



**Division of Development Administration and Review**

City of Pittsburgh, Department of City Planning

200 Ross Street, Third Floor

Pittsburgh, Pennsylvania 15219

**ZONING BOARD OF ADJUSTMENT**

**Date of Hearing:** November 30, 2017

**Date of Decision:** February 19, 2018

**Zone Case:** 362 of 2017

**Address:** 420 Grove Street

**Zoning Districts:** RM-M

**Ward:** 5

**Neighborhood:** Middle Hill

**Owner:** Gaudenzia Foundation, Inc.

**Applicant:** Moss Architects (for the Owner)

**Request:** New construction of 3-story structure for use as community home, with parking.

<b>Special Exception</b>	911.02/911.04.A.84	Use of community home is a Special Exception in the RM zoning district
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**Appearances:**

**Applicant:** David Brooks, Joel Patterson, Andrew Moss, Anna Foster, Hal D. Coffey (Attorney)

**In-Favor:** Brent Thompson, Alex Newberry, Khalil Rahmed

**Opposed:** Marimba Milliones, Dan Wood, Brenda Tate, Rev. Glenn Garrett Grayson, Jerome Reynolds, Felicity Williams, Shinora Grayson Johnson, Alexis Clipper, Daniel Shaffer, Charlotte Ka, Kirk Holbrook, David Serbin, Jonathan Kamin (Attorney)

**Observing:** B. Halen

**Findings of Fact:**

• **Identification of the Subject Property and the Applicant:**

1. The Subject Property is located at 420 Grove Street, in the Middle Hill neighborhood, in an RM-M (Multi-Unit Residential, Moderate Density) District.

2. The Subject Property, which is vacant, is comprised of 4 consolidated parcels, with a total area of 9,072 sf.

3. Calliope Way is located at the rear of the Subject Property and an unnamed 15'-wide alley extends along one side of the property from Grove Street to a garage/warehouse building on the opposite side of Calliope Way.

4. The parcel located across the unnamed alley from the Subject Property is within the LNC (Local Neighborhood Commercial) District that extends along the Centre Avenue corridor.

5. The Applicant is Gaudenzia Foundation, Inc. ("Gaudenzia"), Pennsylvania's largest drug and alcohol treatment system.

6. With the application at issue here, Gaudenzia seeks approval for a community home, which is permitted as a special exception in RM-M Districts, pursuant to Code Sections 911.02 and 911.04.A.84.

- **Prior Zoning History:**

7. In June 2017, Gaudenzia submitted a zoning application seeking variances from the Code's setback, parking lot screening and off-street loading provisions to allow for the construction of a 50'/3-story structure, with 15 bedrooms, staff offices, dining facilities and rooms for counseling and rehabilitation programs.

8. Gaudenzia also sought a special exception for a community home use, pursuant to Section 911.04.A.84. Because it sought to serve up to 30 persons, it was required to seek a use variance from Section 911.04.A.84(c), which provides that the number of persons served by a community home "shall not exceed an average of one (1) per bedroom."

9. Following a public hearing on July 13, 2017, the Board issued its decision on October 12, 2017.

10. With its October 12, 2017 decision, the Board approved the requested dimensional variances for the proposed 50'/3-story structure and the variance from the off-street loading space, subject to approval from the Department of Public Works for use of the right-of-way for deliveries. The Board denied the use variance from Section 911.04.A.84(c) and thus denied the requested special exception for the community home use.

11. No appeals of the Board's October 12, 2017 decision were filed.

- **Special Exception Application For Proposed Community Home Use, At Issue Here:**

12. As of October 30, 2017, Gaudenzia filed an application for a special exception for a community home on the Subject Property, within the new 3-story structure that was approved with the Board's October 12, 2017 decision.

13. The application was accepted and notice, including posted notice on the Subject Property, was provided for the November 30, 2018 hearing. (Ex. A-1).

