

BIG ROCKS, LLC,	:	IN THE COURT OF COMMON PLEAS
	:	
Appellant	:	OF LUZERNE COUNTY
v.	:	
	:	CIVIL ACTION LAW
LUZERNE COUNTY ZONING HEARING BOARD,	:	
	:	
Appellee,	:	
	:	
and	:	
	:	
AVOCA BOROUGH,	:	2024-12395
	:	
Intervenor	:	

PROTHONOTARY LUZERNE COUNTY
FILED 06/25/24

OPINION

I. Relevant Factual and Procedural Background

Appellant Big Rocks, LLC (“Big Rocks” or “Appellant”) is a Pennsylvania limited liability company with its registered address located at 2 Highwoods Road, Wyoming, Pennsylvania 18644. Appellee Luzerne County Zoning Hearing Board (“ZHB” or “Appellee”) is a municipal body located in Luzerne County, Commonwealth of Pennsylvania, with an office located at 20 North Pennsylvania Avenue, Suite 208, Wilkes-Barre, Pennsylvania 18701. Intervenor Avoca Borough (“Borough”) is a municipality of the Commonwealth of Pennsylvania with its principal place of business located at 950 Main Street, Avoca, Luzerne County, Pennsylvania 18641.

The Borough has delegated its zoning governance, application and approval process to the ZHB pursuant to the Pennsylvania Municipalities Planning Code, 53 P.S. 10101 et seq. (“MPC”). Luzerne County has duly adopted a Zoning Ordinance (“Ordinance”) governing all zoning issues for certain municipalities within the County, including the Borough. The

Ordinance appoints the ZHB to act as Luzerne County's authorized agent to hear zoning matters.

Appellant has entered a written purchase and sales agreement to purchase part of land which is currently owned by RJ Stella Mineral Reclamation, LLC ("RJ Stella") and located in the Borough and Dupont Borough, PIN 02D1200A013000 ("Property"). The Property is comprised of approximately twenty-five (25) acres of mine-scarred land which is currently utilized as a quarry operation. Appellant is under contract to purchase five (5) acres ("Parcel") of the Property, which will undergo a subdivision at the time of closing. The Parcel is located in a Light Industrial ("LI") Zoning District in the Borough.

On or around July 30, 2024, Appellant applied for a special exception to operate a construction and demolition transfer station ("Transfer Station" or "Proposed Use") on the Parcel which will only accept solid waste including wood, metal, and construction debris, sort out the recyclable materials, and transfer construction debris to landfills/recycling centers that same day. The Proposed Use would include a steel building approximately eleven to twelve thousand feet in square footage. "Solid Waste Facility" is defined by the Ordinance as "[a]ny facility operated pursuant to the laws of the Commonwealth of Pennsylvania governing the management, processing, treatment, storage, transfer, and/or disposal of solid waste as so defined by [the] Ordinance." See Ordinance § 203. "Solid Waste or Waste" is defined by the Ordinance as: "[a]ny garbage, refuse, or other material including solid, liquor, semi-solid or contained in gaseous material, resulting from the operation of residential, municipal, commercial, or institutional establishments and from community activities..." Id. The Transfer Station is considered a Solid Waste Facility under the Ordinance as it would manage, process, transfer, and dispose of solid waste.

The Ordinance permits a "Solid Waste Facility" as a special exception use in an LI Zoning District. Id. at Appendix 1.1. The Ordinance sets forth the requirements for special exception uses as follows:

- A. Public services and facilities such as streets, sewer, water, police, and fire protection shall be adequate for the proposed use and/or development;
- B. Existing and future streets and access to the site shall be adequate for emergency services, for avoiding undue congestion, and for providing for the safety and convenience of pedestrian and vehicular traffic;
- C. The relationship of the proposed use and/or development to other uses and activities existing or planned in the vicinity shall be harmonious in terms of the locations and site relative to the proposed operation, and the nature and intensity of the operation involved;
- D. The relationship of the proposed use and/or development to other activities existing or planned in the vicinity shall be harmonious in terms of the character and height of the buildings, walls, and fences so that the use, development, and value of adjacent property is not impaired;
- E. The proposed use and/or development shall not be more objectionable in its operations in terms of noise, fumes, odors, vibration, or lights that would be the operations of any permitted use in the district; and
- F. The proposed use and/or development shall not be injurious to the public interest.

