

**BEFORE THE BOROUGH OF MILLERSVILLE ZONING HEARING BOARD**

IN RE: :  
: :  
APPLICATION OF : Case No. 1-2012  
MILLERSVILLE UNIVERSITY :  
FOR SPECIAL EXCEPTION :

**DECISION OF THE ZONING HEARING BOARD**

**A. FINDINGS OF FACT**

1. Applicant is Millersville University, P.O. Box 1002, Millersville, Pennsylvania 17551.
2. The properties which are the subject of this application are located at 135, 139, 203 and 205 North Prince Street in the Borough of Millersville, Lancaster County, Pennsylvania.
3. Applicant is the record owner of the four subject properties.
4. On July 27, 2012, Applicant filed a request for a special exception or, in the alternative, for a variance to demolish the four structures.
5. On August 21, 2012, Applicant submitted a letter to Ed Arnold, Borough Manager and acting Zoning Officer, agreeing to extend the 60-day time period for holding a hearing until September 27, 2012.
6. The property was posted and the application was duly advertised in a newspaper of general circulation.
7. A hearing was held September 27, 2012, at which time Joselle Cleary, solicitor for the Borough of Millersville, appeared and entered her appearance on behalf of the Borough. The hearing was stenographically recorded. The letter of August 21, 2012 was marked as Board Exhibit 1.

The Board took administrative notice of the prior record regarding these properties.

8. Applicant was not represented by counsel. Appearing at the time of the hearing on Applicant's behalf were Ronald E. Frisbie, Jr., the project manager for the construction project, and Thomas A. Waltz, Assistant Vice President for Facilities at Millersville University.

9. At the time of the hearing, Applicant submitted a 6-page exhibit detailing its proposal for demolishing the North Prince Street properties. This exhibit, which was also used as a visual presentation at the time of the hearing, was marked as Applicant's Exhibit 1. Also marked and received into evidence at the time of the hearing was Applicant's Exhibit 2, a copy of the binder submitted by Applicant in support of its zoning application.

10. The binder consisted of 39 numbered tabs.

11. The contents of the binder included all of the requirements under Section 380-30.(D)(2) regarding the historic classification of the buildings, reports from structural engineers, a report from the Borough code enforcement office, recent interior and exterior photographs, a statement of the proposed disposition of salvageable material, the ownership history of the property, the value of the land, and a certified property appraisal of each property.

12. As part of Applicant's case, Mr. Waltz and Mr. Frisbie testified concerning the relevant chronology of these properties and the present zoning ordinance.

13. In 1997-1998 Applicant created its Master Plan identifying proposed development of the campus.

14. The 1997-1998 Master Plan proposed, among other improvements, the acquisition and demolition of the 4 subject properties.

15. Between 2001 and 2002, Applicant acquired 139, 135, and 203 North Prince.

16. During the time period 2002 and 2003, the University allowed the local volunteer fire company to use those 3 properties for training purposes.

17. The training was done with the knowledge of Millersville Borough.

18. The training included cutting holes in the walls, floors, and joists, permanently weakening the structures. The ultimate plan was to allow the fire company to burn down the buildings.

19. The present zoning ordinance was adopted September 23, 2003.
20. The 2003 zoning ordinance described the subject properties as Class II historic structures.
21. In 2005, Applicant acquired the fourth property, 205 North Prince Street.
22. In 2005, Applicant submitted a special exception application for the demolition of the 4 structures. After a series of hearings, on June 23, 2005, the Zoning Hearing Board voted 2 to 2, with 1 member absent.
23. Under zoning law, the tie vote operated as a denial.
24. The University appealed the Board's decision to the Lancaster County Court of Common Pleas, which affirmed the denial; and then to the Commonwealth Court, which affirmed the decision of the Court of Common Pleas.
25. The original 2005 application was incomplete in a number of respects, as detailed in the two opinions of the Court of Common Pleas and in the decision of the Commonwealth Court.
26. The present application addresses the facts found to be missing from the 2005 application.
27. Testimony was offered that surface water has caused deterioration in the wooden structures to the point where the floors are unsafe, particularly in the rear of the structures.
28. Additionally, 205 North Prince Street has severe termite damage, which is a major cause of its structural deficiencies.
29. In 2012, the Borough of Millersville condemned all four properties as being unsafe.
30. In May 2012, the Borough of Millersville amended Section 380.30 of the zoning ordinance related to preservation of historic structures.
31. On September 5, 2012, Millersville Borough Planning Commission met to consider the demolition application presently before the Zoning Board. The Planning Commission made no recommendation regarding the special exception request.
32. On September 10, 2012, the Historic Commission of the Borough of Millersville met and recommended that the application not be approved.

