhood nor promote the harmonious development of the district; or (3) that the proposed use of the property would be injurious to the neighborhood; and (4) that the proposed use would be in violation of the preamble. (R.191a)

If this Court determines that these findings of the Zoning Board reflect a manifest abuse of discretion or error of law, then it must affirm the decision of the Court below.

The first finding was that although the group home fits the definition of family as used in the Zoning Ordinance, the group home still created a small institution that would not be permitted in a R-MF District. (R.178a). At 1303.17 the Zoning Ordinance defines family as ". . . any number of individuals living together as a single housekeeping unit, and doing their cooking on the premises."

The framers of the Ordinance had the right to define family in a broad, even artificial manner. The reason for this broad definition, as noted by the Court below, is to provide for the many other permitted uses which all, including the group home, are simply places where people live. (R.191a-192a).

A family use under the Ordinance a fortiori preserves the residential use if within acceptable area, height and use requirements and accommodating an existing intensity of use. Contrary to the conclusion of the Zoning Board, the record is replete with testimony concerning the overall residential character of the group home. (S.R. 6b-10b, 25b, 34b). The building would not in any way be set apart from other residences in the community. (S.R. 7b). The residents would have common eating facilities and cooking facilities on the premises, and would operate as a single housekeeping unit. (S.R. 6b, 8b).

In finding that the proposed use was a "small institution" the Zoning Board ignored the evidence on the record that such a group home was not a "small institution". Repeatedly in the record there is uncontraverted evidence that the group home is not an institution. (S.R. 7b,8b,17b,41b,42b,45b,46b). The essence of the group home concept is to permit mentally retarded persons to reside in the community in a normal environment. The residents of the group home in fact are not people who require institutional care. (S.R. 41b-42b).

In Merry v. Zoning Board of Adjustment, 406 Pa. 393, 178 A.2d 595 (1962), it was held that the presence of a dentist's office in a building did not render the facility a "medical center". Similarly, the residence of mentally retarded persons in a group home does not render the home a "small institution".

The Zoning Board attempts to characterize this home as a small version of Polk State Hospital is factually erroneous. As was true in Merry, there is a difference in more than just the comparative sizes of the group home and an institution. The residential character of the home is totally unlike the impersonality and regimentation that exists within the confines of an institution. The residents of the group home engage in a normal living process, including employment and recreational activities, as an integral part of the community. (S.R. 8b-10b). In short, the home is to be as different from an institution as possible.

In United Cerebral Palsy v. City of Scranton Zoning Board, 75 Lack. Jur. 149,156 (1974), the Court considered the non-institutional nature of group homes as follows:

> The use proposed for the premises on Monroe Avenue is to provide for the patients who will reside therein a nearly as normal livelihood as possible in what is generally considered to be a family type setting. The testimony reveals that the process of living under such conditions - providing the patients the chance to care for their own beds and clothing and food and to give them a chance to exist in a normal neighborhood where they are available to common police and fire protection, as well as church services, schools and recreation, is considered to be a much more humanizing concept than simply warehousing these same individuals in institutions. The theory being that if these individuals are afforded an opportunity to live under such conditions they will be more normal and productive citizens of the community.

Under the definition of "family" in the Zoning Ordinance, there is no requirement of blood relationship. The only requirement is that residents live as a household unit and cook together. These requirements were met by the group home.

The evidence showing the non-institutional nature of the use and the failure of the record to show anything to the contrary, makes the finding by the Zoning Board that this group home is a "small institution" an error of law and an abuse of discretion and the decision of the Court below must be affirmed.

The Zoning Board also found that the preamble of the Zoning Ordinance should be controlling over the specific definition of family in the Ordinance and that group home for mentally retarded adults was in violation of the preamble. (R. 178a). As the Court below correctly held, the preamble ". . . cannot be construed to negate the unambiguous definition of family." (R. 192a).