Ordinance § 805. The Ordinance also states that the ZHB shall give due regard to the nature and condition of all adjacent uses and structures and may attach such reasonable conditions and safeguards, in addition to those expressed in the Ordinance for the particular special exception, as the ZHB may deem necessary to implement the purposes of the Ordinance. Id.

The Ordinance does not impose any other requirements or restrictions for a solid waste facility. Id., generally.

After being properly advertised, a hearing was held on Appellant's special exception application on October 22, 2024, at which time the ZHB heard testimony on the Transfer Station and admitted various expert reports into evidence. (See October 22, 2024 Transcript of Proceedings ("Transcript"), Docket Entry #10, generally). Appellant presented testimony from two (2) individuals familiar with the Proposed Use and the Property, as well as four (4) expert witnesses. (Id., generally).

Robert Stella ("Mr. Stella"), principal of RJ Stella, testified as to the history of the Property and stated that the Property is currently being utilized as a stone quarry which includes activities such as blasting, crushing, and screening rock to be hauled off site. (Id. at p. 7, l. 1 – p. 15, l. 15). Brian Kerrigan ("Mr. Kerrigan"), Appellant's project consultant, testified about his experience working at a different transfer station, that the Proposed Use will be regulated by the Pennsylvania Department of Environmental Protection, and about the waste process at the Proposed Use, including that only construction debris would be permitted to enter the facility. (Id. at p. 16, l. 13 – p. 26, l. 18).

Brent Berger ("Mr. Berger"), president and CEO of Quad 3 Group, Inc, was qualified as an expert in architectural engineering and testified about the design and operation of the Proposed Use as well as the Highway Occupancy Permit from the Pennsylvania Department of Transportation required to access the Property from Pennsylvania Route 11. (Id. at p. 28, l. 7 – p. 48, l. 12). Mr. Berger explained that there is not sewer at the Property, but the Proposed Use would have "nicer Job Johnn[ies]". (Id. at p. 38, l. 20 – p. 39, l. 5). Mr. Berger also testified that the site will have a water tank to store 20,000 gallons of water for fire protection

and to infiltrate the Property. (Id. at p. 39, l.l. 7-18). Mr. Berger provided his expert opinion in a report and provided it to the ZHB at the hearing. (See Docket Entry #7 at p.p. 82-248).

Nichole Jacobs, P.E. ("Ms. Jacobs") was qualified as an expert in traffic engineering and indicated that the granting of this special exception would meet the applicable Pennsylvania Department of Transportation standards to ensure no adverse impact to traffic and local streets regarding most likely routes to be used by trucks entering the facility. (See Transcript at p. 48, l. 19 – p. 69, l. 14). Ms. Jacobs testified that she is not a structural engineer and, although she studied the traffic that goes over the nearby Heidelberg Bridge, she did not study the bridge's capacity. (Id. at p. 166, l. 22 – p. 167, l. 12). Ms. Jacobs likewise prepared an expert report and provided it to the ZHB at the hearing. (See Docket Entry #7 at p.p. 249-358).

David Liodice ("Mr. Liodice"), a Pennsylvania Certified Appraiser, was qualified as an expert in real estate appraising and testified that in his opinion, the Proposed Use was harmonious with the mixed character of the neighborhood and that using a comparable sales approach, the Transfer Station would not decrease the values of the real estate in the immediate area of the subject property. (See Transcript at p. 70, l. 11 – p. 83, l. 15). Mr. Liocide's expert opinion was provided to the ZHB in a report at the meeting. (See Docket Entry #7 at p.p. 359-546)

Finally, John R. Varaly, A.I.C.P., ("Mr. Varaly") was qualified as an expert in commercial zoning and testified that the compliance of the Transfer Station with the standards set forth in the Ordinance would satisfy the requirements of a special exception. (See Transcript at p. 84, l. 24 – p. 94, l. 20). Mr. Varaly's expert report was also produced and provided to the ZHB. (See Docket Entry #7 at p.p. 547-553).

