

MALVERN INSTITUTE,
Appellant,

v.

ZONING HEARING BOARD OF EAST
GOSHEN TOWNSHIP,
Appellee

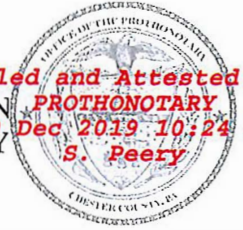
and

GREG AND LISA O'NEILL and SCOTT
AND TERRI RELICK,
Intervenors.

IN THE COURT OF COMMON
CHESTER COUNTY, PENNSY

NO. 2019-03106-ZB

Filed and Attested by
PROTHONOTARY
10 Dec 2019 10:24 AM
S. Peery



ORDER

AND NOW, this 10th day of December, 2019, for the reasons set forth in the foregoing Decision of the court, the Record shall be remanded to the Zoning Hearing Board of East Goshen Township for hearing, findings and issuance of a decision consistent herewith.

BY THE COURT:

Mark L. Tunnell,

J.



Type: ORDER
Case Number: 2019-03106-ZB
Case Title: MALVERN INSTITUTE VS. ZONING HEARING BOARD OF
EAST GOSHEN TOWNSHIP

So Ordered

A handwritten signature in blue ink that reads "Mr. Tunnell".

/s/ Mark Tunnell

Electronically signed on 2019-12-10 10:24:23 page 2 of 2

2019-03106-ZB

MALVERN INSTITUTE,
Appellant,

v.

ZONING HEARING BOARD OF EAST
GOSHEN TOWNSHIP,
Appellee

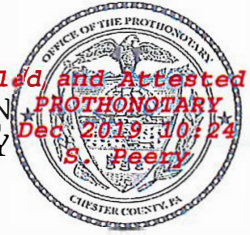
and

GREG AND LISA O'NEILL and SCOTT
AND TERRI RELICK,
Intervenors.

IN THE COURT OF COMMON
CHESTER COUNTY, PENNSY

NO. 2019-03106-ZB

Filed and Attested by
PROTHONOTARY
10 Dec 2019 10:24 AM
S. Peery



DECISION SUR APPEAL

I. Introduction

Malvern Institute for Psychiatric and Alcoholic Studies, Inc. ("Malvern Institute" or "Applicant") is the legal owner of certain real estate located at 940 W. King Road, East Goshen Township, Chester County, known as Chester County UPI No. 53-2-18 (the "Property"). The Property is improved with, *inter alia*, a two and a half (2 1/2) story masonry structure (the "Main Building") and a two (2) story barn (the "Barn"). The Property constitutes of approximately eight (8) acres in the Township's R-2 Low Density Residential District. Applicant uses the Property as a treatment center, as that term is defined in the Township's Zoning Ordinance (the "Ordinance"). The treatment center is a legal non-conforming use, as that term is defined in the Ordinance. An Existing Conditions Plan was made a part of the Application. Through the treatment center, Malvern Institute has, for over seventy (70) years, provided critical services to residents in need in Chester County and nearby, offering a continuum of care for those affected by

the pandemic of drug and alcohol addiction. All services are inpatient services and Malvern Institute's success is achieved through dedication to clinical care and innovative treatment solutions.

Applicant sought to expand the second floor of the Main Building on the Property by 6,200 square feet and to construct a loft in the Barn which would increase the floor area of that structure by 2,320 square feet (the "Original Proposal"). The Original Proposal would not increase the footprint of the Barn, with the exception of an eighty (80) square feet code required elevator and would only increase the footprint of the Main Building by 200 square feet via a small cantilever. The Original Proposal also included the permanent relocation of the smoking area from the rear of the facility to the front of the facility at a new smoking pavilion that would be farther away from residential neighbors as compared to the prior location. The prior smoking area would be converted to a quiet greenhouse space.

In the alternative, and at the recommendation of the Township's Planning Commission, Applicant also proposed a one-story addition to the Main Building which would increase the footprint of the Main Building by 6,980 square feet, and a loft in the Barn which would increase the floor area of that structure by 2,320 square feet (the "Alternative Proposal"). The Alternative Proposal would include a basement area beneath the one-story addition, and would be comprised of a total increase in floor area of approximately 13,180 square feet to the Main Building.

The proposed expansion in floor area of the Main Building and Barn are asserted to be necessary to accommodate the natural expansion of the Applicant's pre-existing legal nonconforming use, to enable Applicant to modernize its facility in accordance with

industry standards, to remain competitive in its marketplace, and to more effectively serve and treat its patients and the residents of Chester County.

II. Project Background

In order to expand the floor area of the Main Building serving its legal nonconforming use, Applicant sought a special exception under Ordinance Chapter 240, Section 40.C(2)(e). Applicant also sought a dimensional variance from Ordinance Chapter 240, Section 40.C(2)(c) in order to permit an expansion of floor area serving a nonconforming use by 36% pursuant to the Original Proposal, or by 59.45% pursuant to the Alternative Proposal under the doctrine of natural expansion. The maximum expansion of floor area serving a nonconforming use permitted by the Ordinance is 25%.

