IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Duane Schleicher and Lavona Schleicher, Appellants	:	
v.	:	
Bowmanstown Borough Zoning Hearing Board and Bowmanstown Borough	:	No. 1834 C.D. 2010
	:	Submitted: December 30, 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: May 4, 2011

Duane and Lavona Schleicher (Applicants) appeal from the Order of the Court of Common Pleas of Carbon County (common pleas court) which affirmed the Bowmanstown Borough Zoning Hearing Board's (ZHB) denial of Applicants' request for special exception.

Applicants own a 5.29-acre parcel in the Industrial/Commercial (I/C) Zoning District[1] of Borough of Bowmanstown (Property), which was previously owned by Prince Manufacturing. The Property is bounded by state roads. The

[1] The following uses are permitted in the I/C zoning district: Asphalt Plant use, Manufacture and/or bulk processing of: Cement, Gypsum, Concrete, Plaster, Chemical Products, Glass and Glass products, Pharmaceuticals, Soaps, Detergents, Paints, Varnishes or Enamels, Mineral Extraction Use, Sawmill/Planing Mill Use, Slaughterhouse or Stockyard Use, and Welding Use. Bowmanstown Borough Zoning Ordinance, §306.B.

Bowmanstown Diner and a residential neighborhood are located directly across the street from the Property's main entrance.

On March 20, 2008, Applicants applied for a zoning permit to operate two new uses at the Property: (1) a recycling facility, and (2) a solid waste transfer station.[2]

The zoning officer denied the application for the recycling facility because Applicants failed to provide the necessary information necessary to satisfy the requirements for such a facility. As to the proposed solid waste transfer station, the zoning officer stated that the proposed use was permitted only by special exception.

Bowmanstown Borough Zoning Ordinance

Section 306.B of the Bowmanstown Borough Zoning Ordinance (Zoning Ordinance) permits a solid waste transfer station to be located in an I/C Zoning District by special exception. Section 116.C of the Zoning Ordinance sets forth "general" requirements applicable to all special exceptions:

> Approval of Special Exception Uses. The Zoning Hearing Board shall approve a proposed special exception use if the Board finds adequate evidence that any proposed use will comply with the specific requirements of this Ordinance and all of the following standards:

[2] A solid waste transfer station is a facility where municipal solid waste is unloaded from collection vehicles and briefly held while it is reloaded onto larger, long-distance vehicles for shipment to landfills or other disposal facilities.

> 1. Other Laws. Will not clearly be in conflict with other Borough Ordinances or State or Federal laws or regulations known to the Board.
>
> 2. Traffic. The applicant shall show that the use will not result in or substantially add to a significant traffic hazard or significant traffic congestion.
>
> 3. Safety. The applicant shall show that the use will not create a significant hazard to the public health and safety, such as fire, toxic or explosive hazards.
>
> 4. Storm Water Management. Will follow adequate, professionally accepted engineering methods to manage storm water. …
>
> 5. Neighborhood. Will not significantly negatively affect the desirable character of an existing residential neighborhood, or a significant odor or noise nuisance or very late night/early morning hours of operation.
>
> 6. Site Planning. Will involve adequate site design methods, including plant screening, berms, site layout and setbacks as needed to avoid significant negative impacts on adjacent uses.

Bowmanstown Borough Zoning Ordinance §116.C.

Section 402.34 of the Zoning Ordinance sets forth the following "specific" requirements applicable to solid waste transfer stations:

> ADDITIONAL REQUIREMENTS FOR SPECIFIC PRINCIPAL USES. Each of the following uses shall meet all of the following requirements for that use:
>
> Solid Waste Transfer Facility.
>
> a. All solid waste processing and storage shall be kept a minimum of 150 feet from all of the following

features: public street right-of-way, exterior lot line or creek or river.

b. All solid waste processing and storage shall be kept a minimum of 300 feet from any dwelling that the operator of the Transfer Facility does not own.

c. The applicant shall prove to the Zoning Hearing Board that the use: a) will have adequate access for firefighting purposes, and b) will not routinely create noxious odors detectable off the site.

d. The use shall not include any incineration or burning.

e. All solid waste processing and storage shall occur within enclosed buildings or enclosed containers. All unloading and loading of solid waste shall occur within an enclosed building and over an impervious surface that drains into a holding tank that is adequately treated.

f. The use shall be surrounded by a secure fence and gates with a minimum height of 8 feet.

g. The use shall be operated in a manner that prevents the attraction, harborage or breeding of insects, rodents or other vectors.

h. An attendant shall be on duty during all times of operation and unloading.

i. Under authority of Act 101 of 1988, the hours of operation shall be limited to between 7 a.m. and 9 p.m.

j. Tires – See "Outdoor Storage" in Section 403.

k. No radioactive, chemotherapeutic, infectious or toxic materials shall be permitted on-site.