Approximately 325 protesters appeared at the hearing in opposition to the granting of the special exception. (See Transcript at p.143, l.l. 5-18). Various individuals testified on behalf of the protestors including municipal representatives of the Borough and Pittston Area School District as well as the neighboring municipalities of Dupont Borough, Duryea Borough, Pittston Township, and Moosic Borough. (Id., generally). William Satkowski, an owner of an abutting property, testified that he can hear noise and feel vibration from activities at the quarry. (Id. at p. 141, l.l. 7-16).

Tom Matthews ("Chief Matthews"), Fire Chief of the Borough's Fire Department, testified that the Borough's Fire Company is not prepared to provide fire protection for the Proposed Use because there are not fire hydrants at the Property, and the length of hose on the fire apparatuses will not reach the closest fire hydrant. (Id. at p. 103, l. 1 – p. 112, l. 25). Chief Matthews testified that if a fully engaged fire broke out on the Property and the contents of a building that size burned, 4,000 gallons a minute would be needed to put out the fire. (Id. at p. 104, l.l. 11-22). Chief Matthews also said that the closest tanker trucks would take twenty (20) minutes to arrive. (Id. at p. 107, l. 24 – p. 108, l. 1). Adequate fire protection is a requirement of the Ordinance for a special exception.

The protestors also presented the testimony of Jamie Dench ("Mr. Dench"), a certified general appraiser. (Id. at p. 159, l. 18 – p. 163, l. 21). Mr. Dench explained that a waste transfer station can negatively impact property values through factors categorized as External Obsolescence, which is a form of depreciation caused by factors not on the property itself, such as environmental, social or economic forces. (Id. at p. 161, l. 21 – p. 162, l. 13). Therefore, Mr. Dench provided his opinion that the granting of Appellant's special exception for the

Transfer Station would have a negative impact on the values of the surrounding neighborhood properties, anywhere from 2.5 to 12.9 percent. (Id. at p. 163, l.l. 11-16).

Zachary Chabala ("Mr. Chabala"), a forensic meteorologist, also testified on behalf of the protestors as to the impact the Transfer Station would have on the Borough and neighboring communities. (Id. at p. 168, l. 3 – p. 172, l. 3). Mr. Chabala explained in his testimony that wind will carry fumes, odors, and particulates from the Transfer Station to the most populated part of the Borough and the eastern side of Dupont Borough. (Id. at p. 169, l.l. 13-21). Mr. Chabala also explained that Mill Creek, which drains into the Lackawanna River, then the Susquehanna River, then the Chesapeake Bay, is approximately 500 to 700 feet away and 11 to 20% downhill from the Property, so the slope and runoff class of the Property would promote rainwater, liquids, chemicals, etc. that are on site to run off in the direction of Mill Creek. (Id. at p. 171, l.l. 2-10).

Christopher Sheerer ("Mr. Sheerer") testified that he is a licensed civil engineer and is concerned with the condition of the Heidelberg Bridge, which is in between Main Street in the Borough and the access road to the Property. (Id. at p. 164, l.l. 2-6). According to Mr. Sheerer, the Heidelberg Bridge received a rating of structurally deficient by the Federal Highway Administration in 2023, but he did not bring proof of that. (Id. at p. 167, l.l. 13-21). Although no other evidence was offered to corroborate Mr. Sheerer's contention that the Heidelberg Bridge is structurally deficient, neighboring residents testified that when it was recently closed, traffic was rerouted through residential neighborhoods. (Id. at p. 198, l.l. 10-14).

At the conclusion of the meeting on October 22, 2024, the ZHB voted to deny Appellant's special exception application. (Id. at p. 212, l. 25 – p. 213, l. 13). On October 23,

2024, the ZHB informed Appellant of this decision in writing and stated that the Findings of Fact and Conclusions of Law would be prepared and submitted within forty-five days of the hearing date if the matter was appealed. (See Certified Record, Docket Entry #7, at p. 2).

