IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Glenn O. Hawbaker, Inc., Appellant	:	
v.	:	
The Zoning Hearing Board of Hazle Township and Sheila Butkiewicz and Margaret Benderavich	:	No. 120 C.D. 2010
	:	Submitted: November 5, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 18, 2011

Glenn O. Hawbaker, Inc. (Hawbaker) appeals from the order of the Court of Common Pleas of Luzerne County (common pleas court) which affirmed the Hazle Township Zoning Hearing Board's (Board) denial of Hawbaker's request for permission to construct and operate an asphalt plant in an M-1 Mining District.

Hawbaker operates a stone aggregate plant located on 4.7 acres in Hazle Township. The plant borders an anthracite strip-mining operation conducted by Mammoth Anthracite, LLC (Mammoth). Mammoth transports the surface stone to Hawbaker to be crushed and used for paving and construction.

On October 8, 2007, Hawbaker applied for a special exception to construct and operate a "hot mix asphalt" plant in close proximity to its aggregate plant. On October 11, 2007, Hawbaker amended its application and asserted that

the hot asphalt plant was a permitted use because it fell within the Zoning Ordinance's definition of "Light Industry" which, under Section 507 of the Hazle Township Zoning Ordinance (Zoning Ordinance), was a use permitted in the M-1 Mining Zoning District.

"Light Industry" is defined in Section 202 of the Zoning Ordinance as:

> A use engaged in the manufacture, predominantly from previously prepared materials, of finished products or parts, including processing, fabrication, assembly, treatment, packaging, incidental storage, sales and distribution of such products, but excluding basic industrial processing.

§202 of the Hazle Township Zoning Ordinance (Emphasis added).

The application was met with strong community opposition. Neighboring landowners and homeowners feared odor, noise, traffic[1], dust, pollution and had other health and safety concerns. Nearby home owners (Intervenors) opposed the application on the ground that the asphalt plant was "Heavy Industry," a use permitted by right in the I-2, Industrial Zoning District.

Section 202 defines the term "Heavy Industry" as:

> A use engaged in the basic processing and manufacturing of materials or products predominantly from extracted or raw materials, or a use engaged in the storage of, or

[1] Daniel Hawbaker testified that an average of 230 trucks would enter and exit the aggregate and asphalt plants a day. Hearing Transcript, October 15, 2007, at 48; Reproduced Record (R.R.) at 49a.

> manufacturing processes using flammable or explosive materials, or storage or manufacturing processes that involve potentially hazardous or commonly recognized offensive conditions.

§202 of the Hazle Township Zoning Ordinance (Emphasis added).

The Board held four hearings. The issue was limited by stipulation to whether the operation of a hot mix asphalt plant was a use permitted by right, a special exception or use variance.

Hawbaker showed the Board a video tape of an asphalt plant in operation. It also presented the testimony of Malcom Swanson (Swanson), Vice-President of Engineering of Astec Industries, the company selling the asphalt plant to Hawbaker. Swanson described "hot mix asphalt" as a paving material "that is typically composed of 95 percent stone…and five percent liquid asphalt cement." Hearing Transcript, November 19, 2007 (H.T. 11/19/07) at 190; R.R. at 192. "Liquid asphalt is a residual from the refining of petroleum." H.T. 11/19/07, at 191; R.R. at 193. "What an asphalt plant does is … blend a recipe of different sizes of stone and sand. It dries the water out of that recipe mixture and heats it up to about 300 degrees Fahrenheit." H.T. 11/19/07 at 245; R.R. at 247a. The exhaust system of the plant "is provided by … the combination of a cyclone and a baghouse" where thousands of bags collect dust. H.T. 11/19/07 at 250; R.R. at 252a. There are exhaust stacks, mixing drums, burners, a cyclone, a dryer, and storage silos. The plant is equipped with emission control devices. H.T. 11/19/07 at 247-252; R.R. at 249a-254a.

Swanson explained that various "products of combustion are emitted from burning fuels to produce heat for aggregate drying, vapor from liquid asphalt

is emitted, stone dust, and water vapor…hydrogen sulfide and formaldehyde." H.T. 11/19/07 at 205; R.R. at 207a. He explained that if the plant was operated properly then the emissions would be minimal. He did admit there is an odor of asphalt from "the trucks as they travel." H.T. 11/19/07, at 254; R.R. at 256a.