Ordinance Chapter 240, Section 32.E(1) requires that fences erected in the side or rear yards shall not exceed six (6) feet in height on a residential lot and eight (8) feet on any other lot. The Applicant contended that the subject lot is a commercial lot. Applicant requested a variance to permit an eight (8) foot sound fence. The sound fence is designed to improve existing conditions relative to the historical use of the outdoor portions of the Property for patient activities. Section 32.E(2) states that fences which are erected within the required front yard shall not exceed four (4) feet in height. The Applicant proposed a six (6) foot tall estate fence in the front yard, and requested a variance to allow same.

Applicant also proposed a twenty-two (22) foot wide one-way section for a portion of the driveway to accommodate additional parking adjacent to that section of the driveway and to avoid additional parking in the front yard setback. However, at night, the driveway will operate as a two-way driveway so that vehicle egress can be observed.

During that time period, a variance of two (2) feet in driveway width was sought from Section 33.C(10).

Ordinance Chapter 240, Section 31C(3)(mm) requires a setback of a minimum of 250 feet from any lot line of an existing dwelling that has a different owner from the owner of a treatment center lot. A variance from that section was requested to permit that proposed setback of the first floor addition.

Finally, Applicant requested a variance from Chapter 240, Section 58D to allow the variances to remain in place and to allow the improvements to occur no later than twelve (12) years from approval of the variances.

There would be no increase in the number of residents' beds (80). Additionally, neither proposal would necessitate an increase in staff.

Malvern Institute sent a letter to neighboring property owners inviting them to visit and tour the facility and to review the plan. Numerous neighbors attended one of several meetings and provided insight and feedback to the Applicant. Changes were made to the plan as a result of those meetings, resulting in the Original Proposal which, with the exception of a proposed greenhouse at the former rear smoking area, the 200 square foot second floor cantilever, the proposed new smoking pavilion, and the small elevator shaft area, included no increase of the footprint of the structures on the Property.

At the behest of the Township's Planning Commission, Applicant devised the Alternative Proposal which, while adding to the footprint of the Main Building, further addressed certain concerns regarding privacy and screening for the Property's residential neighbors. Applicant stated in its application that the Alternative Proposal would further enhance the quality of life both for Applicant's patients and neighbors by providing space

for recreation in the basement area, which would decrease the amount of outdoor recreation on the Property.

Hearings were held before the Township's Planning Commission and thereafter before the Zoning Hearing Board on February 13, 2018, March 19, 2018, April 25, 2018, May 4, 2018, June 25, 2018 and September 6, 2018.

Malvern Institute appeals from the Decision and Order of the East Goshen Zoning Hearing Board dated February 28, 2019 denying both the Original and Alternative Proposals.

III. The Zoning Hearing Board's February 28, 2019 Decision

The Zoning Hearing Board found that the evidence presented by the Malvern Institute was insufficient for the Zoning Hearing Board to conclude that the specific expansion shown in either the Original or the Alternative Proposal was required in order to meet the Applicant's programmatic needs. It found no evidence in the record establishing what additional floor area, either individually or in the aggregate, was required in order to maintain the economic viability of the treatment center use. (F.F. Nos. 51, 53). Moreover, the Zoning Hearing Board found that there was no evidence in the record related to the specific programmatic needs of Applicant to the size of the proposal for expansion (F.F. No. 56). Finally, the Zoning Hearing Board found that the Original Proposal, comprising a 34.04% expansion, rendered it impossible to find that the Alternative Proposal constituting a 52.92% expansion was the minimum expansion that would afford relief under Section 910.2(5) of the Municipal Planning Code (F.F. No. 59).

In its application of the law the Zoning Hearing Board held the case of *Jenkintown Towing Serv. v. Zoning Hearing Bd.*, 67 Pa. Commw. 183, 446 A.2d 716

(1982) as controlling concerning how to analyze whether the Malvern Institute had met its burden under MPC Sections 910(a)(1)-(3) to show that denial of the requested relief would result in the demise of the enterprise, as distinguished from merely taking advantage of a normal increase in business. (Decision, at pp. 22-23). Furthermore, under *Jenkintown Towing Serv.*, the Zoning Hearing Board found that the criteria for the grant of a variance under MPC Sections 910(a)(4) and (5) applied to the Malvern Institute's application. Concerning MPC Section 910(a)(4), the Zoning Hearing Board found that the Malvern Institute's proposal would alter the character of the adjacent residential neighborhood "substantially and permanently impairing the appropriate use or development of adjacent property, thereby causing detriment to the public welfare." (Decision, at p. 26).