33. At the time of the zoning hearing September 27, Michael C. Kirkham, President of Millersville Borough Council, appeared and testified that the Borough supported the requested special exception.

34. The Borough Solicitor, Joselle Cleary, made a statement to the same effect.

35. No one testified in opposition to the request.

36. Following the conclusion of testimony, and a closing statement by Ms. Cleary, the Board conducted an executive session with its solicitor.

37. Following the executive session, the Board resumed public session.

38. The Board conducted a roll call vote and voted 5 to 0 to approve the application as presented. The hearing was then adjourned.

## **B. CONCLUSIONS OF LAW**

1. The subject properties are located within the Historic Preservation Overlay District.

2. The subject properties are all designated Class II structures.

3. The Historic Overlay District Ordinance was amended by Council in May 2012.

4. The present application is governed by the amended ordinance.

5. The old Historic Overlay District Ordinance established seven requirements for a special exception to demolish a Class II structure.

6. The amended Ordinance has five requirements.

7. The present ordinance provides that, in order to obtain a special exception for demolition of a Class II structure, the applicant should provide evidence that:

(a) There is no feasibility to continue the current use.

(b) Other uses permitted within the underlying zoning district, either as permitted uses, special exception uses, or conditional uses, have been denied or are not feasible.

(c) Adaptive use opportunities do not exist.

(d) The proposed new building structure or use of the property will not adversely affect the historic character or architectural integrity of

neighboring historic properties, the neighborhood, or the community, and

- (e) The applicant has not contributed to the existing conditions, either through neglect or prior renovation, conversion, alteration, or similar physical action.

4. The amended ordinance deleted two requirements, (1) that the applicant prove that the building proposed to be demolished did not provide a reasonable rate of return upon the initial investment; and (2) that the proposed demolition would not adversely affect the historic significance or architectural integrity of neighboring historic buildings or the historic character of the neighborhood or community.

5. Applicant's demolition application is in conformity with the Historic District Ordinance, as amended.

6. Applicant offered credible testimony as to the general and specific criteria necessary for the grant of a special exception.

7. No credible testimony was presented that demolition of the buildings on the subject properties would be adverse to the community health, safety or welfare.

### **C. DISCUSSION**

This is an application for a special exception. Unlike an application for a variance, an application for a special exception should be granted if the board is satisfied that the criteria have been met. An applicant for a special exception need not prove hardship or unique physical conditions of the property which prevent the applicant from enjoying a reasonable use of the property.

The Historic District Overlay Ordinance establishes five requirements for a special exception. We will address them in turn.

The first requirement is that it is not feasible to continue the present use. The uncontradicted testimony establish that the four buildings are all condemned and are not fit for occupancy. The buildings have no use at this time as structures. Aside from some incidental usage as office space in one of the buildings years ago, the buildings have never been used by the University. They were purchased, not for use, but for

demolition. The Board is satisfied that the first requirement, there being no feasibility of using the buildings, has been met.

The second requirement is that no other uses of the structures are feasible. The Board is satisfied that this requirement has been met as well. The subject properties are 4 old wooden houses in the middle of the University campus. The surrounding buildings and land uses are dissimilar to the existing structures. The subject properties are surrounded by playing fields, parking lots, and various university buildings. The ground on which the structures sit can be used in furtherance of the University's overall plan, going back to 1997. The structures themselves have no feasible use.

The third requirement is that there be no adaptive use possibilities. For reasons stated above, the Board is satisfied that this requirement has been met.