14. With its application, Gaudenzia proposes a community home that would provide in-patient drug and alcohol counseling and rehabilitation programs as part of the use. Residents would typically stay for up to 90 days for rehabilitation. Ten to fifteen employees would typically be on-site at any time.

15. The building would have one primary means of ingress and egress. It would have common dining facilities and other common areas. As a new structure, it has been designed to comply with the applicable health, safety and building codes. Six parking spaces would be provided on-site.

16. Gaudenzia's proposed community home would serve up to 15 people, with 15 bedrooms and one person per bedroom.

• **Evidence And Testimony Presented At The November 30, 2017 Hearing:**

17. The Board conducted a hearing on Gaudenzia's special exception application on November 30, 2017.

18. At the hearing, Gaudenzia presented credible evidence and testimony relating to the proposed use of the approved building for a group of no more than 15 unrelated persons, who are seeking treatment for drug and alcohol disabilities and who would live together as single housekeeping unit, with shared common facilities and on-site staff. (Tr. 22).

19. The features of the new building designed for the proposed use would include:

- A single primary entrance at the corner of Grove Street and the unnamed alley, facing towards Centre Avenue, with additional emergency exits for fire safety (Ex. A-2; Tr. 10, 12-13, 42);
- A common dining, kitchen and living spaces for the residents (Ex. A-2; Tr. 14-15, 46-47);
- An interior courtyard space, on the second level and screened from Grove Street, for private outdoor space for residents (Ex. A-2; Tr. 23);
- A single utility connection for utility services (Tr. 15);
- Six on-site parking spaces, for no more than 10 to 15 employees (Ex. A-2; Tr. 16);
- Office space for on-site programs (Ex. A-2; Tr. 16); and
- Fifteen bedrooms, intended for no more than 15 residents (Ex. A-2; Tr. 6, 13-14).

20. The building has been designed to comply with the International Building Code standards that apply for the building and the proposed use. (Tr. 40, 49-50).

21. Marimba Milliones, the CEO and President of the Hill Community Development Corporation ("Hill CDC"), testified in opposition to the proposed use. (Tr. 60-76).

22. Ms. Milliones testified that she believes Gaudenzia's proposed facility to be contrary to the goals of the Centre Avenue redevelopment design plan for the area and to the commercial, residential, entertainment and cultural goals for the neighborhood. (Tr. 63-65). She described the community process that led to the creation of a Centre Avenue redevelopment design/master plan and review process and noted that developing a residential treatment facility within that area would be contrary to the goals set forth in the plan. (Tr. 64). Ms. Milliones acknowledged that the City has endorsed the redevelopment plan but has not adopted it. (Tr. 70-71).

23. Ms. Milliones opined that the approved building in the RM-M District would not be within the scale of other residential buildings in the area. (Tr. 65).

24. Ms. Milliones also testified as to complaints regarding the operations and impacts of another Gaudenzia facility on a different site in the area (Tr. 67-68) and disputed some of the letters in support of the proposed facility that Gaudenzia had provided. (Tr. 68-69).

25. Felicity Williams, the Hill CDC's program and policy associated and special assistant to Ms. Milliones, described efforts to identify locations for a new Gaudenzia facility, other than on the Subject Property. Despite touring four alternative locations, Gaudenzia did not pursue any of them. (Tr. 85-86).

26. Dan Wood testified on behalf of Councilman Dan Lavelle and also noted that the proposed facility is not consistent with the goals of the Centre Avenue redevelopment design/master plan. (Tr. 77).

27. Kirk Holbrook, chief of staff for State Representative Jake Wheatley, also testified in opposition and expressed concerns about conflict between the community's goals and a desire to find common ground with Gaudenzia. (Tr. 80-81).

28. Brenda Tate, a retired City police officer and resident, opposed the facility, based on her experience with drug addicts and concerns with respect to the location of the proposed facility. (Tr. 78-79).

