

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTOPHER S. COKER)
t/a COKER CONCRETE,)
)
Plaintiff,)

v.)

C.A. No. 2002-VCS)

KENT COUNTY LEVY COURT, DAVID R.)
BURRIS, PRESIDENT, RONALD D. SMITH,)
VICE PRESIDENT, COMMISSIONER)
ALLAN F. ANGEL, COMMISSIONER P.)
BROOKS BANTA, COMMISSIONER)
DONALD A. BLAKEY, Ph.D.,)
COMMISSIONER RICHARD E. ENNIS, and)
COMMISSIONER HAROLD J. PETERMAN,)
INDIVIDUALLY AND IN THEIR CAPACITY)
AS MEMBERS OF KENT COUNTY LEVY)
COURT,)
)
Defendants.)

MEMORANDUM OPINION

Date Submitted: October 10, 2008

Date Decided: December 23, 2008

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STRINE, Vice Chancellor.

I. Introduction

In this action, a business owner challenges a decision by the Kent County Levy Court denying his application for conditional use approval. The plaintiff, Christopher S. Coker, owns and operates Coker Concrete, a cement, asphalt, and tree recycling facility located on a 20-acre property in Kent County, Delaware. Coker successfully applied to the defendant Levy Court to rezone that property from an agricultural designation to an industrial designation in 2003. Then, in order to bring his operations into compliance with the Kent County Code (“the Code”), Coker began the two-tiered process for obtaining conditional use approval in 2005. He appeared first before the Regional Planning Commission (“the RPC”), which, after a lengthy review process, recommended approval of the application with certain modifications. This recommendation was forwarded to the Levy Court. After a public hearing that spanned two meetings, the Levy Court denied the application in its entirety, citing a hodgepodge of reasons, some of which were responsive to the factual record before the Levy Court and some of which were not.

Coker then brought suit in this court challenging the Levy Court’s decision as arbitrary, capricious, and an abuse of discretion. The Levy Court, while acknowledging that not all of the reasons it gave for its decision were supported by substantial evidence, contends that some of its reasons were rational and supported by substantial evidence, and therefore its decision was a proper exercise of discretion.

In this post-trial opinion, I find in favor of the Levy Court. This court can only interfere with the decisions of local zoning bodies when those agencies base their

decisions solely on impermissible grounds. Here, there was substantial evidence that Coker Concrete posed a threat to the quality of life of its residential neighbors due to Coker's insistence on operating extensively during evenings and weekends. There was also substantial evidence that Coker's proposed site plan would not adequately protect Code-required setback lines.

For these reasons, the Levy Court's decision to deny Coker's application must be upheld. But, if Coker brings a new application that addresses these focused issues, the Levy Court cannot rely as a basis of denial on the other, unsubstantiated reasons it gave during these proceedings, including its generalized concerns that the use is "too intense" or will harm the environment.

II. Factual Background

A. The Property Is Rezoned

The subject of this dispute is a 20-acre parcel of land in Kent County ("the Property") and the business that operates on it, Coker Concrete, a concrete, asphalt, and tree recycling facility. The plaintiff, Christopher S. Coker, began operating Coker Concrete in 2000 on a 4.5-acre section of the Property which at all relevant times has had the zoning designation of "General Industrial," the most permissive level of zoning available in Kent County.¹ In 2003, Coker acquired the adjacent 15.5 acres, which were zoned for agricultural use at the time, in order to have room to expand Coker Concrete.

¹ The purpose of the General Industrial designation is to "provide a wide variety of industrial uses, including those which may produce some objectionable conditions" and to "concentrate more intense industrial uses in areas which would least impact neighboring land uses." Kent Cty. C. § 205-196.

Coker then applied to have this new section of the Property rezoned to the General Industrial designation. Because the Property is located in an unincorporated area of Kent County, the appropriate authority to apply to was the defendant, the Kent County Levy Court, which unanimously approved the rezoning in December 2003 based on the RPC's recommendation.²

The Property is located in an area of Kent County where industrial and residential uses come together. Neighbors of the Property include commercial and industrial sites, farms, a hospital, a dozen or so residential properties, and the Dover Air Force Base.³ The RPC was aware when it recommended the rezoning that the Property was to be used as a concrete recycling facility, and it took into account the continuing oversight power it would have over the Property through the County Code's conditional use provisions.⁴ A contractor's establishment such as Coker Concrete is a conditional use in General Industrial zones, meaning that the property owner must submit and obtain approval of a site plan before using the land for that purpose.⁵ Therefore, when Coker promised the RPC during the rezoning hearings that he would take steps to minimize the effect of his activities on his neighbors, such as installing fencing and shrubbery, the RPC was aware that it could require that Coker follow through on those promises.

² PX E-9.

³ PX E-7 at 3; PX G at 3.

⁴ PX E-6 at 4-5.

⁵ Kent Cty. C. § 205-200.