At 1315.01 the preamble of the R-MF Article of the Zoning Ordinance states in relevant part:

> A Multiple Family Residential Use District in the City of Meadville, Pennsylvania is intended to preserve a predominantly residential use in which the area, height and use requirements are designed to accommodate an existing intensity of use and to encourage new uses in a manner that will tend to preserve the residential character and to promote a harmonious development of the use district as a whole. (Emphasis supplied.)

The Zoning Board had already determined that the use of 636-638 Cullum Street as a group home for eight mentally retarded adults complied with a family use as defined by the Ordinance. After reaching this conclusion, the Board applied criteria only applicable to "new uses" in a R-MF District. A family use is not a "new use" and therefore consideration of criteria as "preserving residential character" and "promoting harmonious development of the use district as a whole" was an error of law. As the Court below determined, ". . . not only does the proposed [group home] use fit the municipal definition of 'family', but even considered as a 'new use' the preamble specifically states that such uses are to be encouraged." (R. 192a-193a).

Assuming arguendo that the "new use" criteria was applicable to the group home, it was an error of law and an abuse of discretion for the Zoning Board to conclude that it was a violation of the preamble. The Zoning Board found that the group home would not preserve the residential character of the neighborhood, would not promote harmonious development of the district and would be injurious to the neighborhood. (R. 178a)

The Zoning Board must base its decision upon evidence presented. "If a Zoning Board's findings of fact are unsupported by substantial competent evidence of record, it has committed a manifest abuse of discretion." West Whiteland Twp. v. Sun Oil Co. 11 Pa. Commonwealth 474, 479, 316 A.2d 92, 94, (1974)

citing De Cristoforo v. Philadelphia Zoning Board of Adjustment, 427 Pa. 150, 233 A.2d 561 (1967). The record in the instant case is not only insubstantial, but devoid of any evidence that will support the above findings of the Zoning Board.

In United Cerebral Palsy, Inc. v. City of Scranton Zoning Board, supra, the Court found that the record must contain substantial evidence before a finding can be made that the establishment of a group home for mentally retarded suffering from cerebral palsy will cause a traffic or parking problem. At page 158 the Court stated:

> The concern evinced by the Protestants about traffic and parking was in no way backed or substantiated by facts or substantial testimony. There was not even any indication that the people who would live in this home would have access to the use of private automobiles. There was no evidence of any large-scale visitation to this home by families or friends of the patients involved and indeed, one is hard put to find in the record any evidence which would substantiate anything other than a normal increase which comes from the influx of additional population into any area.

The residents of 636-638 Cullum Street won't have automobiles. (S.R. 18b). Similarly there is no evidence of large-scale visitation and in any event persons who visit the residents will be able to park in the back. (S.R. 22b).

In Soble Construction Co. v. Zoning Hearing Board, 16 Pa. Commonwealth 599, 607, 329 A.2d 912, 917 (1974) the Court stated:

> "The burden is on the Township and the protesting neighbors, if there are any to prove by evidence that the impact of the requested use in its normal operation would be injurious to the public health, safety and welfare."

In the instant case, no evidence was presented to support the conclusion of the Zoning Board that the group home use would be injurious to the neighborhood. "Findings of fact of the Zoning Board must be based upon the evidence presented to it and not upon unsupported conjecture." De Cristoforo v. Philadelphia Zoning Board of Adjustment, supra, at page 152.

In West Whiteland Twp. v. Sun Oil Co., supra, protestants opposed a gas station in a community where such a use was permitted. Protestants alleged that such a use in its normal operation would present a danger to the public health, safety and general welfare. Evidence was presented that the noise, traffic and adverse economic impact caused by the station would be injurious to the neighborhood. The Court found that the evidence presented by the protestants failed to support the conclusion that the proposed use would raise the noise level, increase traffic problems, or have any deliterious economic effect on the neighborhood properties.

In the instant case, there is no evidence of any injury to the neighborhood by the use of 636-638 Cullum Street as a group home for mentally retarded adults.