On December 12, 2024, the ZHB filed its Findings of Fact and Conclusions of Law. (See Docket Entry #11, generally). In its Conclusions of Law, the ZHB stated that Appellant failed to meet its burden of proving that the Proposed Use complies with the objective requirements of the Ordinance and that the objectors proved that allowing the special exception would be detrimental to the public health, safety and welfare of the general public and will have an adverse effect on the general public. (Id. at Conclusions of Law ¶¶ 1-2). On January 23, 2025, the Borough filed its uncontested petition to intervene in this matter. (See Docket Entry #17, generally).

On April 30, 2025, Appellant filed its Brief in Support of Land Use Appeal, arguing that the objectors did not present specific or substantial evidence which contradicted the expert testimony of Appellants' experts. (See Docket Entry #28 at p. 14). Appellant also argued that the ZHB committed an error of law when it shifted the burden for subjective requirements to Appellant, and stated that all of the special exception requirements are subjective, for which objectors bear the burden to disprove. (Id. at p. 21).

On May 30, 2025, the ZHB and the Borough filed their Briefs in Opposition to Appellant's Land Use Appeal. (See Docket Entries #30 and #32, generally). The ZHB's Brief in Opposition cites to Section 307 of the Ordinance, which is applicable for uses not addressed within the Ordinance. (See Docket Entry #30 at p.p. 2-3). In applying Section 307 of the Ordinance to the matter sub judice, the ZHB placed a burden of proof on *all* special exception applicants to display: 1) the proposed use is similar to and compatible with

permitted uses in the district; 2) the proposed use would not be detrimental to the public health, safety and welfare of the neighborhood; and 3) the proposed use meets the standards and criteria for special exceptions as contained in the Ordinance. (Id. at p. 9). The Borough's Brief in Opposition argues that the ZHB made sufficient findings of fact and conclusions of law and did not err in concluding that Objectors met their burden of proof. (See Docket Entry #32 at p.p. 11-13).

On June 18, 2025, Appellant filed a Reply Brief in Support of Land Use Appeal. (See Docket Entry #33, generally). Oral Argument was held on June 20, 2025. (See Docket Entry #35, generally).

II. LEGAL DISCUSSION

A. Standard of Review

If no additional evidence is presented to the trial court in a zoning hearing board appeal, the scope of judicial review is limited to determining whether the zoning hearing board committed an error of law or abused its discretion. Appeal of Chester County Outdoor, LLC, 64 A.3d 1148, 1151 n. 3 (Pa. Commw. 2013) (citing Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 501 Pa. 550, 462 A.2d 637, 639 (1983)). A zoning hearing board abuses its discretion when its findings of fact are not supported by substantial evidence in the record. Miravich v. Twp. of Exeter, 54 A.3d 106, 110 n. 4 (Pa. Commw. 2012). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Philadelphia Suburban Development Corp. v. Scranton Zoning Hearing Bd., 41 A.3d 630, n. 8 (Pa. Commw. 2012); Marr Development Mifflinville, LLC v. Mifflin Twp. Zoning Hearing Bd., 166 A.3d 479, n. 3 (Pa. Commw. 2017).

B. Discussion

The Commonwealth Court has explained that “[a] special exception is not an exception to a zoning ordinance, but rather a use which is expressly permitted, absent a showing of a detrimental effect on the community.” Tower Access Grp., LLC v. S. Union Twp. Zoning Hearing Bd., 192 A.3d 291, 300 (Pa. Commw. 2018). “The important characteristic of a special exception is that it is a conditionally permitted use, legislatively allowed if the standards are met.” Bray v. Zoning Bd. of Adjustment, 410 A.2d 909, 911 (Pa. Commw. 1980).

The Commonwealth Court has consistently held:

an applicant for a special exception has both the duty of presenting evidence and the burden of persuading the board that his proposed use satisfies the objective requirements of the zoning ordinance for the grant of a special exception. Once the applicant meets his burden of proof and persuasion, a presumption arises that the proposed use is consistent with the health, safety and general welfare of the community. The burden then normally shifts to the objectors to the application to present evidence and persuade the board that the proposed use will have a generally detrimental effect on health, safety, and welfare. The evidence presented by objectors must show, to a high degree of probability, that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community.