B. Coker Delays His Application For A Conditional Use

Despite the clear requirement that Coker apply for conditional use approval, Coker did nothing to initiate the process for nearly two years. Coker Concrete continued to thrive in the meantime, but Coker neither moved the operations to the back of the Property as planned, farther away from the neighboring homes, nor installed the fencing and landscape buffers he had promised during the rezoning hearings. This state of affairs did not ingratiate Coker to his residential neighbors. The business of concrete, asphalt, and tree recycling is a noisy and dusty one. Coker Concrete receives materials from commercial customers, including the State of Delaware, stores them in stockpiles up to 40' high, crushes or mulches the materials, and then sells the output to commercial customers. This is an entirely outdoor operation and involves an array of heavy equipment and trucks, many of which kick up dust and debris when in use.⁶ In the case of Coker Concrete, this is also an around-the-clock operation. The evidence from all sides is that Coker works an incredible number of hours, including weekends, holidays, early mornings, and late nights.⁷

Unsurprisingly, Coker's residential neighbors did not appreciate the constant noise and dust emanating from the Property, and they complained about both problems to various authorities. None of the alleged noise and dust violations reported by the neighbors were ultimately substantiated in a violation hearing, but the frequency of

⁶ A neighbor testified that the vehicles on the property include excavators, front end loaders, dump trucks, and eighteen wheelers. PX H-1 at 13.

⁷ See, e.g., PX I-1 at 58; *id.* at 70; PX H-1 at 15. Coker's own counsel acknowledged that Coker "work[s] an extreme amount of hours." PX H-4 at 4.

complaints, combined with Coker’s failure to obtain the required conditional use approval, led the County to issue a stop work order on Coker Concrete in April 2005.⁸ The stop work order was lifted a few days later on the condition that Coker comply with the County’s noise ordinance, which prohibits the use of heavy equipment between 11:00 p.m. and 7:00 a.m., and that he at last begin the conditional use approval process.⁹ Coker submitted his long-awaited conditional use application (“the Application”) and site plan (“the Plan”) in August 2005,¹⁰ kicking off what became a lengthy review period.

C. The RPC Recommends Approval Of The Application

Like many other jurisdictions, Kent County uses the conditional use process to bring flexibility to its zoning scheme and allow for a greater variety of beneficial uses.¹¹

The Code states the criteria to be used for approving a conditional use:

A conditional use should be approved only if it is found that the location is appropriate and not in conflict with the Comprehensive Plan; that the public health, safety and general welfare will not be adversely affected; that adequate off-street parking facilities will be provided, and that necessary safeguards will be provided for the protection of surrounding property and persons and further, provided, that the additional standards of this article are complied with.¹²

⁸ DX F.

⁹ DX G.

¹⁰ PX F-1.

¹¹ As stated in the Code:

The purpose of the conditional use procedure is to provide for certain uses which cannot be well-adjusted to their environment in particular locations with full protection offered to surrounding properties by rigid application of the district regulations. These uses . . . are essential and desirable for general convenience and welfare, but because of the nature of the use, . . . require the exercise of planning judgment on location and site plan.

Kent Cty. C. § 205-251; *see generally* 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING §§ 61:4-7 (discussing the purposes of conditional uses).

¹² Kent Cty. C. § 205-251. The Code also enumerates specific requirements for contractors’ establishments such as Coker Concrete, all of which were met in the Plan. *See id.* at § 205-282.

Conditional use approval is a two-tiered process in Kent County.¹³ An applicant first goes before the RPC, which holds a public hearing, and then votes to recommend approval, denial, or approval with conditions of the application.¹⁴ This recommendation is then forwarded to the Levy Court for its consideration.¹⁵

The RPC hearing on the Application was held on October 5, 2005. At the hearing, the RPC staff (“the Staff”) presented its report recommending approval of the Application (“the Staff Report”). This approval was conditioned on certain requirements and recommendations (“the Staff Recommendations”) being met, all of which Coker agreed to comply with except three: 1) installing Jersey barriers to mark setback requirements;¹⁶ 2) limiting the height of stored materials to 30’; and 3) limiting the hours of operation to 7 a.m. to 7 p.m. (8 p.m. during daylight saving time), with crushing and mulching only occurring between the hours of 8 a.m. to 5 p.m. during the week, 8 a.m. to 12 p.m. on Saturday, and not at all on Sunday.¹⁷

At the hearing, Coker, through his counsel, made his case for varying from these three Staff Recommendations. He wanted to replace the Jersey barriers with concrete posts, arguing that anyone could still easily tell if the setback lines were sliding.¹⁸ The Staff was opposed to this approach because the posts would not prevent materials from

¹³ See Kent Cty. C. § 187-40.

¹⁴ *Id.* §§ 187-40(A)-(F).

¹⁵ *Id.* §§ 187-40(G)-(K).

¹⁶ Jersey barriers are continuous concrete barriers and typically seen at highway construction sites.

¹⁷ This scheme apparently has precedent in the County. An RPC staff member noted that similar hour limitations were placed on the conditional use application of a tree processing company in the area. PX H-1 at 10.