Bowmanstown Borough Zoning Ordinance §402.34.

Witness Testimony

The ZHB held eight public hearings between May 2008 and November 2008. There was strong public opposition to the proposed uses and numerous members of the community participated in the hearings.

Robert Cox (Cox), a civil engineer, testified as an expert witness on behalf of Applicants. Cox designed the site layout and prepared a site plan which was marked as Exhibit A-1 and attached to the application. Cox testified that all loading and unloading of vehicles would take place in a totally enclosed 3,000 square-foot building which met the setback criteria of the Zoning Ordinance.[3] Notes of Testimony, May 21, 2008, (N.T., 5/21/08), at 95; Reproduced Record (R.R.) at 196a. Cox testified that Applicants anticipated that there would be 95 trucks going in and out of the Property per day. Notes of Testimony, September 17, 2008, (N.T., 9/17/08), at 628; R.R. at 820a. Applicants anticipated that there would be 1200 tons of garbage moved in and out of the facility per day. N.T., 9/17/08, at 700; R.R. at 892a.

Cox identified trees "off-site" that shielded the view of the Property from the Diner and surrounding residences, but later admitted those trees were deciduous trees which lose their leaves for part of the year. He also admitted on cross-examination that there was "no significant vegetation at all" on the Property and that Applicants intended to use existing buildings to buffer the processing

[3] Applicants first proposed to build a 10,000 square-foot "processing building" but later amended the application to reduce the size of the building to approximately 3,000 square feet, to account for the Zoning Ordinance's setback requirements

building from view. Notes of Testimony, June 18, 2008, (N.T., 6/18/08), at 153, 157; R.R. at 279a, 283a.

On June 16, 2008, two days before the third hearing, Cox prepared another site plan, Exhibit A-7, which showed for the first time 20 parking spaces for short-haul trucks and 10 parking spaces for tractor trailers. When asked what the need for truck storage was relative to the transfer station, Cox revealed for the first time that Applicants also intended to operate a third use, a municipal waste hauling operation, from the Property. N.T., 9/17/08, at 610-611; R.R. at 802a-803a. Cox indicated that these trash-collection trucks and tractor trailers would be parked on the Property overnight.

Thomas G. Pullar (Pullar), an environmental engineer, testified as an expert witness on behalf of Applicants. Pullar designed the operational components of the proposed solid waste transfer station and provided testimony as to its day-to-day operations. Pullar stated that municipal waste would be processed at the site. Municipal waste is "basically trash, garbage, refuse coming from residential, commercial, industrial" buildings. Notes of Testimony, July 16, 2008, (N.T., 7/16/08), at 350; R.R. at 496a. He explained the purpose of transfer stations was "to consolidate waste" and "limit the amount of vehicles that have to leave the area" and "saves the smaller trucks from a lot of trips back and forth" to the landfill. N.T., 7/16/08, at 352-353; R.R. at 498a-499a.

Pullar testified that to prevent odors from migrating off-site, the waste would be removed "either by the end of the day, within 24 hours or within 24 hours of receipt at the station." N.T., 7/16/08, at 361; R.R. at 507a. After the

waste is removed, "the floors and … equipment … have to be cleaned and the area washed down to prevent any odors." N.T., 7/16/08, at 362; R.R. at 508a.

Eric Conrad (Conrad), former DEP Deputy undersecretary, testified that the proposed solid waste transfer station would meet the DEP regulations, and operate in a safe, clean manner that would not have a deleterious or negative impact on the nature of the surrounding community. Conrad testified further that the proposed solid waste transfer station would not create any more traffic, dust, odors, or similar negative impacts on the community than any other similarly situated solid waste transfer station. Notes of Testimony, November 10, 2008, (N.T., 11/10/08), at 1121; R.R. at 1397a.

