IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Erie Renewable Energy, LLC	:	
	:	
v.	:	
	:	
Zoning Hearing Board of the City of Erie, Erie County, Pennsylvania	:	
	:	
Robert Petroff and Susan Tymoczko	:	
	:	
v.	:	
	:	
The City of Erie Zoning Hearing Board	:	
	:	
Appeal of: Robert Petroff and Susan Tymoczko	:	No. 735 C.D. 2010 Argued: November 9, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: December 15, 2010

Robert Petroff and Susan Tymoczko (Appellants) appeal the March 24, 2010 order of the Court of Common Pleas of Erie County (trial court) affirming the City of Erie Zoning Hearing Board's (Board) decision to grant the exclusionary challenge by Erie Renewable Energy, LLC (ERE) to City of Erie Ordinance Number 80-2005 (Ordinance). The issue before this Court is whether the trial court erred in affirming the Board's grant of ERE's exclusionary zoning challenge that the Ordinance's height restrictions result in a *de facto* exclusion of all power plants as a

land use within the city limits. For the following reasons, we affirm the order of the trial court.

ERE proposed the construction of a tires-to-energy power plant on land it owns in the City of Erie, Pennsylvania. The proposed power plant is located in an M-2/Heavy Industrial District that was once the site of the International Paper Company. A Residential Limited Commercial District is located adjacent to the subject property. Appellants live on properties adjacent to the subject property in the Residential Limited Commercial District.

The proposed power plant would use tire-derived fuel (TDF) to generate up to 100 megawatts of electrical power, using industry-standard, circulating fluidized bed (CFB) boiler technology. The components of the power plant include a turbine, two 165-foot high CFB boilers, a 180-foot cooling tower, filter equipment, and a 300-foot smokestack. The TDF fuel would be shipped to the site by rail, meaning no tire shredding activity would take place on the site. A power plant is a permitted use under Section 204.20 of the Ordinance. However, Section 205 of the Ordinance imposes a 100-foot height restriction on structures in the M-2 District with an exception to the restriction for necessary mechanical appurtenances listed in Section 205.15 of the Ordinance.

Starting in April of 2008, ERE submitted three separate site plans for the construction of the power plant to the Zoning Officer. Appellants appealed all of the plans to the Board. On September 4, 2008, the Board granted Appellants' appeal from the Zoning Officer's approval of the first proposed plan, and determined that the 165-foot boilers did not fall under the exception in Section 205.15 of the Ordinance for necessary mechanical appurtenances. Hearings were held before the Board on February 24 and 26, and March 24, 2009 concerning the second and third proposed

plans. After the February 24, 2009 hearing, the Board affirmed the Zoning Officer's denial of ERE's second proposed plan, and denied ERE's application for a dimensional variance. On February 26, 2009, the Board denied ERE's motion to quash Appellants' appeal from the Zoning Officer's approval of the third proposed plan, and overturned the Zoning Officer's approval of the third plan. Finally, on March 24, 2009, the Board granted ERE's exclusionary challenge to the Ordinance.

All of the Board's decisions were appealed to the trial court. The trial court consolidated the appeals and on March 24, 2010, issued an order and opinion which, *inter alia*, affirmed the Board's decision to grant ERE's exclusionary challenge.[1] Appellants appeal the trial court's grant of ERE's exclusionary challenge to this Court.[2]

Appellants argue that ERE has only proven that a 100 megawatt tires-to-energy combustion power plant[3] utilizing two 165-foot CFB boilers, a 180-foot

---

[1] The order addresses the five consolidated appeals; however, the only issue being appealed to this Court is the granting of ERE's exclusionary challenge.

[2] Our standard of review in a zoning hearing board case in which the trial court did not take additional evidence:

> is limited to determining whether the board abused its discretion or committed legal error. An abuse of discretion occurs when the board's findings are not supported by substantial evidence in the record. Substantial evidence is that relevant evidence which a reasonable mind would accept as adequate to support the conclusion reached.

Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp., 599 Pa. 568, 578, 962 A.2d 653, 659 (2009) (citation and quotation marks omitted).

[3] Combustion power plants are those run on some form of fuel, i.e., coal, nuclear energy, gas, fossil fuels, tires, etc., as opposed to other types of power plants which run on resources such as solar or wind. Reproduced Record (R.R.) at 64a.

cooling tower and a 300-foot smokestack cannot be constructed within city limits, not that there is a *de facto* exclusion of all power plants in the City of Erie. We disagree.

> [A] zoning ordinance enjoys a presumption of constitutionality and validity unless the challenging party shows it is unreasonable, arbitrary or not substantially related to the police power interest the ordinance purports to serve. Among other reasons, an ordinance will be found unreasonable and not substantially related to the police power purpose if it is unduly restrictive or exclusionary. To overcome the presumption of constitutionality, the challenger may demonstrate the ordinance totally excludes an otherwise legitimate use. A challenger may show the ordinance is exclusionary on its face or by application. Once the challenger meets this burden, the municipality must show the ordinance bears a substantial relationship to the public health, safety, and welfare.