29. Reverend Glen Garrett Grayson, the pastor of Wesley Centre AME Zion Church, asked that Gaudenzia respect the review procedures described in the development plan. (Tr. 81-82).

30. Jerome Reynolds, from the Mocha Art Gallery, testified as to efforts to establish the cultural district and the potential detrimental effects of the proposed facility. (Tr. 83-84).

31. The Board provided Gaudenzia and the Hill CDC with the opportunity to present proposed findings of fact and conclusions of law for the Board's consideration and directed that any submission be made to the Board in the first week of January. (Tr. 90-91). Gaudenzia submitted its proposed finding of fact and conclusions of law on January 4, 2018 and, without seeking an extension of time, the Hill CDC made its submission as of January 16, 2018. Although the Hill CDC's submission was not timely, the Board has addressed the arguments it raised.

## Conclusions of Law:

- **Relevant Provisions of the Zoning Code**

1. The Code's definition of "community home" is:

A group of more than eight unrelated disabled persons living together as a single housekeeping unit with shared common facilities. If required, staff persons may reside on the premises. A Community Home may not be a Multi-Suite Residential use or an Assisted Living use as defined in Section 911.02. For the purposes of this definition, 'disabled' means 'handicapped' as defined according to the Fair Housing Act Amendments of 1988, 42 U.S.C.S. 3602(h), and any amendments thereto. This use does not include Custodial Care Facilities. This use includes halfway houses where persons are aided in readjusting to society following a period of hospitalization or institutionalized treatment for a medical, psychiatric, developmental, emotional, or other disability or handicap. This does not include halfway houses for people leaving a correctional facility.

Code Section 911.02 (Use Table).

2. Pursuant to Code Section 911.02, the "community home" use is permitted in essentially all zoning districts, including all residential zoning districts, as a special exception, subject to the specific criteria set forth in Section 911.04.A.84.

3. The Code's specific criteria are: (a) the dwelling unit shall have one primary means of ingress/egress, a single mail box, single utility connections and common cooking/eating areas; (b) no alteration to exterior structure, unless required under health/safety codes; (c) the number of unrelated disabled persons is not to exceed an average of one per bedroom; (d) one parking space for every 3 persons on duty; (e) on-site offices limited to the program use; and (f) the Board is to determine that the proposed Community Home will not impact the neighborhood by contributing to "the saturation of Community Homes or other social service institutions."

4. The Code defines "dwelling unit" as "a building or portion thereof designed and used for residential occupancy by a single family and that includes exclusive sleeping, cooking, eating and sanitation facilities. Buildings with more than one (1) set of cooking facilities are considered to contain multiple dwelling units unless the additional cooking facilities are clearly accessory, such as an outdoor grill." Code Section 926.72.

5. Code Section 922.07.D sets forth the general criteria for the Board's review of a special exception, including whether the proposed use would create detrimental visual impacts; transportation impacts on vehicular or pedestrian circulation or traffic; operational impacts; health, safety and welfare impacts (including noise, emissions and vibrations); impact on property values; and impact on future and potential development in the vicinity of the property.

6. Code Section 922.07.E, titled "Successive Applications" provides that if the Board denies a special exception application, "a similar application" shall not be refiled unless significant changes have taken place or when the reapplication is for a different use.

- **Relevant State and Federal Law**

7. Under Pennsylvania law, a special exception is a form of a permitted use. A special exception is neither special, nor an exception. A use permitted as a special exception "evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community." *Allegheny Tower Assoc's., LLC v. City of Scranton Zoning Hearing Bd.*, 152 A.3d 1118, 1123 (Pa. Commw. Ct. 2017), citing *Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of L. Heidelberg Twp.*, 918 A.2d 181 (Pa. Comm. Ct. 2007) and Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, § 5.1.1; see also *Bray v. Zoning Bd. of Adj.*, 410 A.2d 909 (Pa. Commw. Ct. 1980).