In respect to MPC Section 910(a)(5), the Zoning Hearing Board found that the Malvern Institute failed "to connect its programmatic needs to evidence that it is proposing the minimum expansion shown to be necessary to meet the proven need and to maintain the viability of the facility." (Decision, at p. 30). Given the two Proposals by the Malvern Institute, one being significantly smaller in size than the other, the Zoning Hearing Board found that there was no basis for determining that the proposed expansion was the minimum required to meet the Malvern Institute's essential needs. In addition to the expansion of the use beyond the 25% permitted by the Ordinance, the Zoning Hearing Board found that there was no evidence in the record to support Malvern Institute's request that the minimum deviation in the required buffer setback of 250' be reduced to 45', a reduction of 82%.

IV. Review of appeal to Common Pleas

In evaluating a local agency decision, where a complete record is made before the agency and the court takes no evidence, the scope of review is limited to determining whether the agency committed an error of law or a manifest abuse of its discretion. *Valley View Civic Assoc. v. Zoning Hearing Bd. of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983); *Herr v. Lancaster County Planning Comm'n*, 155 Pa. Commw. 379, 387, 625 A.2d 164, 167 (1993); *Allegheny West Civic Council v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997); *41 Valley Assocs. v. Bd. of Supervisors of London Grove Twp.*, 882 A.2d 5, 13 (Pa. Commw. 2005); *Piatek v. Pulaski Twp.*, 828 A.2d 1164 (Pa. Commw. 2003). If the record of proceedings of the local agency demonstrates the existence of substantial evidence, a reviewing court is bound by the local agency's findings. *In re Nevling*, 907 A.2d 672 (Pa. Commw. 2006). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Valley View Civic Assoc.*, 501 Pa. at 555, 462 A.2d at 640; *Herr*, 155 Pa. Commw. at 387, 625 A.2d at 167.

In considering appeals from decisions of local agencies, a reviewing court is not to substitute its judgment on the merits for that of the municipal body. *In re Thompson*, 896 A.2d 659, 667 (Pa. Commw. 2006). Furthermore, a reviewing court must accept the credibility determinations made by the municipal body which hears the testimony, evaluates the credibility of the witnesses and serves as fact finder. *Id.* In determining whether the Zoning Hearing Board committed an error of law or an abuse of discretion, this court must give great weight and deference to the Zoning Hearing Board's

determination. *Snyder v. Zoning Hearing Bd. of Warminster Twp.*, 782 A.2d 1088, 1089 (Pa. Commw. 2001). "[A]n abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." *Paden v. Baker Concrete Constr., Inc.*, 658 A.2d 341, 343 (Pa. 1995). This court will adhere to these principles of law.

The addiction treatment center at Malvern Institute has been in operation since 1948, over seventy (70) years. As a result of the Township's zoning regulations being implemented in 1953, it is categorized for zoning purposes as a lawful, nonconforming use.

"The continuance of nonconforming uses and structures is permitted notwithstanding the obstruction thereby of a public purpose in order to preserve the validity of zoning regulations which otherwise would be vulnerable to attack as working an uncompensated deprivation of these property interests." *Nettleton v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033 (2003).

On the other hand, the protected status of nonconforming uses is not without limits and is in tension with an equally well-established preference for lawful land development. As the Supreme Court has also noted, "nonconforming uses, inconsistent with a basic purpose of zoning, represent conditions which should be reduced to conformity as speedily as is compatible with the law and the Constitution." *Hanna v. Bd. of Adjustment of Borough of Forest Hills*, 408 Pa. 306, 312-13, 183 A.2d 539, 543 (1962); *see also Pa. Northwestern Distribs., Inc. v. Zoning Hearing Bd. of the Township of Moon*, 526 Pa. 186, 584 A.2d 1372 (1991).

V. **Doctrine of Natural Expansion**

Malvern Institute seeks to expand its nonconforming use. Under the doctrine of natural expansion, "the right to expand as required to maintain economic viability or to take advantage of increases in trade, is also constitutionally protected." *Nettleton*, 574 Pa. at 51, 828 A.2d at 1037, n. 3. "[A] nonconforming use cannot be limited by a zoning ordinance to the precise magnitude thereof which existed at the date of the ordinance; it may be increased in extent by natural expansion and growth of trade, neither is it essential that its exercise at the time the ordinance was enacted should have utilized the entire tract upon which the business was being conducted." *Humphreys v. Stuart Realty*, 364 Pa. 616, 73 A.2d 407, 409 (1950); *see also Silver v. Zoning Bd. of Adjustment*, 435 Pa. 99, 255 A.2d 506, 507-508 (1969).

The right to expand a nonconforming use to provide for the natural expansion and accommodation of increased trade "is a constitutional right protected by the due process clause." *Jenkintown Towing*, 67 Pa. Commw. at 186, 446 A.2d at 718, citing *Silver v. Zoning Bd. of Adjustment*, 435 Pa. 99, 102, 255 A.2d 506-07 (1969). Accordingly, a municipality cannot prohibit, *per se*, the natural expansion of a nonconforming use. *Silver*, 435 Pa. at 103, 255 A.2d at 506.