The Borough presented the testimony of Pete Nolan (Nolan) who had 12-13 years experience working for a company which removed radioactive material detected at solid waste transfer stations. Nolan testified that he was familiar with solid waste transfer stations and in his opinion the solid waste transfer stations which process 1,200 tons of garbage a day "are typically situated on 50-100 acres" and the processing buildings are "two to three times the size in … square footage" of Applicant's proposed 3,000 square foot processing building. Notes of Testimony, October 20, 2008, (N.T., 10/20/08), at 1013; R.R. at 1265a. He believed that the Property's 5.29-acre site was "inappropriate" for a transfer station and the size of the processing building was "inadequate." N.T., 10/20/08, at 995, 1013; R.R. at 1247a, 1265a.

In Nolan's experience, the operation inside the processing building "is a very loud operation" which involves a "huge loader." Nolan testified that when "this more intense activity takes place in more of the interior sections of these

larger tracts of land" the distance "helps mitigate a lot of … objections … in terms of the odor, litter and even truck traffic." N.T., 10/20/08, at 997-998, 1011; R.R. at 1263a, 1249a-1250a. Nolan also testified there was a big litter issue due to "the trash trucks constantly coming in and constantly going out." N.T., 10/20/08, at 998; R.R. at 1250a. In Nolan's experience odors in these larger facilities were not contained inside of the processing building, but in these larger facilities, the nearest residential areas weren't measured in feet, as here, but in quarters of miles. N.T., 10/20/08, at 1014; R.R. at 1266a.

Nolan did not believe it was feasible for 95 trucks to process 1,200 tons of garbage a day, and he explained in detail why 150 short-haul and long-haul trucks would be needed to process that amount of tonnage. N.T., 10/20/08, at 995-996; R.R. at 1247a-1248a. He stated that typically the trucks entering and leaving the site will come in at "spurts." N.T., 10/20/08, at 1009; R.R. at 1261a. In his experience, he observed 15-20 trucks backed up to enter waste stations during peak periods. N.T., 10/20/08, at 1008-1009; R.R. at 1260a-1261a.

ZHB's Denial

The ZHB denied the request for special exception because Applicants failed to meet the requirements for a special exception set forth in Section 402.34 of the Zoning Ordinance. Specifically, the ZHB found that the Applicants' proposed use fell short of the requirements because:

> A. Solid waste will be processed within 150 feet of a public right-of-way and exterior lot line.
>
> B. Solid waste will be processed within 300 feet of a dwelling.

> C. Insufficient evidence was presented that would establish that noxious odors would not be detectable off of the site.
>
> D. In so much as the scales are not enclosed, all solid waste processing will not occur within an enclosed building.
>
> E. No evidence was presented that the scales were on an impervious surface or that they drain into an adequately treated holding tank.
>
> F. While the testimony established that gates would be established at the entrance on the access road from Bank Street, no testimony was presented regarding the type of fencing that would be erected.

Zoning Hearing Board Decision, (Undated), Conclusion of Law No. 19.

The ZHB further held that Applicants failed to comply with the general requirements for special exceptions set forth in Section 116.C of the Zoning Ordinance because:

> A. The evidence presented was not sufficient to establish that the increased truck traffic would not cause significant traffic hazards or congestion.
>
> B. The evidence presented was not sufficient to establish that the proposed use would not negatively affect the desirable character of the existing residential neighborhood with regards to the creation of significant odors beyond the boundary of the property.
>
> C. Applicants' site plan did not contain any specifics with regards to plant screenings.

Zoning Hearing Board Decision, (Undated), Conclusion of Law No. 19.

Finally, the ZHB found that Applicants failed to satisfy the requirements of Section 803.D of the Zoning Ordinance pertaining to buffer yards.

On February 20, 2009, Applicants appealed the ZHB's decision to the common pleas court. Bowmanstown Borough (Borough) intervened as an objector.

Common Pleas Court

The common pleas court overturned portions of the ZHB's decision, but ultimately upheld the denial. The common pleas court found that the term "processing" did not include weighing of the trucks on a truck scale. Therefore, the location of the truck scales did not violate the Zoning Ordinance which precluded processing solid waste within 150 feet of a public right-of-way and exterior lot line and within 300 feet of a dwelling.