¹⁸ *Id.* at 4.

drifting past the setback lines during the frequent loading, unloading, and moving operations.¹⁹ On the matter of stockpile height, Coker argued that 40' piles of concrete and asphalt were logistically more desirable due to the height of the crushing machines and did not pose a safety hazard.²⁰ The Staff did not respond to this at the RPC hearing.

On the issue of hours, Coker was adamant that he needed to be able to operate to the fullest extent allowed by the Code, subject to the limits imposed by his federal permits, which prohibit crushing and grinding on Sundays.²¹ Coker said he needed this flexibility because the outdoor nature of his operations put his business at the mercy of the weather and because his customers want to be able to drop off and pick up materials on the weekends. Coker also argued that noise conditions would improve when the proposal to move materials to the back of the Property was completed.²²

In addition to Coker's testimony in favor of the Application, the RPC heard opposition comments from Coker's residential neighbors. Their biggest concern was the dust created by Coker Concrete. The neighbors noted that they could not open their windows, have barbeques in their yards, or hang their laundry out to dry while work was being done on the Property, which was often. They were also frustrated by the constant layer of dust on their houses and cars, and some raised questions about whether exposure to the dust might be unhealthy. The residents also testified about the noise. Aside from the "deafening" noise of the crushing and mulching machines, they were also regularly

¹⁹ *Id.* at 5.

²⁰ *Id.* at 7. Mulch was not part of this request because it cannot be stored safely at these heights. *Id.*

²¹ *Id.* at 8.

²² *Id.* at 5-6, 8.

disturbed by the sounds of concrete and asphalt chunks sliding across metal surfaces as they were being moved and the beeps of large trucks backing up.²³

The Application was then discussed at each of the next three RPC monthly business meetings. The greatest amount of discussion was devoted to the issue of Coker Concrete's hours of operation. At each meeting, Coker asserted that his business required greater operating flexibility than the Staff Recommendations allowed. He asked the RPC to take a wait-and-see approach by approving expanded hours with the Application and then revisiting the issue if noise was still a problem after the operations were moved to the back of the Property in accordance with the Plan.

Some members of the RPC were concerned that the Staff Recommendations on hours did not do enough to protect the neighboring land uses from the noise and dust. Expressing a view supported by several of the Commissioners, one Commissioner stated:

I highly recommend that from my perspective, that this should not be a seven day operation and I think there should be hours set on it. I think that when a person comes home [at] 5:00 they're entitled to sit out in the backyard and have a barbeque, whatever the case may be, enjoy their family without somebody across the street beating and banging and dust flying all over the place.²⁴

Sunday hours especially were a concern to some of the Commissioners. The Staff Recommendations would have banned materials processing on Sunday, but would have allowed other activities from 7 a.m. to 7 p.m. (8 p.m. daylight saving time). Several Commissioners found this unacceptable, arguing that the trucks and machinery not

²³ *Id.* at 15.

²⁴ PX H-2 at 3.

involved in crushing or mulching still produced considerable noise and dust and that the neighbors deserved at least one day of rest from all of it.²⁵

The other areas of disagreement between Coker and the Staff — setback markers and stockpile height — also received attention at the RPC business meetings. Coker maintained his position that Jersey barriers were not necessary to maintain the required setbacks, despite warnings from the RPC that it would not approve a site plan without Jersey barriers.²⁶

On the issue of stockpile height, Coker repeated his argument that 40' stockpiles were more convenient given the height of the crushing machines and the lack of an offsetting safety concern. The Commissioners found these reasons persuasive, and noted also that the taller stockpiles would probably be less visible once they were moved farther back into the Property.²⁷

During these meetings, the RPC also discussed various aspects of the landscape plan, such as the height, location, and composition of the tree-planted berms that would surround the Property, and all of these issues were worked out to the apparent satisfaction of the Staff and the RPC.

At the end of the third RPC business meeting, held December 8, 2005, a motion was brought to approve the Application subject to all of the Staff Recommendations,

²⁵ PX H-6 at 6-7.

²⁶ One Commissioner told Coker “I think the staff is telling you they’re pretty adamant that they want [the barriers]. I suggest you agree with that.” PX H-2 at 11. Another concurred: “If I’m going to support this recommendation, this application, we’re going to need to have a physical barrier and if you can’t agree to that, it’s going to be hard for me to give you the support that you need” *Id.*

²⁷ PX H-6 at 9.

except that stockpiles would be limited to 40' rather than 30'.²⁸ The motion narrowly passed by a 4-3 margin. The reason stated by all three dissenters for their objection was that Coker Concrete would be allowed to operate on Sunday under the Plan as approved.²⁹

This action at the RPC level did not result in a formal resolution or draft resolution identifying statements of fact and conclusions of law relied on by the Commissioners. Instead, the RPC forwarded to the Levy Court the Staff Report along with a statement that the RPC recommended approval of Coker's application in accordance with the Staff Recommendations, except that materials could be stored in 40' piles. Thus, what the Levy Court received for review was the same Application that had been before the RPC, consisting of a basic information sheet and the Plan, the RPC record, and the Staff Report incorporating the RPC's recommendations. Throughout this process, Coker had updated the Plan, where applicable, in response to the RPC comments to which he agreed.