Siya Real Estate LLC v. Allentown City Zoning Hearing Bd., 210 A.3d 1152, 1157 (Pa. Commw. 2019)(internal quotations and citations omitted).

Regarding the burden of persuasion that a proposed use satisfies the requirements for the grant of a special exception, the Commonwealth Court has differentiated between objective requirements and non-specific and non-objective requirements such as the proposed use not being detrimental to health and safety. See Tower Access Group, LLC, 192 A.3d at 301. Objective requirements are those reasonably definite conditions that are

detailed in the zoning ordinance, such as that a stormwater basin must be located at least 50 feet from the defined edge of a watercourse. Id. (citing Williams Holding Group, LLC v. Bd. of Supervisors of West Hanover Township, 101 A.3d 1202, 1213 (Pa. Commw. 2014)).

Once an applicant shows compliance with specific requirements of the ordinance, the burden is placed on objectors as to all general detrimental effects. Tower Access Group, LLC at 302 (citing Allegheny Tower Associates, LLC v. City of Scranton Zoning Hearing Bd., 152 A.3d 1119, 1124 (Pa. Commw. 2017)). In Tower Access Group, LLC, the Commonwealth Court held that the lower court erred when it placed the burden on the applicant to meet the requirements of the general detrimental effects to the public health, safety and welfare, because objectors have the burden. 192 A.3d at 302.

The question of whether a zoning ordinance provision regarding a special exception is an objective or subjective requirement involves statutory interpretation and is therefore a question of law. See Heisler's Egg Farm, Inc. v. Walker Twp. Zoning Hearing Bd., 232 A.3d 1024, 1038 (Pa. Commw. 2020). Although Appellant argues that all six (6) requirements under the Ordinance for special exception uses are subjective and therefore the burden of objectors to disprove, relevant case law reveals that some of the requirements are actually objective and Appellant's burden to prove compliance.

In Heisler's Egg Farm, the Commonwealth Court explained that establishing the availability of adequate services and utilities, such as sewer, water, police protection, etc., are generally regarded as specific, objective requirements. 232 A.3d at 1040 (citing Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of Lower Heidelberg Twp., 918 A.2d 181, 187-88 (Pa. Commw. 2007)). In Cogan Properties, LLC v. East Union Twp. Zoning Hearing Bd., 318 A.3d 981, 989-90 (Pa. Commw. 2024), the Commonwealth Court held that the requirement of a zoning

ordinance that a special exception use be “compatible with adjoining development and the character of the zoning district and neighborhood in which it is proposed to be located” is objective and quantitative, so it was the applicant’s burden to demonstrate.

Keeping these cases in mind, the Court finds that subsections (A) through (D) of Section 805 of the Ordinance are objective and the burden of Appellant. Adequacy of public services and facilities in subsection (A) and adequacy of streets and access to the site for emergency services, for avoiding undue congestion, and for providing for the safety and convenience of pedestrian and vehicular traffic in subsection (B) are akin to the criteria analyzed in Heisler’s Egg Farm. The relationship of the proposed use and/or development to other uses and activities in the vicinity being in harmony as required by subsection (C) and (D) of Section 805 is akin to the criteria analyzed in Cogan. Therefore, relevant case law dictates that these requirements are on Appellant to demonstrate compliance, and the ZHB found that Appellant did not meet its burden. (See Docket Entry #11 at Conclusions of Law ¶¶ 1, 3-6).

Zoning hearing boards are the sole judge of the credibility of witnesses and weight afforded to their testimony. See 1825 Rt. 309 Allentown, LLC v. Zoning Hearing Bd. of South Whitehall Twp., 309 A.3d 187, 192 (Pa. Commw. 2024) (quoting Davis-Haas v. Exeter Twp. Zoning Hearing Bd., 166 A.3d 527, 545 (Pa. Commw. 2017)). Assuming the record contains substantial evidence, appellate courts are bound by zoning hearing boards’ findings that result from resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence. 1825 Rt. 309 Allentown, LLC, 309 A.3d at 192. A zoning hearing board is free to reject even uncontradicted testimony that it finds lacking in credibility. 1825 Rt. 309 Allentown, LLC at 192.