However, the common pleas court affirmed the ZHB with respect to the remaining deficiencies. Specifically, the common pleas court upheld the ZHB's determination that Applicants failed to show compliance with respect to the fencing requirements, buffer yards, increased traffic, noxious odors, and plant screenings.

Issues on Appeal

On appeal[4], Applicants assert that the ZHB erred (1) when it determined that Applicants failed to demonstrate compliance with the fencing

[4] Where, as here, the common pleas court takes no additional evidence, this Court's review is limited to determining whether the zoning board manifestly abused its discretion or
(Footnote continued on next page…)

requirement of Section 402.34(f), and the noxious odor requirement of Section 402.34(c); (2) when it determined that Applicants failed to comply with the criteria enunciated in Section 116(C) of the Zoning Ordinance and by reference and implication, the buffer yard requirement of Section 803.D.1; (3) because its decision resulted in a *de facto* exclusion of a solid waste transfer station within the Borough of Bowmanstown; (4) when it failed to consider Applicants' application amendments; and (5) because it usurped the authority of the Department of Environmental Protection (DEP).

Legal Standard – Special Exception

An applicant seeking a special exception has the burden of proving (1) that the proposed use is a type permitted by special exception, and (2) that the proposed use complies with the requirements in the ordinance for such a special exception. Agnew v. Bushkill Township Zoning Hearing Board, 837 A.2d 634 (Pa. Cmwlth. 2003). Once an applicant for a special exception shows compliance with the specific requirements of the ordinance, the burden shifts to the protestors to prove that the proposed use will have an adverse effect on the general public. Id.

The standard to be observed by the ZHB is "whether the plan as submitted complies with specific ordinance requirements at the time the plan

(continued…)

committed an error of law. Broussard v. Zoning Board of Adjustment of the City of Pittsburgh, 831 A.2d 764, 768, n. 5 (Pa. Cmwlth. 2003). A zoning hearing board abuses its discretion only if its findings are not supported by "substantial evidence," that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. (internal citation omitted).

comes before it." Edgmont Township v. Springton Lake Montessori School, Inc., 622 A.2d 418, 420 (Pa. Cmwlth. 1993). A "concept plan" is insufficient to warrant the granting of a special exception. Rather, to be entitled to receive a special exception the applicant must come forward with evidence detailing its compliance with the necessary requirements. Elizabethtown/Mt. Joy Associates, L.P. v. Mount Joy Township Zoning Hearing Board, 934 A.2d 759 (Pa. Cmwlth. 2007).

Fencing and Noxious Odor Requirements

Applicants assert that the ZHB capriciously disregarded substantial evidence when it determined that they failed to demonstrate compliance with the fencing and the noxious odor requirements of Sections 402.34(c) and (f).

Fencing

Section 402.34 (f) of the Zoning Ordinance states that "[t]he use shall be surrounded by a secure fence and gates with a minimum height of 8 feet."

The ZHB found in Finding of Fact No. 37, that: "[w]hile testimony was given that there would be a gate at the bottom of Bank Street access, no other testimony was offered regarding the type or extent of fencing that would be erected on the property." Zoning Hearing Board Decision, Undated, Finding of Fact No. 37 at 6.

Applicants assert that "nothing in the … submitted engineering plans could lead a reasonable mind to believe that fencing could not or would not be provided in strict compliance with DEP or the Borough's requirements." Applicants' Brief at 30. They point to "Exhibit A-7," the Sketch Plan prepared on

June 16, 2008, which they allege "clearly shows existing metal chain linked fencing, guardrails and existing industrial buildings with sufficient space to fully enclose the property with any additional required fencing consistent with the expert testimony presented." Applicants' Brief at 27. Applicants claim "Exhibit A-7 clearly shows that the subject property can accommodate a chain link fence around the entire perimeter of the facility even if said fence must be bolted onto the side of both the preexisting building and the 'processing building' at the center of the site." Applicants' Brief at 27. Applicants also point to the testimony of their expert, Pullar, who testified that there would "either" be a "fence or the building" that will prevent access to the site. Notes of Testimony, August 13, 2008, (N.T. 8/13/08), at 429-430; R.R. at 594a-595a.