It was Hawbaker's position that because the proposed asphalt plant would manufacture hot mix asphalt from processed stone and paving grade asphalt, both previously prepared finished products, the asphalt plant qualified as "Light Industry." Hawbaker's experts testified that the use met the criteria for "Light Industry" because the manufacturing process used "previously prepared materials" and the stone used to produce hot mix asphalt was previously processed, cleaned and sized for specific use as part of the asphalt manufacturing process.

Hawbaker also presented the expert testimony of George W. Fasic (Fasic), a Community Planner, who offered his opinion that the asphalt plant was either a permitted use in the M-1 Zoning District as "Light Industry" or permitted by special exception as a use not listed anywhere in the Zoning Ordinance. Critically, Fasic admitted on cross-examination that the proposed use "could be" "Heavy Industry." Hearing Transcript, January 29, 2008 (H.T. 1/29/08), at 482; R.R. at 394a.

Thomas J. Shepstone (Shepstone), a land use planner with an emphasis in agricultural economic development and rural development, also testified on behalf of Hawbaker. He concluded that an asphalt plant was a use permitted in the M-1 Zoning District.

In opposition, Intervenors argued that the asphalt plant involved the processing or manufacturing of predominantly extracted or raw stone material, not the manufacture of finished product from previously prepared materials. The nearest residences were located 1000 feet from the proposed plant and citizens were extremely concerned that the use involved the storage or manufacturing of flammable or potentially hazardous or commonly recognized offensive conditions, namely oil and propane. It was their position that an asphalt plant was an industrial use that belonged in an industrial zoning district.

Interveners presented the expert testimony of John Varaly (Varaly), the author of the Zoning Ordinance and expert in the area of land use, planning and zoning. Varaly testified that an asphalt plant was a use intended by the drafters of the Zoning Ordinance to be a permitted use in the I-2 Industrial Zoning District, not the M-1 Zoning District. He viewed the stone removed from a quarry "as a raw material" and the process of crushing it or resizing it does not create a "finished or processed product…because it's still a raw material. It's just resized." H.T. 11/29/08, at 549-550; R.R. at 461a-462a. He did not believe that "changing the size of stone changes its chemical composition." H.T. 11/29/08 at 550; R.R. at 462a. Rather, it is akin to "taking a piece of paper and ripping it into a hundred pieces, it would still be the same, it would just be different sizes as opposed to any other changes to it." H.T. 1/29/08, at 566; R.R. at 478a. Varaly remarked that the video actually showed that the process was more complicated than just mixing asphalt with stone "in terms of ventilating, temperatures, right-sized stone, right heating mixture for the petroleum mixture." H.T. 1/29/08, at 565; R.R. at 477a. It was clear to Varaly that the asphalt plant was "not just as simple as mixing asphalt with stone" but was a heavy industrial manufacturing process. H.T. 1/29/08, at 565; R.R. at 477a.

On January 30, 2008, the Board determined that an asphalt plant was not a permitted use in the M-1 Zoning District. The Board relied on the testimony of Varaly that a hot mix asphalt plant did not qualify as "Light Industry" because stone is a "raw" material. The Board specifically found that a hot mix asphalt plant involved "the basic processing and manufacturing of materials and products from extract or raw materials and that it does use explosive materials and products from processes that potentially involve hazardous or commonly recognized offensive conditions." Board Decision, January 30, 2008, at 6-7. The Board also relied heavily on Fasic's admission that the proposed asphalt plant "could be" defined as "Heavy Industry."

The Board concluded that the proposed asphalt plant required a use variance, not a special exception, and it was not a use permitted by right.

Hawbaker appealed to the common pleas court. Following oral argument, the common pleas court denied the appeal and remanded the matter to the Board for further proceedings to determine whether Hawbaker's proposed use met the criteria for the granting of a use variance. On January 26, 2010, Hawbaker petitioned for reconsideration and asked the common pleas court to amend its order and vacate the remand and thereby render the common pleas court's order regarding the permitted use and special exception issues final for purposes of appellate review. By order dated January 25, 2010, the common pleas court granted Hawbaker's petition for reconsideration and amended its order.