If an applicant's proposed expansion would violate ordinance requirements such as a front setback or other dimensional regulations the applicant must obtain a variance. *Jenkintown Towing*, 67 Pa. Commw. at 190, 446 A.2d at 720.

As the Supreme Court said in *Silver*, "[t]he rationale behind the [nonconforming use expansion] doctrine can be traced to the due process requirements protecting private property. If a person owns property which constitutes a valid nonconforming use, it is

inequitable to prevent him from expanding the property *as the dictates of business or modernization require.*" 435 Pa. at 102, 255 A.2d at 507. The *Jenkintown* court went on to quote Ryan, *Pennsylvania Zoning Law & Practice*, Section 7.4.5 (1981) as follows:

[A]ny protection of the expansion right must relate to a protection of the preexisting use itself. Certain types of modernization or expansion are necessary to the survival of a commercial or industrial enterprise. Where the permission which the owner seeks falls in this category, protection of the nonconforming use itself requires that the right of expansion be recognized in the absence of evidence of a compelling injury to the public interest [citing *Silver*].

VI. Argument

At this juncture, the court adopts the following argument from the Brief of Appellant, Malvern Institute, starting at page 23:

Louis W. Merlini, the Institute's Vice President of Operations at both its Malvern and Willow Grove facilities, focused his attention on the necessity for the proposed expansion in addressing the Original Expansion Proposal for the second-story addition to the Main Building. N.T. 5/14/18, pp. 240-246.

"...I have three counselors sharing an office, another three counselors sharing an office. The amount of scheduling that has to go on so a counselor can get one-on-one time with their patient load is enormous. These are the leads. They don't have a proper room to spend time with a patient.... the second story addition...I think was just a response that we had a structure, build on top of it. It was kind of a simple approach. Wasn't going to give us all we needed or wanted. Let's do that. If we can get another story on the barn we can get some treatment space, get some of these offices spread out.... If we can get – nobody wants more beds. People want to provide the kind of resources that patients we have on-site can get better care, better outcomes. This [the expansion] does not drive any new revenue or more revenue..." N.T. 5/14/18, p. 243.

"If we can really come up with some real activity space, a learning center – we don't have space to put any computer training for life skills. We just can't do it. We can't have other things we talked about. Women's Empowerment Program which is a huge success at Willow Grove. We have been [un]able to

[en]gender separate [space] to have these kinds of programs that empower women in their march to recovery. We have nowhere to do it. We can't do it." N.T. 5/14/18, p. 246-247.

"Malvern has a reputation started here on King Road seventy years ago. We need to continue to add to the modalities and treatment capabilities that we have. We want to provide a better environment to have better outcomes." N.T. 5/14/18, p. 248.

On cross examination, Mr. Merlini was asked whether it is true that the Institute could reduce its number of patients at the Malvern facility and still provide the level of patient care he addressed in his testimony. He responded in the negative, and explained:

"...the fixed costs – just the fixed costs alone of the medical staff across the board starting with psychiatrists and nursing, three shifts seven days a week, you start with Master's degree clinicians, just take that. That's before you get to my support staff. Running a full dietary staff seven days a week... To keep the best therapists...find out who has the most educated, best trained, most experienced drug and alcohol therapists in the region. You're going to come out with Malvern. We have to pay those clinicians to stay with us." N.T. 5/14/18, p. 249.

On further cross examination, Mr. Merlini was asked if the Institute could gain extra space for new treatment modalities by converting patient rooms to those uses. He responded in the negative, and explained:

"No. You need eighty beds... You have to have people come through detox, you have to have rehab beds. When they are done several days of detox they have to have beds. The likelihood that you will fill all eighty beds every day is extremely slim, but we run into those peak periods. We, as a business model, need eighty beds." N.T. 5/14/18, p. 252.

As respects the Alternate Expansion Proposal prompted by the Township's Planning Commission and Supervisors, Mr. Merlini testified:

"I will give you insight. I was against the barn because I didn't want patients going back and forth between the barn and the main building... When the Township came back to us and said what would you think of a single story addition, first thing I said, okay, we have to start all over again with the architect and engineer. Then upon fifteen minutes of reflection it was very simple. Guess

we can dig a basement. We can really start to get maybe a gym, exercise room, music room, group rooms, spread out our counselors in a more effective way, keep patients inside... We didn't come up with the one story... It was my understanding it would create this courtyard effect to really help with neighbor's concerns with seeing patients outside. Hopefully reduce that significantly... Putting up acoustic fence with a lot of shrubbing." N.T. 5/14/18, pp. 245-246.