It is not adequate for an applicant to merely testify that, in one fashion or another, he will bring his plans into compliance before the use begins. Ryan, Pennsylvania Zoning Practice and Law, §5.2.1 (2001). To be entitled to a special exception, the applicant must come forward with evidence detailing its compliance with the necessary requirements. Elizabethtown/Mt. Joy Associates. Evidence is not a "promise" that the applicant will comply because that is a legal conclusion the zoning hearing board makes once it hears what the applicant intends to do and then determines if it matches the requirements set forth in the ordinance. Edgmont, 622 A.2d at 419.

In Edgmont, an applicant for a special exception to operate a private pre-school educational facility failed to show that its proposal met specific ordinance requirements relating to additions to the septic system, provision of buffer areas, parking and water management. The zoning hearing board accepted the applicant's promise that the school would be in compliance with all

requirements prior to its opening, and it granted the special exception. This Court reversed because a "promise" was not the equivalent of the provision of plans and testimony that demonstrated compliance with the requirements of the zoning ordinance. "A self-serving declaration of a future intent to comply is not sufficient to establish compliance with the criteria contained in the ordinance." Edgmont, 622 A.2d at 420. As this Court explained in Edgmont, "to adopt a rule that to obtain a special exception all that would be required is for an applicant to promise to come into compliance at some future date, it would make [zoning hearing board] approval meaningless because once an applicant promises it is entitled to receive the special exception." Id.

A review of the record confirms that Applicants failed to meet this requirement. The Zoning Ordinance provides that the "use" shall be surrounded by an 8-foot secure fence. However, it is not clear from the sketch plans or the testimony where Applicants intended to locate the fence, i.e., only around the "processing building" or around the Property's entire boundary. While "chain link fence" can be found on the Legend of Exhibit A-7, its location is not shown anywhere on the drawing. Applicants' expert, Pullar, conceded that "we haven't determined exactly what would be done as far as the perimeter work, the fencing, the landscaping and all that … It hasn't been --- we haven't gotten to that point in the design." N.T., 8/13/08, at 458; R.R. at 623a. Further, Exhibit A-7 shows "guardrails," but the Zoning Ordinance calls for 8-foot fencing, which would prevent third parties from entering the property, and trash from blowing off-site.

Applicants attempt to distinguish Elizabethtown/Mt. Joy Associates, a case which also involved a developer's failure to meet the requirements for special exception. However, this Court finds the case to be directly on point. There, a

developer applied for a special exception to build a shopping center in a limited commercial zoning district in Mount Joy Township. The local zoning ordinance permitted shopping centers by special exception so long as specific requirements were met. The zoning ordinance required the developer to submit an "exterior lighting plan" which included: "detailed grid of illumination levels, a calculation as to the average illumination levels, the number of lighting fixtures, the height and location of the mounting fixtures" and other requirements. Instead of submitting an exterior lighting plan, the developer indicated that the lighting proposed was "merely conceptual" and that the lighting "will" comply with the zoning ordinance requirements. Elizabethtown/Mt. Joy Associates, 934 A.2d at 762, 767. The zoning ordinance also required developer's application to include "all dimensions, locations and methods for illumination for signs." The developer did not submit the detailed information but promised that the signage for the shopping center "shall" conform to the ordinance requirements and that "signage for this project has not yet been designed." Elizabethtown/Mt. Joy Associates, 934 A.2d at 765.

This established line of case law clearly reflects that a mere promise that the ordinance requirements will be met, without indicating how, is insufficient to demonstrate full compliance with the zoning ordinance requirements for a special exception.

Here, Applicants were required to demonstrate to the ZHB that their proposed use would meet the fencing requirements. There were no details on the site plans which demonstrated where the fence and gates would be located, a description of the fence or evidence that it would be sufficiently "secure" to prevent third parties from entering the premises and keep trash from blowing off-site. It was not sufficient to simply state, matter-of-factly, that there was enough

room to accommodate a fence, or that some fencing would be used and "existing buildings" might be utilized as a barrier.

In Broussard v. Zoning Board of Adjustment of the City of Pittsburgh, 589 Pa. 71, 907 A.2d 494 (2006), the developer, although it did not strictly comply with the requirement that there be a "written agreement" demonstrated by a letter from the parking provider that an agreement was a mere step from fruition and was just a matter of executing a formal contract. The Zoning Board of Adjustment of Pittsburgh accepted this interim alternative as proof that the requirement would be met. The Supreme Court, in affirming the grant of special exception, noted that there would be situations where the realities of the business setting have to be considered. Applicants' assertion that this is just such a setting is unpersuasive.