On appeal[2], Hawbaker argues that the Board erred as a matter of law when it concluded that a hot mix asphalt plant involved the basic processing and manufacturing of materials and products from *extracted or raw materials*. Hawbaker contends that the uncontroverted testimony firmly established that hot mix asphalt was manufactured by mixing two *previously prepared materials*: (1) finished stone from a separate aggregate production facility; and (2) liquid asphalt produced from the petroleum refining process. Hawbaker maintains that no chemical or refining process takes place; rather, it is a mixing of two previously processed materials. Hawbaker contends the Board erred when it concluded that the asphalt plant qualified as "Heavy Industry", as opposed to "Light Industry."

It is well settled that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference. Smith, 734 A.2d at 57. Once the zoning ordinance is interpreted, a court will defer to the zoning board because of "the knowledge and expertise that a zoning hearing board possesses to interpret the ordinance that it is charged with administering." Id. at 58.

Determinations as to credibility of witnesses and the weight to be given to the evidence are matters to be left to the zoning board in performance of its fact finding role. Borough of Youngsville v. Zoning Hearing Board of Youngsville, 450 A.2d 1086 (Pa. Cmwlth. 1982). The zoning hearing board may elect to disbelieve a witness even if the witness is uncontradicted. Roseberry Life

[2] Where the common pleas court takes no additional evidence, this Court's scope of review is limited to determining whether the Zoning Hearing Board committed an error of law or manifestly abused its discretion. Smith v. Zoning Hearing Board of Huntington, 734 A.2d 55 (Pa. Cmwlth. 1999). An abuse of discretion will be found where the Board's findings are not supported by substantial evidence. Id.

Insurance Company v. Zoning Hearing Board of the City of McKeesport, 664 A.2d 688 (Pa. Cmwlth. 1995).

In the present controversy, much of the evidence and argument focused on whether the materials involved in the process of manufacturing hot asphalt constituted "raw" versus "finished materials." Although the Zoning Ordinance defines "Light Industry" and "Heavy Industry" in terms of the nature of materials used in the manufacturing process, this Court believes that the inquiry must not stop there.

Subsumed in the definition of a "previously prepared material" or "finished product" is the inference that the heavy industrial work has been done somewhere else. The reference to "raw" or "extracted" materials in the definition of "Heavy Industry" has a different connotation; the premise being that it is going to require more in terms of industrial effort to change a raw material into product, as opposed to mixing two or more materials that have already been changed through the industrial process. Accordingly, the issue whether the manufacturing process is "Heavy Industry" as opposed to "Light Industry" rests not on a straightforward "raw versus finished material" distinction, but on an analysis of the manufacturing process itself. For example, a stone monument plant is not "Heavy Industry" simply because a raw material, e.g., granite, is involved in the manufacturing process.

Here, the Board found credible Intervenors' experts who testified at length about the actual *process* which involves 300-degree Fahrenheit temperatures, burning of fuels, dust, fumes, harmful emissions, and odors. The Board members watched the video of an asphalt plant in operation and reasonably

concluded it was the type of manufacturing process which was limited to Industrial Zoning Districts, which are typically farther from residences. The nearest residences were a mere 1000 feet from the proposed asphalt plant.

The record also amply supports the Board's conclusion that the manufacturing process involved potentially hazardous or commonly recognized offensive conditions associated with "Heavy Industry." Despite Hawbaker's efforts to downplay and minimize the effects of the hot asphalt plant, the Board was free to reach the conclusion that a hot asphalt plant belonged in an Industrial Zoning District.

Accordingly, this Court must conclude, based on the record and on the sound reasoning of the Board and common pleas court, that Hawbaker's proposed asphalt plant did not qualify as Light Industry, but was Heavy Industry.

The common pleas court is affirmed.

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BERNARD L. McGINLEY, Judge

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v.	:	
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O R D E R

AND NOW, this 18th day of February, 2011, the order of the Court of Common Pleas of Luzerne County in the above-captioned case is hereby affirmed.

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BERNARD L. McGINLEY, Judge