D. The Levy Court Denies The Application

The Levy Court began its public hearing on December 20, 2005. At that hearing, the Levy Court Commissioners reviewed the RPC record and discussed the main issues that had arisen at that level regarding landscaping, setback markers, and hours of operation. They also heard further discussion of the dust issues, including the fact that

²⁸ The same motion was made at the end of the previous meeting, except that the approval would be subject to all of the Staff Recommendations including the 30' stockpile limit. The motion received approval from three of the five Commissioners present, but did not garner the four votes necessary for approval. Rather than consider the motion failed, which would have forced Coker to shut down his business, the Commissioners opted to table the Application to the next meeting, when more Commissioners could vote. PX H-4 at 11.

²⁹ PX H-6 at 10-11.

Coker Concrete is required to comply with the requirements of the Delaware Department of Natural Resources (“DNREC”), and the proposals in the Application to further alleviate the dust, such as moving materials further back from the road, paving dirt driveways, and installing a DNREC-approved sprinkler system.³⁰ Finally, the Levy Court heard testimony from many of the same neighbors who had appeared at the RPC public hearing reiterating their concerns, mainly about the dust, the excessive hours, and the unsightliness of the Property.

Like their RPC counterparts, the Levy Court Commissioners were particularly concerned about the effect Coker Concrete’s noise, dust, and hours of operation had on its residential neighbors’ enjoyment of their homes. Coker remained as uncompromising on the issue of hours as he had been at the RPC level. Despite the fact that the RPC recommendation for approval was contingent on the limited hours set forth by the RPC Staff — and the fact that the extensiveness of even those limited hours led three of the seven RPC Commissioners to vote against the Application — Coker asked the Levy Court to reject the Staff Recommendation on hours and allow him to operate in the full window of 7 a.m. to 11 p.m. daily permitted by County ordinance, with the concession that materials processing would not occur after 7 p.m. (8 p.m. daylight saving time). This proposal met strong opposition.³¹ The Commissioners pointed out what had already been noted by the RPC, that even if materials processing, meaning crushing concrete or grinding mulch, was not going on, there could still be considerable noise coming from the

³⁰ PX I-1 at 8-9.

³¹ *See, e.g., id.* at 37 (“I, for one, cannot even begin to support that . . .”).

Property due to the sounds of commercial trucks moving materials and backing up.³²

Some Commissioners offered sets of hours they would find reasonable.³³ These were more limited than the Staff Recommendation on hours, and they specifically required that no activities occur on Sundays. Coker, for his part, did not waver from his position that his business required operating flexibility and that the proposed landscape and other site modifications would address the noise and dust concerns.

Coker was similarly unaccommodating on the issue of setback markers. Again, despite the fact that the RPC recommendation for approval was contingent on the Staff Recommendation that Jersey barriers be used to mark setbacks, and despite the clear statements from RPC Commissioners that Jersey barriers were necessary for their support of the Application, Coker asked the Levy Court to allow him to use concrete posts instead.³⁴ The Commissioners took issue with this, in part because a picture they had of the site in its current condition showed that some stockpiles had encroached beyond the 100' setback required for a blue line stream running across the Property.³⁵ Why, the Commissioners asked, should they trust that Coker would stay in setback areas marked by posts if he was already in violation of the setback requirements? Coker responded that problem was the cramped nature of the operations because they were only in a small part of the Property, and once they were moved back, space would not be an issue and posts, rather than a continuous barrier, would be adequate.

³² *Id.* at 39-40, 56.

³³ *Id.* at 37 (7 a.m. to 5 p.m. on weekdays, 7 a.m. to 12 p.m. on Saturday, no Sunday hours); *id.* at 54 (7 a.m. to 6 p.m. on weekdays, no weekend hours).

³⁴ *Id.* at 29-30.

³⁵ *Id.* at 52.

The Levy Court left these issues unresolved at the end of its December 20 hearing. Acknowledging the amount of information they had received during the hearing and the fact that the most recent version of the landscape plan had not been available to them, the Commissioners opted to table the Application for further consideration at their next meeting.³⁶

The Levy Court reconvened on January 17, 2006 and reopened the hearing on the Application. This time the discussion was relatively brief. The Commissioners reviewed the most current version of the Plan, clarified some minor issues regarding it with the Staff, and heard a statement from Coker's counsel. Finally, after some additional consideration, a motion was brought to deny the Application, and that motion passed by a 5-2 vote.³⁷

The Levy Court's denial motion was not done through formal resolution, and, unlike the motion made at the RPC, this motion did not reference the Staff Recommendations. That is, at this key culminating point when the Levy Court was to give its reasons for action, and perhaps understandably given the length of the process up to that point and the other items on the Levy Court's agenda, the Commissioners expressed themselves in an off-the-cuff manner that was not carefully tied to the record. Their statements were brief and offered a number of reasons for denying the Application:

- [I support the denial motion based on] concerns that I've heard from some of the neighbors and the hospital in the area, noise and air quality issues in that area and the quality of life³⁸

³⁶ *Id.* at 71.