The fourth requirement is that the proposed new structure or use will not affect the historic character of neighboring historic properties, the neighborhood, or the community. Applicant's presentation clearly meets this criteria, for a number of reasons. Most importantly, testimony established that the surrounding buildings and neighborhood do not have a historic architectural character in the first place. The testimony established that these four buildings are located in the middle of a modern university campus surrounded by playing fields and modern buildings. The structures are not part of a neighborhood. They are not part of a private community. They sit squarely in the middle of the university campus. Simply put, there is no historic character of the immediate area that would be disturbed. Further, no new buildings are specifically proposed at this time to replace the subject properties. The proposed new use is simply open space, with some landscaping to create an attractive streetscape along North Prince Street. We feel the Board finds that these changes will not adversely affect the surrounding area.

The fifth and last specific criteria is that the Applicant needs to show that it did not contribute to the existing conditions.

It is undisputed that, at the present time, the properties are in a deteriorated condition. Indeed, they are structurally unsafe and have been condemned by the Borough. In order to establish whether Applicant has met its burden of proof, we need to review the chronology of events.

Three of the four properties were acquired before the enactment of the present zoning ordinance September 23, 2003. The house at 139 North Prince was acquired July 25, 2001; the house at 203 North Prince was acquired October 8, 2001; and the house at 135 North Prince was acquired July 31, 2002. Those three structures were substantially damaged during training exercises in 2002 and 2003. The testimony indicated that those exercises were completed prior to the effective date of the zoning ordinance. The property at 205 North Prince Street was acquired February 1, 2005, after the effective date of the ordinance; however, there was no testimony that any volunteer fire company activities took place at that particular address.

The question before the Board is whether allowing the fire company activities before the enactment of the ordinance constitute a prohibited contribution by the University to the existing conditions on three of the four properties.

As of the time Applicant acquired the properties, it was under no obligation to preserve those structures. The subject buildings were never designated on the Historic Register and enjoyed no special protection under any law that existed prior to September 23, 2003. To hold Applicant chargeable for pre-September 23, 2003 activities would be, in effect, making the zoning ordinance retroactive.

Pennsylvania law does not favor retroactivity of laws, particularly in zoning cases. For example, if a landowner has established a lawful use prior to the enactment of a zoning ordinance, that use is allowed to continue as a prior non-conforming use. If a party has built a structure prior to enactment of a zoning regulation, the structure is allowed to remain in place as a prior non-conforming structure. By analogy, the Board feels that the pre-ordinance activities with the fire company cannot be chargeable to the Applicant. The activities took place in accordance with all applicable laws at the time. To change the rules after the fact would be unfair and unduly burdensome to the Applicant.

A Zoning Board does not create a zoning ordinance. It merely interprets the ordinance and applies it to the cases brought before it. It is not the function of the Zoning Board to make broad pronouncements about how the historic district overlay ordinance would be applied to other cases. Every fact situation is different. Because the Board is determined in this particular case that the Applicant is entitled to a special

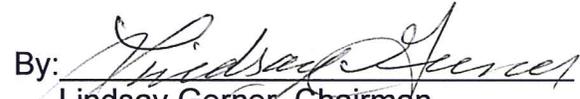
exception does not mean that this Board would not reach the same result. The chronology of events in this case presents this Board with a unique situation that may not apply in other cases.

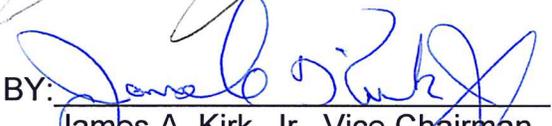
**D. DECISION**

AND NOW, this 27th day of September, 2012, Applicant's request for a special exception to demolish structures at 139, 135, 203 and 205 North Prince Street in the Borough of Millersville is hereby granted.

Because of our disposition of the case, no determination on the Applicant's variance request is necessary.

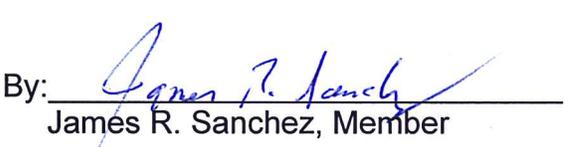
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