Hanson Aggregates Pa., Inc. v. Coll. Twp. Council, 911 A.2d 592, 595 (Pa. Cmwlth. 2006) (citations and quotation marks omitted). "Zoning ordinances that exclude uses fall into one of two categories - *de jure* or *de facto*. . . .[4] In a *de facto* exclusion case, the challenger alleges that an ordinance appears to permit a use, but under such conditions that the use cannot in fact be accomplished." *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp*., 599 Pa. 568, 579, 962 A.2d 653, 659 (2009) (*Exeter*).

The specific issue this Court must decide is whether the Ordinance's exclusion of a certain type of power plant qualifies as *de facto* exclusion. In the present case, the trial court determined that since "the necessary components of a combustion power plant must be built in excess of 100-feet . . . the Board could conclude that, pursuant to the height restriction in the Ordinance, no combustion power plant, including ERE's proposed tires-to-energy power plant, can be built in the City of Erie." Tr. Ct. Op. at 5.

[4] There is no dispute that the issue before this Court concerns a *de facto* exclusion.

In *Exeter*, an outdoor advertising business applied for permits for billboards within the township. The proposed billboards consisted of approximately 300 or 672 square feet of signage per side. The township's zoning ordinance restricted signs to 25 square feet. The advertising company argued that the national industry standard for billboards was set at either 300 or 672 square feet, and therefore the 25-square-foot restriction in the ordinance effectively banned billboards anywhere in the township. The Pennsylvania Supreme Court held:

> the Board's finding that the 25-square-foot limitation on signs in Section 105.2 amounts to a *de facto* exclusion of billboards in the Township is supported by substantial evidence. [The appellant] established that a billboard is a legitimate means of displaying and communicating an advertising message to passing drivers on roads and highways. [The appellant] also established that a 300-square-foot sign is large enough to serve this purpose, but that a 25-square-foot sign is not. [The appellant] showed that a 25-square-foot sign cannot function effectively as a billboard because it is too small to contain and convey an advertising message to the motoring public. Such a conclusion is also supported by common sense. Thus, [the appellant] proved a *de facto* exclusion-that is, it demonstrated that Section 105.2 appears to permit billboards as a use, but under such conditions that the use cannot in fact be accomplished.

Exeter at 583-84, 962 A.2d at 662. The trial court in the present case opined that "[b]ased on [its] reading of *Exeter*, a zoning hearing board can sustain an exclusionary challenge based on finding that a subcategory of a permitted use is excluded due to restrictions within a zoning ordinance." Tr. Ct. Op. at 5.

ERE presented the testimony of two experts. Ned Popovic, is the lead engineer for the project and Vice President of Engineering and Construction for Caletta Renewable Energy, and has 40 years experience in the power generation industry. Joseph Pezze has over 30 years experience in the air quality field, including

working for the Pennsylvania Department of Environmental Protection for 27 years. Both experts testified in detail about the structural components and regulatory requirements for combustion power plants, and concluded that, based on today's technology, combustion power plants could not be built to meet the Ordinance's height restrictions.

Based on the record, it is clear that there was no abuse of discretion by the trial court because there was substantial evidence that combustion power plants cannot be built to meet the current height restrictions in the Ordinance. In addition, based on the reasoning in *Exeter*, it is clear that if an entire subcategory of a use is excluded, the use is, in effect, excluded from the municipality. Therefore, the Board did not err in determining that there was a *de facto* exclusion of combustion power plants in the Ordinance.

We note that the Supreme Court in *Exeter* determined that there was a two-step analysis to be applied in exclusionary challenge cases. Specifically, we must first consider whether the party challenging the Ordinance has overcome the presumed constitutionality of the Ordinance by showing that it excludes the proposed use. Secondarily, we must consider whether the municipality has salvaged the Ordinance by presenting evidence to show that the Ordinance bears a substantial relationship to the health, safety, morality, or welfare of the public. *See Exeter*. Here, we have determined that ERE has overcome the presumed constitutionality of the Ordinance, and the municipality, the City of Erie, is a co-appellee with ERE. Thus, in this case, the municipality is not offering evidence showing that the Ordinance bears a substantial relationship to the health, safety, morality, or welfare of the public, as doing so would be counter-productive given the municipality's position as co-appellee. Further, even if the Appellants were substituted for the municipality for

purposes of this analysis, the evidence offered would be insufficient to salvage the Ordinance because the only evidence presented in support of salvaging the Ordinance was hearsay and lay opinion testimony regarding the effect that the power plant would have on the neighborhood.

For the reasons stated above, the order of the trial court is affirmed.

_____

JOHNNY J. BUTLER, Judge

Judge McCullough did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Erie Renewable Energy, LLC	:	
	:	
v.	:	
	:	
Zoning Hearing Board of the City of Erie, Erie County, Pennsylvania	:	
	:	
Robert Petroff and Susan Tymoczko	:	
	:	
v.	:	
	:	
The City of Erie Zoning Hearing Board	:	
	:	
Appeal of: Robert Petroff and Susan Tymoczko	:	No. 735 C.D. 2010

O R D E R

AND NOW, this 15th day of December, 2010, the March 24, 2010 order of the Court of Common Pleas of Erie County is affirmed.

_____

JOHNNY J. BUTLER, Judge