³⁷ PX I-5 at 603.

³⁸ *Id.* at 598.

- I will be supporting the motion based on the environmental issues, based on the proximity to ah lands of Kent General Hospital, based on the proximity to residential housing and the intensive use at this site is not appropriate.³⁹
- [A]djoining property to one side is hospital. We have residential uses at least on one side residential and others in the immediate vicinity. We have [a] Blue Line stream running through the property. Ah of course we are not too far from the Dover Air Force Base. Ah I think this type of use ah is way too intensive to be approved as a conditional use I have to agree that 40 foot high mounds of this debris ah will and does present an extremely unsightly situation. And ah the dust and other things that are generated I think have an extreme negative impact on the surrounding properties⁴⁰
- I'm going to be supporting the denial motion only because of the intense use with what is already existing out there. Um it's unfortunate because the IG zoning is where this belongs but when the IG zoning was given I don't believe any of the Commissioners expected the intense use that would come with this type of operation Coker uses. . . . [I]ts just this application because of its seeming inability to deal with air quality, to deal with possible water quality because of the Blue Line streams and the possibility we could set ourselves up to harm the environment rather than recycle and help the environment. I think this operation needs to find a different location that's more suitable.⁴¹
- Ah I haven't been comfortable in approving this particular application. Throughout the process whether it be at the RPC or at this level the Applicant has continually tried to reverse everything that was recommended or has been recommended by the RPC. . . . The dust, the noise, the possibility of him expanding this operation to a seven day operation which he says he's not going to do right now but there's a possibility he may want to. . . . [I]t is very difficult for me to approve this Applicant, this application when as of this time he hasn't made any real effort to show us that he will fully comply with the requirements which we place on it so I will definitely have to support the denial.⁴²

³⁹ *Id.* at 602.

⁴⁰ *Id.* at 599.

⁴¹ *Id.* at 601-02.

⁴² *Id.* at 602.

Many of these issues, for example the proximity of the hospital and Dover Air Force Base and environmental matters, were not ones based on any factual concerns in the record, as discussed below. But, the Commissioners also cited public welfare issues relating to the residential neighbors' quality of life that had been heavily discussed over the course of the Levy Court hearings and that were supported by substantial evidence.

After his Application was denied, Coker initiated this action challenging the Levy Court's decision on the basis that it was arbitrary, capricious, and an abuse of discretion.⁴³

III. Legal Analysis

A. Standard Of Review

This court's review of a decision by a local zoning authority to deny a conditional use application, like its review of other zoning decisions, is a limited one. I may only review "the record to ascertain if the statutory procedural mandates have been followed, that the decision is supported by substantial evidence and that it is not arbitrary, capricious or an abuse of discretion."⁴⁴ If the applicant meets the statutory prerequisites required for obtaining a conditional use, a rebuttable presumption favoring approval

⁴³ Coker also argues in his brief that the Levy Court was estopped from denying the conditional use because Coker had relied to his detriment on the validity of Coker Concrete's expansion based on the rezoning in 2003. *See* Pl.'s Op. Br. at 25-26. This argument fails to address the requirement that a property owner must rely in good faith on a zoning decision in order to claim estoppel. *See Wilmington Materials, Inc. v. Town of Middletown*, 1988 WL 135507, at *6 (Del. Ch. Dec. 16, 1998). Coker was made aware at the time of the rezoning that additional review proceedings were required to bring Coker Concrete in compliance with the Code. He therefore could not rely in good faith on the rezoning as assurance that his conditional use application would be approved.

⁴⁴ *Steen v. County Council of Sussex County*, 576 A.2d 642, 648 (Del. Ch. 1989).

arises, and the burden falls to the Levy Court to articulate a non-arbitrary reason for denying the application.⁴⁵

An arbitrary decision is one “which is unreasonable or irrational, or . . . which is unconsidered or which is wilful and not the result of a winnowing or sifting process.”⁴⁶ I need only find one of the reasons stated by the Levy Court sufficient to support its decision to deny the Application.⁴⁷ In other words, the inclusion of unsupported or irrational reasons will not render a decision arbitrary as long as there is also a rational reason articulated in the record and supported by substantial evidence for the decision.⁴⁸ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁴⁹

B. The Levy Court’s Decision Was Not Arbitrary, Capricious, Or An Abuse Of Discretion

After reviewing the record, I am satisfied that the Levy Court articulated rational, well-supported reasons for denying the Application based on Coker’s refusal to agree to limited hours or to install continuous barriers to protect setback lines. Both of these reasons are responsive to the Code’s requirement that a conditional use only be approved

⁴⁵ *Gibson v. Sussex County Council*, 877 A.2d 54, 65 (Del. Ch. 2005) (citing *Steen*, 576 A.2d at 646).