As Mr. Merlini concluded "This [the expansion] is not driving profit. This is driving [patient] outcomes" at 244, Lines 20-22: Exhibits A-3(a)-(d), A-3(g)-(h)(2)-(4), A-3(e) & (f). (emphasis added)

Jason Birl, AIA was qualified as a registered architect, and testified on the Institute's behalf to his design plans for the expansion of the Main Building's second floor and barn renovation under both the Institute's Original Expansion Proposal and the Institute's alternate plan for the one-story addition. All counsel stipulated at the outset of his testimony that he is familiar with the Property, which he has repeatedly visited in conjunction with his assignment and is conversant with the particulars of the Institute's zoning application. N.T. 4/25/18, p. 146; Exhibit A-12, Birl C.V. His testimony makes clear that in his design of both the proposed second story addition, the barn renovation and the alternate one-story addition, he was fully conversant with the space requirements for the various program needs and the uses to which all of the new building areas would be put. N.T. 4/25/18, pp. 150-160.

"Yes. These are spaces that [they] have been continually said (sic) that they need for operation of the facility here at Malvern. N.T. 4/25/18, pp.158, L. 24.

In response to the question whether the areas he was describing were indicated by his client as necessary for the Institute's operation, Architect Birl responded:

So taking the bedrooms or taking patient beds ...there is instead of three beds in a room there is two beds in a room. Also creating more space for counselors so counselors have their own dedicated space where they can work with a patient singularly or in group. Right now counselors are two or three to a room....So this would break out spaces for each individual counselor... group meeting spaces and...clinical space. N.T. 4/25/18, pp.158-159; Exhibits A-14 & A-15.

Birl's testimony and architectural drawings described with particularity the various uses to which each room and area would be devoted, relating them to the Institute's program needs. Exhibits A-14 and A-15. As designed, the 6,212 square feet second-story addition would provide needed areas for patient rooms, counselor offices and group meeting rooms, without any increase of impervious building coverage. The barn's loft conversion would provide much needed office space and an admission's office area. Three patients are now forced to share one undersized bedroom, whereas the added bedrooms would be restricted to not more than two patients per room. As previously noted, the one-story addition would also provide adequate office space for patient counseling and psychiatric care. Conversion of the loft of the barn would add 2,142 square feet of needed office and operational space, without any increase of impervious coverage, except 200 square feet to accommodate a Township building code-required elevator. There would be no increase in the height of the Barn and no alteration in the exterior appearance of the Barn other than the addition of windows in the existing exterior barn walls. N.T. 4/25/18, pp.150-152; Ex. A-14. Mr. Merlini testified these two additions, while not programmatically ideal, represent the bare minimum increase in floor area necessary to address operational and programing needs. N.T. 4/25/18, pp.146-153 and 166-167; Exhibit A-14. Birl echoed this observation in his testimony. N.T. 4/25/18, pp. 158-159.

Following the Commission's evaluation of the Institute's Original Expansion Application and plans, the Township authorities asked the Institute to change its original plans in favor of a one-story addition, the 6,975 square feet footprint of which is comparable in size to the second story addition originally proposed. Because this stand-alone addition would be constructed with a useable sub-grade basement area of 6,799 square feet, the need for the conversion of the barn loft to floor space was eliminated, and would also allow unanticipated space for a small work-out room, combined theatre/community room, lifestyles classroom, admissions/orientation office and staff office. 4/25/18, J. Birl, pp.157-167; Exhibit A-14. Architect Birl explained the considerations that prompted the location of the one-story addition were preservation of the existing outdoor recreational areas and providing added buffering for the neighbors from sound and visual incursions. Exhibit T-1, para. 13.

Birl prepared a floor area chart comparing the second-story addition and the one-story addition, that included the square footage of all buildings on the Property, existing and proposed, and testified extensively about each. Exhibit A-16. It is from this chart that the Board derived its determination of the percentage increases in floor area in the alternate proposals. Each plan was consistent in including the addition of a smoking pavilion, 800 square feet in area, and small greenhouse, 480 square feet in area, located to the side and rear of the existing Main Building. The roofed smoking pavilion (closed on all sides with three openings) is proposed to be located to the front of the Main Building and is intended to create a restricted smoking area that is equipped with a "Smoke Eater", to eliminate cigarette smoke, a condition sought by the Township. If the one-story addition were constructed, the pavilion would be completely shielded from neighbors to the west. Exhibit T-1, para. 15 & 16.

We respectfully argue that the Board's finding No. 56, that "No evidence of record related the specific programmatic needs of the Applicant to the size of either proposal for expansion" is erroneous. * * * As well, the Board credited the Institute's testimony that additional and improved program space was needed, but reasoned that its evidence fell short of proving that either proposed expansion was the minimum required "to meet Applicant's intake, detox, rehabilitation, programmatic, supervisory, counseling, recreational and other essential needs". Decision, p. 30, penultimate paragraph. Presumably, its conclusion is premised on its finding that "...no evidence of record establishes the additional floor area required for these proposed programs either individually or in the aggregate...". Board Finding #53. These findings ignore the testimony of Architect Jason Birl, recounted above, who expressly testified that his architectural renderings of the proposed second-floor addition in the Original Expansion Proposal, both in size and in designation of the purpose served by each room, had been explained to him in terms of programmatic needs by its Vice-President, Louis Merlini, and was the basis upon which he designed and presented the addition in his architectural drawings. In proving minimum relief necessary, the Board's insistence on a precise calculus correlating each program need to measurable space for each component program part was an unnecessary component of the Institute's required proofs. See Exhibits A-14 and A-16. Based on the genesis of the Alternate Proposal for a one-story building addition, the comparable sizes of

each one-story addition, the Board's Finding No. 56 was unwarranted. Equally, the Board's findings Nos. 18, 20, 21 and 53 do not support the Board's legal conclusions that the Institute failed to prove its legal right to the special exception pursuant to its Original Expansion Proposal.