8. In *Allegheny Tower*, the Commonwealth Court reiterated the rules regarding the initial duty to present evidence and the burden of persuasion in special exception cases, as set forth in *Bray*. With respect to the objective requirements for the special exception use, as specifically detailed in the ordinance, the applicant has the duty to present evidence and the burden of persuasion. The applicant has the initial burden to show that its proposal complies with the specific criteria delineated in the ordinance. *Bray*, 410 A.2d at 910.

9. If the applicant demonstrates compliance with the ordinance's objective criteria, a presumption arises that the use is consistent with the public health, safety and welfare. *Allegheny Tower*, 152 A.3d at 1121; *Bray*, 410 A.2d at 911; Ryan, *Pennsylvania Zoning Law and Practice*, § 5.2.6. The burden then shifts to any objectors.

10. With respect to any general detrimental impacts, the objectors have both the duty of identifying and presenting evidence of a potential impact and the burden of persuasion with respect to that impact. See *Allegheny Tower*, 152 A.3d at 1124, quoting *Bray*, 410 A.2d at 912-13. As the Court explained, "the applicant has the burden of persuasion only as to specific requirements, while objectors have the burden as to all general detrimental effects." *Id.*, citing *Marquise Investment, Inc. v. City of Pittsburgh*, 11 A.3d 607 (Pa. Commw. Ct. 2010).

11. To prove a “detrimental impact,” objectors to a proposed special exception cannot simply speculate but must raise specific issues regarding the effect of the proposed use on the public interest and they must show with “a high degree of probability” that the effect of the proposed use will be substantial. *Allegheny Tower*, 152 A.3d at 1123; *Manor Healthcare Corp.*, 590 A.2d at 71 (quoting *Archbishop O’Hara’s Appeal*, 131 A.2d 587, 596 (Pa. 1957)). Opinions, without more substantive evidence, do not satisfy the objectors’ burden of proof. *Appeal of R.C. Maxwell Co.*, 548 A.2d 1300, 1304 (Pa. Commw. Ct. 1988); *Commonwealth of Pennsylvania Bureau of Corrections v. Pittsburgh City Council*, 532 A.2d 12, 14-15 (Pa. 1987) (Court rejected the assertion that a pre-release center should be treated as a *per se* detriment to the community); see also *JoJo Oil Co., Inc. v. Dingman Twp. Zoning Hearing Bd.*, 77 A.3d 679, 688-89 (Pa. Commw. Ct. 2013) (A proposed use’s detrimental effect on public safety must be established with evidence, to a high degree of probability, noting that general concerns of the possibility of an explosion were insufficient to warrant denial of a special exception).

12. Under federal law, the Fair Housing Act Amendments (“FHA”) forbid discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.” 42 U.S.C. § 3604(f).

13. The FHA explicitly applies to recovering drug and alcohol addicts. See 42 U.S.C. § 3604(f)(3)(B), *United States v. Southern Management Corp.*, 955 F.2d 914 (4<sup>th</sup> Cir. 1992).

14. Under the FHA, Code Section 911.04.A.84(f) is not enforceable.

- **Requested Approval of Special Exception for “Community Home” Use**

15. Gaudenzia seeks approval to use the Subject Property, and the new structure approved with the October 12, 2017 decision, to serve a group of no more than 15 unrelated disabled persons, who would live together as a single housekeeping unit, with shared common facilities, with on-site staff members. The proposed use is not “multi-suite residential” or “assisted living” as the Code defines those terms. It is not a halfway house for people leaving a correctional facility.

16. The Board concludes that the proposed use is within the definition of “community home,” as set forth in the Code.

17. The Code does not specifically identify or limit the type of structure that can be used for a “community home.” The definition of the use and the specific criteria for the use in Section 911.04.A.84 require only a single “dwelling unit” and shared common facilities. A “dwelling unit” can be located in any “building or portion thereof.” The definition and the specific criteria for the use do not limit the “community home” use to existing buildings or to a particular type of residential structure and to do so would violate the FHA.