⁴⁶ *Willdel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970).

⁴⁷ See 101A C.J.S *Zoning & Land Planning* § 343 (“[W]here any one of the reasons given for the denial of an application is sufficient, it is unnecessary to review other reasons given.”); 3 RATHKOPF’S § 62:33 (“A board abuses its discretion when its decision is based *solely* on grounds which it could not consider, or when it is ‘arbitrary.’” (emphasis added) (citation omitted)).

⁴⁸ There is no suggestion that any Commissioner was motivated by invidious considerations, such as racial or ethnic bias. Hence, the most deferential form of review is appropriate. See 2 AM. JUR. 2D *Administrative Law* § 484.

⁴⁹ *E.g., Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

if “the public health, safety and general welfare will not be adversely affected,”⁵⁰ and both are supported by substantial evidence in the administrative record.

1. Hours

It is helpful at this point to summarize the various proposals on hours that were discussed over the course of the Application’s review. Coker’s initial request was to be able to work to the fullest extent allowed by the County noise ordinance, which permits heavy machinery operation from 7 a.m. to 11 p.m. daily, and by his federal permits, which prohibit crushing and mulching on Sundays. The RPC Staff then recommended, and the RPC adopted, a more limited set of hours that only permitted full operations, including crushing and mulching, from 8 a.m. to 5 p.m. on weekdays and 8 a.m. to 12 p.m. on Saturdays, but allowed limited operations, such as deliveries, from 8 a.m. to 7 p.m. (8 p.m. daylight saving time) daily. Rather than adopt the RPC hours, Coker went before the Levy Court still requesting daily operations from 7 a.m. to 11 p.m., but now with the concession that only non-crushing operations could occur after 7 p.m. (8 p.m. daylight saving time). This did not sit well with the Levy Court Commissioners, who were strongly opposed to any operations occurring during evenings and Sundays. Several of the Commissioners proposed hours schemes they would find reasonable, but Coker did not agree to any of them, or even to the more generous hours recommended by the RPC.

The issue of hours was a driving force behind the concerns about “quality of life” that many of the Commissioners cited in their final remarks on the Application. The

⁵⁰ Kent Cty. C. §205-251.

hours were the subject of lengthy, and sometimes heated discussion, between the Levy Court and Coker. The Commissioners essentially asked Coker why he thought extensive hours of operation for Coker Concrete were appropriate when they were ruining the quality of life of his residential neighbors, who could not enjoy outdoor activities on the weekends or quiet evenings at home during the week.⁵¹ Coker's response was always that he recognized the concern, but the hours would not be a problem once the Plan was implemented.

Coker acknowledges that he never presented an Application to the Levy Court that incorporated the RPC hours, much less one that addressed the Levy Court's concern about Sunday hours.⁵² Coker argues, however, that the hours issue is not a sufficient basis for denying the Application, and he gives two reasons for this assertion. The first is essentially that the Levy Court could not deny the Application on the basis of hours when it could have used its power to impose special conditions instead. The second reason is that the issue of hours is intertwined with the issues of noise and dust, and, with regard to those issues, the Levy Court impermissibly focused on current conditions rather than those presented in the Plan. Neither of these arguments is persuasive.

On the first reason, Coker has provided no authority for the proposition that the Levy Court had to choose a set of hours rather than deny the Application in full.

Although the Levy Court has the discretion to impose special conditions, that does not mean the Levy Court is required to rewrite the applications presented to it. This is

⁵¹ See, e.g., PX I-1 at 37; *id.* at 47-48; see also *id.* at 58 (testimony from a neighbor that “[t]o allow [Coker] to operate at night, on weekends and holidays has taken my quality of life away”).

⁵² Tr. at 8.

especially true here, where Coker was fully aware of the concerns the RPC and Levy Court Commissioners had about the hours, and yet refused to make any meaningful attempt to address them. The Application barely squeaked through the RPC approval process because of the hours issue, but Coker nevertheless applied to the Levy Court asking for more extended hours than the RPC had approved. And the Levy Court, for its part, even suggested various hours of operation schemes that would make the Application acceptable, all of which Coker refused to adopt. In these circumstances, where an applicant already had a history of noise complaints and was strongly resisting the imposition of any limits on hours, it was within the Levy Court's discretion to determine that denial was more appropriate than approval with conditions.

As for the second reason, it is true that the issue of hours is intertwined with the issue of the noise and dust generated by Coker Concrete. The hours of operation are a problem only because of the noise and dust generated during that time. Coker argues that the Commissioners based their decision on the noise and dust issues associated with the Property as it existed at the time of the hearings,⁵³ and that they ignored the improvements in the Plan that would address these issues.