The Board abused its discretion and committed error of law in finding that the Institute did not carry its burden of proof and burden of persuasion warranting a variance from the 25% nonconforming use expansion limitation imposed by Section 240-40.C(2)(c) of the Township's Zoning Ordinance to permit its Original Expansion Proposal. See, Board's Findings of Fact, Nos. 53 through 60; Institute's Notice of Land Use Appeal, Ascribed Erroneous Findings, paragraphs No. 39, 50-53, 56-60.

The Board found that the Institute's "offer into evidence" of its Original Expansion Proposal, in the absence of evidence that the original proposal was inadequate to provide it with the minimum relief necessary to meet its needs, made it impossible for the Board to find that the greater relief needed for the Township-sponsored alternate plan met the minimum relief standard of Section 910.2(a)(5). Conversely, it found that the submission of the alternate proposal negated the Institute's proofs that its original proposal was the minimum necessary to afford relief. In other words, the submission of the suggested alternate plan cancelled out the Institute's proofs that demonstrated its original plan's compliance with the required minimum relief standard. On its face, this logic is reminiscent of the paradoxical Air Force rule created by Joseph Heller in his novel, "Catch 22". Heller posed the plight of Captain John Yossarian, a World War II bombardier, stationed on the island of Pianosa. He is an individualist who wants to be relieved of flying in combat as a means to protect his own life by pretending to be crazy, but first has to be certified as such by a doctor after asking to be relieved of duty. Except, there's an Air Force rule known as the "catch-22", whereby any pilot who wants to get out of combat duty isn't really crazy. Thus, a "catch-22" is a paradoxical situation from which an individual cannot escape because of contradictory rules or limitations. That's the logic the Board used in canceling out both the Institute's Original Expansion Plan and its Alternate Expansion Plan.

Two considerations prompted the Township's alternate plan, the Township's recognition of the Institute's demonstrable need and long-standing

presence in the community and its desire to reduce any perceived impacts on the later-occurring residential neighborhood. The Board's opinion recognized both motivations as "laudable but unrelated to the issues before this Board", opining that the Alternate Proposal did not represent the minimum relief necessary, and that its mere inclusion as a proposal eliminated the Board's ability to consider the merits of the Institute's Original Expansion Proposal. Decision, pp. 31-35, quote at p. 31, 2nd paragraph. The Board found "No evidence was adduced by Applicant indicating the inadequacy of the Original Proposal". Finding #57. However, that was not the basis for its submission of an alternate proposal in the first place. The fact that the Institute agreed the one-story building provided more amenable space and made sense was not an abandonment of its original plan. Recall Township Manager Smith's testimony cited above and Township-imposed condition No. 4 requiring the one-story addition, and that only. Exhibit T-1. Except for elimination of the proposed second-floor addition, the Institute's original plan remained essentially unchanged.

Indeed, the Board's entire discussion at the foregoing pages of its Decision is perplexing and contradictory. Decision, pp. 31-35. For example, on one hand, the Board states, "The motivation Applicant's witnesses repeatedly described had nothing to do with survival and everything to do with the adoption of a more profitable business model". This conclusion is dead wrong. The Institute's desire to foster and continue its historic business model can in no wise be logically construed to be "the adoption of a more profitable business model". The Institute's testimony clearly and unequivocally proved the proposed expansion supported its existing business model. Conversely, the Board opines that "There can be no doubt that Malvern Institute requires additional space to remain viable in the pursuit of its business model", an obvious contradiction. Decision, p. 35, 1st and 2nd paragraphs. As well, the Board's use of the term, "survival" skews its intended meaning as used by Judge Craig in Jenkintown and its progeny. The right to a variance for expansion beyond the ordinance percentage limitation requires a showing that "modernization or other revision [is] essential to the continued viability of the business", Jenkintown, 446 A.2d at 722; Hamilton Township, 84 A.3d at 803. This concept has been described as the expression of a concomitant right "to develop and to continue its business by adapting to changing market conditions...". Domeisen, 814 A.2d at 857, which is

exactly the rationale behind the Institute's need to expand its physical facility. The Board's discussion of this issue ascribed a pejorative connotation to the term, "business model", equating it with "profit", in finding that the Institute's motivation in seeking relief was solely and simply to make more money. That was not at all the thrust of the Institute's evidence, as is evident from the testimony of its witnesses quoted earlier in this brief. How could the Institute increase its profit by incurring substantial debt to expand its facilities and allow and agree, as it has, to no increase in its current patient population?