This is not like Broussard where the developer specifically and thoroughly addressed the requirement and provided proof that the necessary steps would be taken. Here, as in Elizabethtown/Mt. Joy Associates, and Edgmont, Applicants basically "put off" dealing with the fencing requirement, and promised they would satisfy the requirement one way or another. In fact the record supports the conclusion that the fencing requirement was not even fully investigated by Applicants. Applicants mentioned that existing buildings could be substituted for fencing and gave no indication where the fence would be located, or what structures and features would be fenced. Based on the scant information provided the ZHB could not determine whether the proposed fence would enclose the various existing buildings, parking lots, truck scales, or just the processing building. The ZHB was not supplied critical information to make an informed decision that Applicants were entitled to a special exception. Applicants failed to shoulder their burden.

For these reasons, this Court concludes that Broussard does not control. The point of the submissions and evidence and the very hearing was to give the ZHB an accurate and detailed depiction of the proposed use so that the ZHB was provided the information necessary to determine whether the proposed use qualified as a special exception. Applicants failed to do this.

Noxious Odors

The ZHB concluded that "[w]hile Applicants provided testimony that no odors would be discernable off the property, there was very little evidence presented on how this would be accomplished, especially in light of the fact that scales are located in the northwestern portion of the property and accordingly was found not to be credible." ZHB Decision, Undated, Finding of Fact No. 43 at 6.

Applicants argue that the ZHB's finding was against the "overwhelming" evidence. They contend their expert Conrad established that the proposed solid waste transfer facility would not create any more traffic, dust, odors, or similar negative impacts on the community than any other similarly situated solid waste transfer facility. Conrad testified that waste would be processed and moved from the site efficiently, and that the trucks and floors of the facility would be washed. Conrad also testified that the Property has a "previously installed air handling infrastructure" to control odors. N.T., 11/10/08, at 1147-1148; R.R. at 1423a-1423a. Applicants' expert Pullar testified that "odor control is mainly through cleaning, keeping the facility clean, removing the waste promptly and cleaning the floor. … There is existing air pollution control equipment on the site that could be incorporated into the design." N.T., 8/13/08, at 465; R.R. at 630a.

Applicants argue that there was no reasonable basis for the ZHB to disregard this evidence. This Court must disagree.

First, the evidence showed that the proposed "processing building" was not yet constructed and that the existing building would only provide "access to" it. N.T., 8/13/08, at 463-464; R.R. at 628a-629a. Therefore, Applicants failed to explain how the existing air pollution system would control odors in a totally separate building.

Further, Pullar acknowledged the potential for odors when the doors were opened when trucks moved in and out. N.T., 8/13/08, at 474; R.R. at 639a. Nolan, who had extensive experience in waste transfer stations, confirmed that odors were routinely detectable outside processing buildings. He explained that facilities which process 1,200 tons of garbage a day were typically located on larger tracts of land, with greater buffer distances, a characteristic the Property lacked. Also, as the ZHB observed, the "truck scales" which weigh both full and empty garbage trucks, were located essentially at the edge of the Property, directly across the street from a residential neighborhood.

Finally, it appears that the Applicants significantly underestimated the number of short-haul trucks and tractor trailers entering and leaving the Property. Applicants estimated 95 trucks entering and exiting the Property per day between the hours of 7:00 a.m. and 9:00 p.m. However, testimony which the ZHB

credited[5], proved that estimate was unreasonable, and the number of trucks was more likely to be 150. This discrepancy further supported the ZHB's concern about odors given the proximity of the truck scales to the edge of the Property.

The ZHB was well within its authority to conclude from the evidence that the odors which accompany waste-hauling trucks, and which are associated with the operations inside the processing building, were to be routinely detectable offsite. This Court would usurp the ZHB's fact-finding authority if it was to find otherwise. Questions of credibility and evidentiary weight are solely within the province of the ZHB as fact finder, and the ZHB resolves all conflicts in testimony. Elizabethtown/Mt.Joy.