It appears from the administrative record that, to some extent, the Commissioners were focused on the current rather than proposed conditions. This is especially true for the dust issue. For example, one Commissioner, remarking on quality of life problems,

⁵³ In some ways, Coker created this problem for himself by operating on the Property as a non-conforming use for several years, giving his neighbors and the Commissioners ample opportunity to observe just how much noise and dust an unmitigated concrete recycling facility can generate.

noted that “having seen that dust, you can’t barbecue.”⁵⁴ This, of course, refers to the dust conditions before the improvements included in the Plan were implemented. Coker had proposed a number of methods of reducing dust, including moving the operations farther away from the residential neighbors, paving the access road, planting opaque landscape berms, and installing a DNREC-approved sprinkler system to prevent dust from rising into the air. Aside from some doubt raised about whether the landscape barriers would be tall enough to contain the dust⁵⁵ and some testimony from a neighbor that the previous use of a water truck had been relatively ineffective in containing dust,⁵⁶ there is no discussion in the record of whether these measures would reduce the dust to acceptable levels.

That said, one might also acknowledge the legitimate skepticism the Levy Court had about Coker. Coker had no real response to the substantial testimony that his operations had, for several years, been generating dust that traveled on to neighboring properties, dirtying cars, pool water, windows, and other property of his neighbors. His lack of action to address this substantiated concern was a factor the Levy Court could consider. But, the RPC’s recommendations, if adopted, mandated Coker to take steps to remedy the issue, and the Levy Court could have conditioned approval on implementation before a continuation of operations.

By contrast, the evidence in the record about the noise Coker Concrete would generate even after the Plan was implemented is sufficient by itself to support the

⁵⁴ PX I-1 at 48.

⁵⁵ *Id.* at 41.

⁵⁶ *Id.* at 68.

decision that Coker’s proposed hours were unacceptable. The neighbors, who were in the best position to know how noisy Coker’s equipment was, testified to the carrying power of the noises from even the non-crushing machines. One neighbor had told the RPC that “[t]he noise when you move concrete, metal hitting concrete it doesn’t matter how far away you are.”⁵⁷ A Levy Court Commissioner underscored this point by noting that, based on his own experience with a similar site, “when those backup alarms go off . . . you can hear those at least a mile away.”⁵⁸ Coker’s own counsel admitted to the Levy Court that noise would be generated during the evenings and weekends under Coker’s proposed hours, although he also argued that moving the operations farther into the interior of the Property would mitigate the noise problems. From this evidence, the Levy Court could reasonably conclude that, even with all the features of the Plan in place, extensive operations at Coker Concrete on evenings and Sundays were not appropriate for conditional use approval.

2. Setback Markers

The issue of setback markers provides additional support for the denial of the Application. Several of the Commissioners noted the presence of a blue line stream when they gave their reasons for denying the Application. The blue line stream in question is a small creek running through the Property that appears on the U.S. Geological Survey Maps. The Code requires a 100’ setback from such bodies of water, but earlier in the proceedings the Commissioners had noted that Coker Concrete’s

⁵⁷ PX H-1 at 15.

⁵⁸ PX I-1 at 39.

stockpiles were encroaching over the setback line. Nevertheless, Coker insisted that a continuous barrier like a Jersey barrier was not required, and concrete markers would be sufficient to maintain setbacks, despite the RPC Staff's warning that the setbacks were bound to spill over such imaginary lines given the realities of moving large piles of rocks and mulch with heavy trucks. Thus, the Plan that Coker submitted to the Levy Court did not comply with the condition of the RPC approval requiring Jersey barriers, and instead called for concrete posts to be placed at various intervals along the setback lines.

Setbacks serve an important role in any zoning scheme, and this includes setback requirements that are meant to protect an environmental feature like a body of water. Coker attempts to minimize the importance of this issue by contending that this particular body of water is a man-made ditch that only carries water when it rains, and that he intends to apply to have it removed from the U.S. Geological Map. But, whether Coker thinks the blue line stream is substantial or not, the fact that it does appear on the U.S. Geological Map currently means that Coker is required to comply with the Code provisions regarding such bodies of water. On this record, it was reasonable for the Levy Court to conclude that concrete posts would not prevent materials from coming within 100' of the blue line stream, and therefore the Levy Court had a rational basis for concluding that the Plan did not meet the Code requirements for a conditional use.

Thus, the Levy Court articulated two, non-arbitrary reasons supported by substantial evidence for denying the Application.⁵⁹ The Levy Court has therefore met its burden for denying a conditional use application, and I dismiss Coker's complaint.