In formulating its rationale to deny the application, the Board seized on testimony of the Institute's expert, Joseph Curran, who was asked the hypothetical question what might happen if the Institute were unable to provide its traditional drug and alcohol treatment model without the expansion. The Board quotes his equally hypothetical response at page 36 of its Decision, opining that the Institute would either shut down or accept "public funded" patients. Exercising an expertise it does not possess, the Board then reasoned that this brief segment of his testimony trumped any need for the Institute to expand, erroneously finding that "A shift in patient population would not require physical changes to the property". Board Finding #21. To the contrary, however, the Institute's un rebutted testimony proved the relief it sought was essential to the continued viability of its competitive business in the 21st century marketplace.

* * * The Board's rationale for its Decision, and findings and conclusions on which it is premised, discussed in this section of the Institute's brief, represent a capricious disregard of the totality of the evidence in this Record and a manifest abuse of discretion. In a zoning appeal, the Court's consideration of the appeal allows review for an agency's capricious disregard of the evidence. *Wintermyer*, 571 Pa. at 197-98, 812 A.2d at 483-84. "Since an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced, we hold that review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court". *Accord, Gaudenzia v. Zoning Bd. of Adjustment of the City of Phila.*, 4 Pa.Cmwlth. 355, 287 A.2d 698 (1972); *Zoning Hearing Bd. of Sadsbury Township v. Bd. of Supervisors of Township*, 804 A.2d 1274 (Pa.Cmwlth. 2002). A capricious disregard occurs

when the fact-finder ignores relevant, competent evidence. *Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.)*, 851 A.2d 997 (Pa.Cmwth. 2004).
Section III. Alleged Detriment to Neighbors.

The Board abused its discretion and committed error of law in finding and concluding that the Institute's use and expansion of its property is detrimental to its neighbors. See, Board's Findings of Fact, Nos. 47 & 48; Institute's Notice of Land Use Appeal, Ascribed Erroneous Findings, paragraphs No. 47& 48.

The Board made only two findings of fact about neighbor annoyances, including alleged "noise" from outdoor patient activities, occasional incidents of patient trespasses, an increase in patient numbers over the years, and visual impacts of existing Institute structures; and, general complaints about wandering patients and police responses to neighbor complaints about same, allegedly due to staff dereliction in assuring adequate patient oversight. Finding #47 & 48. These "findings" can best be described as conclusory in nature, though buttressed in three and one-half pages of Board discussion of perceived detriment to a few neighbors, enumerating therein various examples from neighbor accounts about which no explicit findings of fact were made. These included the following neighbor witnesses.

Intervenor, Teri Relick testified in objection to the Institute's application. N.T. 6/25/2018, pp. 295 et seq. She is not an abutting neighbor of the Institute's campus but resides a street away. Exhibit A-18. Nonetheless, she complained of noise that originates from outdoor patient recreational activities. She described the campus as "blended in with the neighborhood" and the Main Building as "kind of consistent with the look of the neighborhood". (at p. 308). Her objections were primarily the visual effects of both proposals as inconsistent with a residential neighborhood, although she admitted the existing facilities predate her 25-year residency. (at p. 309). She described the proposed fence as "this foul wall", even though the Institute's plans and the testimony show that it will be shielded from neighbors by a landscape buffer of thickly planted trees. (at p. 308). She admitted that she did not attend meetings to which she was invited by the Institute intended to acquaint neighbors with the details of its proposed expansion plans. (at pp. 301 & 313).

Joseph Fenimore's property at 3 Treemont Drive does not abut the Institute's campus but sits at a higher elevation. N.T. 6/25/2018, pp. 316 et seq. He testified to an incident in 2006 when he called police after he saw presumably a patient climb a neighbor's fence to retrieve an unknown item. (at pp. 319-20). He complained of noise he heard in 2017 originating from outdoor campus activities. (at p. 324); and, he objected to the expansion proposal because he can look into the campus from his back patio and observe people "sitting on the bench". (at p.324).

Deborah Marovick resides at 8 Brookmont Drive. N.T. 6/25/2018, pp. 325 et seq. Her property abuts both the southwest corner of the Institute's campus and a contiguous empty lot. Exhibit A-18. On an undetermined date while having dinner on her patio, she testified she observed a patient run across the empty lot and be restrained by police, called, she was sure, by Institute staff. (at pp. 327-28). In 2015 her husband had a confrontation on their property with a patient and called police. He declined to pursue disorderly conduct charges against the patient. The Institute staff called and apologized to the Marovicks for this disturbance. (at p. 328). She complained to police in 2015 about abusive language emanating from the campus. Staff at the Institute called and apologized. (at p. 328 et seq.). She was prompted by these incidents to keep a log of similar undetermined incidents. She has observed suspicious activity on the adjacent empty lot and has removed discarded liquor bottles and drug paraphernalia from it. (at pp. 330-332). However, she offered no testimony and no proof, aside from inference and speculation, that such suspicious activity, discarded liquor bottles or drug paraphernalia bore any relationship to the Institute or its patients.