Buffer Yard Requirements – Application of §803.D.1

The ZHB concluded that Applicants failed to prove they would comply with the buffer yard/evergreen screening requirements of §803.D.1.

Section 803.D.1 of the Zoning Ordinance provides that a buffer yard, a minimum of 10 feet in width with evergreen screening, is required "[a]long side and rear lot lines of *a newly developed* or expanded portion of … an area routinely used for the keeping of 3 or more: tractor-trailer trucks or trailers of a tractor trailer combination … if visible from and within 250 feet of a public street or dwelling." (Emphasis added).

[5] The ZHB found "[t]estimony regarding the number of trucks traveling to and from the Property in question did not appear to be consistent with the amount of waste that was expected to move through the facility on a daily basis." ZHB Decision, Undated, Finding of Fact No. 22 at 4.

On appeal, Applicants argue that Section 803.D.1's buffer yard requirement does not apply because no "newly developed" parking areas were proposed. Rather, the parking proposed was "merely a continuation" of the extensive parking of heavy equipment and trucks during Prince Manufacturing's ownership of the Property. Applicants' Brief at 48-49.

This Court disagrees and finds that the use proposed by Applicants constituted a newly developed portion of an area routinely used for keeping of three or more tractor trailers; therefore the buffer yard requirements of Section 801.D.1 are applicable.

Applicants' site plan called for the erection of a new 3,281 square foot building, the demolition of existing structures, and a change in use from a manufacturing facility to a solid waste facility, recycling facility and trash-hauling operation. The site plan depicted 29 new parking spaces for overnight parking of both short-haul and long-haul tractor trailers on the south side of the Property.

Because it was apparent that both short-haul and long-haul vehicles were to be kept on the Property overnight, and that the location of these parking spaces was within 250 feet of a right-of-way for Bank Street, Applicants had to comply with Section 803.D.1. They failed.

Application Amendments

Next, Applicants argue that the ZHB erred because it did not consider all of Applicants' amendments, including its request for a variance.

Applicants argue that the ZHB should have recognized overnight parking as an accessory use and issued a *de minimis* and/or dimensional variance from the buffer yard requirements of Section 803.D.1 due to the fact that the Property was unique and the amount of the variance required was very small and necessary to avoid a finding there was *de facto* exclusionary zoning for a solid waste transfer facility in the Borough. Again this Court must disagree.

Applicants substantially changed the issues before the ZHB mid-way through the proceedings and submitted a revised site plan, Exhibit A-7, which proposed a third use, a trash hauling operation. Generally, amendments which do not change the issues should be permitted. But here the trash hauling operation involved 30 trash hauling trucks being parked near borders of the Property. This was not a minor request for a simple *de minimis* variance. There were substantial concerns whether Applicants proved their proposed solid waste transfer station should operate on the site. The issuance of a *de minimis* variance would not have corrected the numerous other deficiencies found by the ZHB.

This Court also rejects Applicants' argument that the ZHB's resolution of the matter resulted in a *de facto* exclusion of solid waste transfer stations in the Borough. As explained in greater detail above, the ZHB's decision to deny Applicants' request for special exception was based on Applicants' failure to meet several Zoning Ordinance requirements. It was based on Applicants' failure to meet specific criteria in the Zoning Ordinance. It was not that the Property could not be developed as a solid waste transfer station in such a way to demonstrate compliance with the Zoning Ordinance, but rather that the Applicants' plans did not meet all the specific requirements for the special exception.

Finally, Applicants argue that the ZHB's denial of their request for special exception preempted the rules and regulations promulgated by the DEP concerning solid waste transfer stations. Again, this Court must disagree.

The ZHB based its denial on Applicants' failure to prove compliance with the specific requirements of the Zoning Ordinance. The ZHB's decision was not based on Applicants' inability or failure to meet other state agency regulations.

Accordingly, the order of the common pleas court is affirmed.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Duane Schleicher and Lavona Schleicher, Appellants	:	
v.	:	
Bowmanstown Borough Zoning Hearing Board and Bowmanstown Borough	:	No. 1834 C.D. 2010

O R D E R

AND NOW, this 4th day of May, 2011, the order of the Court of Common Pleas of Carbon County in the above-captioned matter is hereby affirmed.

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BERNARD L. McGINLEY, Judge