Furthermore, even if the appellants had presented evidence that the proposed use would cause lower property values or violate aesthetic values, this would not support a finding of injury to the neighborhood. See Soble Construction Co. v. Zoning Hearing Board, supra.

The residential character of the group home was documented above. There is no evidence of any injury to the neighborhood or threat to its harmonious development. For the Zoning Board to make such findings based upon this record is an error of law and an abuse of discretion and the decision of the Court below must be affirmed.

2. AN INTERPRETATION OF THE ZONING ORDINANCE OF THE CITY OF MEADVILLE THAT A GROUP HOME FOR MENTALLY RETARDED ADULTS IS NOT A PERMITTED USE IN AN R-MF DISTRICT WOULD BE IN VIOLATION OF THE PHRA.

The Zoning Board held that the proposed use of 636-638 Cullum Street as a group home for eight mentally retarded persons was not a permitted use in a R-MF District. The Zoning Board was "of the opinion that the proposed use of the property by eight mentally retarded men would be injurious to the neighborhood." (R. 178a). The Court below correctly noted that there is not a scintilla of evidence to support this finding. (R. 192a). The Court below also observed:

> It would be incongruous to deny eight citizens who qualify as a family the right to live in an area which permits hotels, apartments, town houses and dormitories merely because they are retardates. Such denial would be to brand them as "legal lepers." (R. 192a).

The Zoning Board's interpretation of the Zoning Ordinance would exclude the proposed group home because of the handicap or disability of its residents.

The PHRA declares:

> "(T)he opportunity for an individual . . . to obtain all the accommodations, advantages facilities and privileges of . . . commerical housing without discrimination because . . . handicap or disability are hereby recognized as and declared to be civil rights which shall be enforceable as set forth in this act." 43 P.S. 952.

The PHRA further provides:

> "It shall be an unlawful discriminatory practice . . . For any person to: (3) Discriminate against any person . . . in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any commercial housing because of the . . . handicap or disability of any present or prospective owner, occupant or user of such commercial housing . . ."
> 43 P.S. 955(h)(3).

The purpose of the PHRA is to "eradicate the evils of discrimination in the Commonwealth." Pennsylvania Human Relations Commission v. Alto-Reste Cemetary Park Association, 453 Pa. 124, 306 A.2d 881 (1973). To achieve this fundamental purpose, the PHRA specifically provides that its provisions be liberally construed and that any law inconsistent with any of its provisions shall not apply. 43 P.S. 962(a).

In the instant case, the Zoning Board's interpretation of the Zoning Ordinance is contrary to the requirements of the PHRA. The Zoning Board's decision based upon the evidence presented, or lack of it, was a denial of housing accommodations because of the handicap or disability, mental retardation, of the group home's prospective occupants. This is a violation of their civil rights guaranteed under the PHRA and the explicit mandate of the PHRA prohibits such a result. Although the Court below did not specifically rely upon the PHRA in reversing the decision of the Zoning Board, its reference to the Zoning Board branding the residents of the group home as "legal lepers"

indicates its awareness of the unlawfulness of such an interpretation and again requires the affirmance of the decision of the Court below.

CONCLUSION

It is clear from the record that each of the findings upon which the Zoning Board based its decision were legally erroneous and manifested an abuse of discretion. Indeed, the interpretation of the Zoning Ordinance espoused by the Zoning Board appears to violate the PHRA as the only apparent basis for the decision is the mental retardation of the prospective residents. The Court below properly reversed the decision of the Zoning Board and the decision of the Court below must be affirmed.

The Commonwealth also adopts and incorporates by reference the brief of Appellees Bethesda and Kephart, et al.

Respectfully submitted,

THOMAS F. HALLORAN
Assistant Attorney General
KATHERINE L. FEIN
Assistant General Counsel
ROBERT P. KANE
Attorney General
Attorneys for Appellee Commonwealth of Pennsylvania