18. The Code permits the “community home” use as a special exception in all residential districts and in LNC Districts. By designating a use as a “special exception,” the governing body has determined that the use is one that is appropriate in these districts and is presumptively consistent with the promotion of the public health, safety and general welfare, subject to the specific criteria set forth in Section 911.04.84.

19. Gaudenzia submitted sufficient, substantial and credible evidence to demonstrate compliance with the Code’s specific criteria for the “community home” use, as follows:

- **Section 911.04.A.84(a) – one primary means of ingress/egress, single utility connections and common eating/cooking areas:** The facility will have a single primary entrance, single utility connections, a common dining area and a single kitchen (Ex. A-2; Tr. 10, 12-15, 42, 46-47). The additional emergency exits that are intended to comply with fire safety requirements are not the “primary means of ingress/egress.”
- **Section 911.04.A.84(b) – no alteration to the exterior structure:** Because a new structure is to be used, this provision does not apply here.
- **Section 911.04.A.84(c) – number of unrelated persons shall not exceed an average of one per bedroom:** Fifteen bedrooms are proposed for no more than 15 residents (Ex. A-2; Tr. 13-14).
- **Section 911.04.A.84(d) – on-site parking at a ratio of one space for every 3 persons on duty:** Six on-site parking spaces are to be provided for no more than 15 persons on duty (Ex. A-2; Tr. 16); and
- **Section 911.04.A.84(e) – office space is to be limited to on-site program use:** The office space proposed is to be used for on-site programs (Ex. A-2; Tr. 16).

20. The Board concludes that Gaudenzia met its burden of demonstrating compliance with all of the Code’s specific criteria for a special exception for the “community home” use.

21. The burden thus shifted to the objectors to identify and present evidence with respect to any general detrimental impacts and the burden of persuasion with respect to those impacts. See *Allegheny Tower*, 152 A.3d at 1124, quoting *Bray*, 410 A.2d at 912-13. The Board concludes that the objectors did not meet this burden.

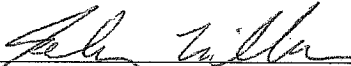
22. The Hill CDC presented evidence regarding the Centre Avenue redevelopment design/master plan and noted that developing a residential treatment facility within that area would be contrary to the goals set forth in the plan. (Tr. 64). Although the City has endorsed the redevelopment plan, it has not adopted it. As laudable as its goals are, the plan cannot be treated as legislation that supplants the legislatively-adopted requirements of the Zoning Code, particularly where the Code permits the Community Home use in all residential districts and in LNC Districts throughout the City.

23. In these circumstances, the testimony regarding the potential impact of the community home on the Subject Property can only be viewed as not meeting the “high degree of probability” required to demonstrate a detrimental impact of the proposed special exception use.

24. In its untimely submission to the Board, the Hill CDC asserts, for the first time, that the current application should be barred as a “successive application” under Section 922.07.E. The Board does not agree. In its first application, Gaudenzia sought a use variance to allow the proposed use because it sought approval for a use that did not comply with the Code’s criteria. Here, it seeks special exception approval for the community home use, in full compliance with the Code’s criteria. The Board concludes that the current application, which does not seek a use variance, is significantly different from the first application and is not barred. Further, the Board notes that the Hill CDC was provided notice of the application before the November 30, 2017 hearing and did not object to the City’s acceptance of Gaudenzia application at that time or at the hearing. It thus waived any argument under Section 922.07.E and Gaudenzia was entitled to rely on the City’s acceptance of the application.

25. Consistent with the evidence and testimony presented and the applicable legal standards governing special exceptions, the Board concludes that approval of the requested special exception is appropriate.

**Decision:** The Applicant's request for a special exception pursuant to Sections 911.02 and 911.04.A.84 is hereby APPROVED.

  
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for Alice B. Mitinger, Chair

  
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LaShawn Burton-Faulk

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John J. Richardson

FOR