Rebuttal was heard from Dennis A. Deal, Malvern Institute's Chief Clinical Officer, who testified that following various neighbor complaints, he has become very familiar with the issues raised by the neighbors, has increased supervision of patient outdoor activities on campus, has himself stopped five patient volleyball games due to raucous conduct and language, and seen to the imposition of more individualized patient restrictions and tighter staff control of patient activities and the interdiction of bad patient behavior. Surveillance of nighttime patient activities has also been increased, with electronic monitors and cameras at each door. N.T. 6/25/2018, pp. 360 et seq.

There is significant testimony elsewhere in the Record that supports the Institute's position that expansion of its facility under either of the proffered plans would significantly address virtually all the issues the neighbors testified about, providing significant improvement and protection. This evidence includes the testimony of Jack Zybura, Acoustical Engineer, who conducted sound studies and spoke at length about the benefits of the solid wall proposed to shield neighbors from both sights and sounds emanating from patient out-door activities, minimizing both. N.T. 9/6/2018, pp. 375-384. Robert Plucienik, P.E., who testified from several perspectives. He described how both plans would improve buffering and screening of the Institute's property from neighbors. N.T. 3/19/2018, pp. 114-116; N.T. 4/25/2018, pp. 127-132; and the ways in which either the original two-story plan or the alternate one-story plan would further improve security, including their integration with the security measures specified by the Supervisors. N.T. 3/19/2018, pp. 88-89 & 105-110; N.T. 6/25/2018, p. 283.

From this testimony, the Board drew the legal conclusion that allowance of the variance to expand the Institute's nonconforming use would constitute a detriment to the adjoining neighborhood and thus was contrary to the public interest. While the number of cases addressing this leg of the variance standards are numerous, few, if any, clearly define the quantum and quality of evidence necessary to support such a conclusion. *Goldstein v. Zoning Hearing Bd. of Twp. of Lower Merion*, 19 A.3d 565, 569 (Pa.Cmwlt. 2011). Section 910.2(a)(4) of the MPC characterizes the standard as an alteration of the essential character of the neighborhood, or a substantial and permanent impairment of use or development of adjacent property, or a detriment to public welfare. Case law dictates that the evidence presented by objectors to a special exception must show, to a high degree of probability, that the proposed use will generate adverse impacts not normally generated by this type of use, and these impacts must be shown to pose a substantial threat to the health and safety of the community. *Siya Real Estate LLC v. Allentown City Zoning Hearing Board*, 2019 WL 2306303, Cmwlt. Ct., filed 5/31/19. So, in judging both special exception and detriment, consideration of the quality and quantum of substantive proof necessary to sustain the Board's adverse conclusions is critical and controlling. In this case, Malvern Institute's presence on King Road preceded its residential neighbors,

whose properties have been fully developed. Logically, therefore, it is impossible for the proposed expansion to impair the development of the land adjacent to it. Neither is it possible for the proposed expansion to alter the neighborhood's essential character by the construction of a one-story building that will house no additional patients, require no additional staff or otherwise alter the character and intensity of the existing nonconforming use, save the existence of the building itself. Indeed, were the one-story addition approved, it would shield neighbors from the alleged annoyances described by the objectors, as would the proposed fencing, landscaping, other improvements and required patient monitoring that would be added as a condition of the construction under either proposal. Public welfare is an amorphous term historically employed in zoning law to measure the extent of government regulation of private property. See *Village of Euclid v. Ambler Realty Co.*, 272 US 365 (1926). Given the instant facts, it cannot be logically argued and should not be concluded that adding a building or second floor addition to a government licensed health care facility that has existed in the same place for over 70 years is a detriment to public welfare.

Instantly, the record demonstrates that the Institute's neighbors are many times greater in number than the three objectors who testified in opposition to its application. Yet, none but those three neighbors appeared and voiced opposition to the proposed expansion, and only two neighbors sought and were granted party status. The evidence is simply inadequate to support the Board's findings and conclusions that granting of the requested relief would be detrimental to the neighbors, much less detrimental to public welfare."

(Brief of Appellant, Malvern Institute, pp. 23-39).

The court finds no little irony in the thought that this dedicated treatment facility is detrimental to the public welfare.

VII. Conclusion

After careful review, this court concludes that the Decision of the Zoning Hearing Board of February 28, 2019 represents a capricious disregard of the material and

competent evidence in the record and a manifest abuse of discretion.

An appropriate order follows.

BY THE COURT:

Date: _____

Mark L. Tunnell, J.



Type: DECISION BY THE HONORABLE
Case Number: 2019-03106-ZB
Case Title: MALVERN INSTITUTE VS. ZONING HEARING BOARD OF
EAST GOSHEN TOWNSHIP

So Ordered

Mr. Tunnell

/s/ Mark Tunnell

Electronically signed on 2019-12-10 10:24:20 page 23 of 23

2019-03106-ZB