Here, there was substantial evidence for the ZHB to consider in declaring that Appellant did not meet its objective requirements. This evidence included testimony from the Chief of the Borough's Fire Department that the Borough is not equipped to handle a fire at the Property and that the proposed water tank stored at the Property would only fight a fully engaged fire for approximately five (5) minutes. Ms. Jacobs did not study the structural sufficiency of the Heidelberg Bridge and therefore cannot state with certainty that it would be adequate for travel to and from the Property. This concern was heightened due to the testimony of a resident of a nearby development who testified about routes used by vehicular traffic when the Heidelberg Bridge was recently closed. Additionally, Appellant cannot demonstrate that the Proposed Use's relationship to other uses and activities in the vicinity are harmonious because the Property abuts residences, and a large, steel building is certainly not harmonious with residences.

Even if Appellant met its objective requirement burden, the ZHB found that the objectors met their burden in demonstrating that the Proposed Use would be detrimental to the public health, safety and welfare of the general public and will have an adverse effect on the general public. (See Docket Entry #11 at Conclusions of Law ¶ 2). Objectors bear a heavy burden to prove that a proposed use would adversely affect the community. Marr Development Mifflinville, LLC, 166 A.3d at 483. Objectors cannot meet their burden to demonstrate adverse effect on the community by merely speculating as to possible harm, but instead must show a high degree of probability that the proposed use will substantially affect the health and safety of the community. Id.

In Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorrance Twp., 987 A.2d 1243, 1251 (Pa. Commw. 2009), the Commonwealth Court affirmed a zoning hearing board's finding that

objectors met their burden of establishing a detriment to the public health, safety or welfare if a special exception application to expand a quarry operation was granted. The objectors presented evidence about the impact blasting operations have on their residential wells, quality of their water, noise, accompanying dust and vibrations, sediment discharge onto their properties, and negative impact on property value. 987 A.2d at 1250. While the applicant in Pennsy Supply, Inc. argued that the testimony of neighboring residents was speculative because they were not experts on the subject matter about which they testified, the Commonwealth Court stated that the objectors' testimony could hardly be considered speculative when it was based upon their own experiences, and the mere fact that objectors were lay witnesses did not make their testimony less valuable than the expert evidence proffered by the applicant. Id.

Similarly, the objectors here testified about concerns with handling potential fires due to the location of fire hydrants, previous issues with traffic being rerouted through pure residential neighborhoods when the Heidelberg Bridge was closed for repairs, a decrease in property values as assessed by Mr. Dench, impacts on the environment as assessed by Mr. Chabala, current noises heard and vibrations felt from the existing quarry operations, etc. These concerns were based on the objectors' own knowledge and own experiences and are therefore not speculative. Likewise, the lay witnesses' testimony is not less valuable than Appellant's experts. Because the ZHB's findings of fact and conclusions of law are based on substantial evidence, the Court will not disturb its decision.

The Court does note, however, that the ZHB erred in its Brief in Opposition by citing to Section 307 of the Ordinance, which applies to uses not addressed by the Ordinance. (See Docket Entry #30 at p.p. 2-3). When a proposed use is not addressed by the Ordinance, then

the ZHB is instructed to treat such request as a special exception, and the applicant has the burden of proof to demonstrate that the proposed use is similar to and compatible with permitted uses in the district, the proposed use would not be detrimental to the public health, safety and welfare of the neighborhood, and the proposed use meets the standards and criteria for special exceptions as contained in the Ordinance. Ordinance § 307. Citing to this section was in error, because a waste transfer facility is addressed by the Ordinance and is permitted as a special exception in various districts. See Ordinance at Appendix 1.1. Therefore, it was improper and an error of law for the ZHB to impose an additional burden of proof on Appellant based on a section of the Ordinance which does not apply to Appellant. This error was harmless, however, because Appellant did not meet some of its objective standards as explained above and because the objectors met their burden in disproving the subjective standards.

III. CONCLUSION

For the foregoing reasons, the decision of the ZHB is **AFFIRMED**.