⁵⁹ In supplemental, post-trial briefing requested by the court, Coker advanced an argument that the Levy Court does not have the power under the Code to deny applications, only to approve them or approve them with conditions. This argument both came far too late in the proceedings and is unconvincing. The Levy Court's interpretation of its own regulations is entitled to deference. *See State Farm Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995). Moreover, Coker's argument that the Levy Court is duty-bound to approve all applications on some set of conditions is not persuasive. I do note that a similar question was raised in the context of subdivision approval in a recent case before our Supreme Court, *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n*, ___ A.2d ___, 2008 WL 5114981 (Del. Dec. 5, 2008). In that case, the Court held that the RPC could not deny a Code-compliant subdivision plan on the basis of public health, welfare, and safety concerns raised by commenting state agencies; instead, the Court held that those concerns may only be used to shape reasonable conditions on the plan. This case is distinguishable on a number of levels. For starters, in *Ashburn*, the Court was interpreting statutes enacted by the General Assembly regarding land development and subdivision approval in Kent County. Conditional uses in Kent County, by contrast, are entirely creatures of regulation adopted by the Levy Court under its general zoning authority. *See 9 Del. C. § 4901*. Second, subdivisions and conditional uses are substantively different zoning tools. Although both require site plan approval, subdivision approval is more ministerial, as evidenced by the fact that a subdivision plan may be approved by the RPC while a conditional use requires Levy Court approval as well. *Kent Cty. C. §§ 187-21, 187-40*. The requirements for approval of each are also different. Subdivision plans are required to comply with all applicable state and federal laws. *Kent Cty. C. § 187-56*. Conditional uses must meet more stringent standards, including, for example, the requirement that a conditional use only be approved "if the public health, safety and general welfare will not be adversely affected." *Kent Cty. C. § 205-251*. This aspect of the Kent County Code is not novel to it. Conditional use provisions are, throughout the nation, used to address types of land use that raise particularly sensitive concerns that cannot be the subject of general rules, and that require more parcel-specific consideration. *See 3 RATHKOPF'S § 61:6-7*. I do not read *Ashburn* as casting doubt on the propriety of that approach by Kent County. And finally, this is a different situation from *Ashburn* because here the RPC did propose conditions to Coker, but Coker refused to accept them, and instead asked the Levy Court to approve an Application that was entirely different from what the RPC approved. The RPC and Levy Court should not be required to bargain with applicants who refuse to accept reasonable conditions. Such a requirement would create an incentive for applicants to resist accepting conditions suggested by bodies like the RPC, because the ultimate approving authority would be duty-bound to approve on some set of conditions. That would force bodies like the Levy Court to bargain with themselves when an applicant like Coker comes before them. Had Coker wished to have the Levy Court grant him approval based on conditions, he should have assented to the conditions recommended by the bare majority of the RPC. Having squeaked out an approval by a single vote at the RPC level, Coker was on notice of the precariousness of his

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Having dismissed the complaint, my analysis would normally end here. But, much of the controversy that arose in this case will likely be repeated if Coker chooses to reapply for conditional use approval from the RPC and Levy Court. If Coker does submit a new application for conditional use approval that addresses the issues discussed above, the Levy Court will have to review it with a focus on the relevant issues grounded in the factual record, and cannot rely as a basis of denial on the other, unsubstantiated reasons it provided in these proceedings. To guide this analysis, I now turn to the other reasons provided by the Levy Court that I find were unsubstantiated by the record.

C. Concerns About Intensity Of Use, Air Pollution, And The Non-Residential Neighbors Are Not Supported By The Factual Record

Many of the Commissioners voted to deny the Application on the basis that Coker Concrete was “too intensive” a use for the Property.⁶⁰ But, the record does not reveal the reasoned basis the Levy Court used to determine when a use is too intensive. The Property was already zoned for General Industrial use, the most intensive use in the County. There seems to have been substantial regret about that earlier rezoning decision among the Commissioners, most of whom had been on the Levy Court when it unanimously voted in favor of the rezoning two years earlier with the knowledge that the

position, especially given how long he had tarried in even seeking approval and his refusal to voluntarily clean up his operations. Rather than be accommodating, Coker played hardball and lost.

⁶⁰ See PX I-5 at 599 (“[T]his type of use . . . is way too intensive to be approved as a conditional use”); *id.* at 601 (“I’m going to be supporting the denial motion only because of the intense use with what is already existing out there.”); *id.* at 602 (“[T]he intensive use at that site is not appropriate.”).

Property would be used for concrete recycling.⁶¹ The purpose of the conditional use process is to add a layer of oversight and impose additional, reasonable conditions on presumptively valid uses; the purpose is not to revisit zoning decisions. And, the Commissioners acknowledged that other industrial uses could be appropriate on the Property.⁶² Without an articulated, rational basis supporting the Levy Court’s conclusion that the Plan was too intensive a use while other industrial uses would be acceptable and addressing the fact that the Property was already zoned General Industrial, denial on the basis of “intensity” was arbitrary.

The Levy Court’s approach to environmental issues was also flawed. Aside from the issues surrounding the blue line stream setbacks, the Commissioners were concerned with the air and water quality issues posed by the dust Coker Concrete generated. It is undeniable that crushing concrete and asphalt and mulching trees on a commercial scale creates dust, as the Levy Court undoubtedly knew when it unanimously approved the rezoning of the Property. And because of this, Coker Concrete is subject to the oversight of state and federal agencies. The crushing equipment requires federal permits to operate, and there is no evidence in the record that Coker Concrete had violated the conditions of its permits.⁶³ Coker Concrete is also required to maintain air emissions

⁶¹ *See id.* at 601 (“IG zoning is where this belongs but when the IG zoning was given, I don’t believe any of the Commissioners expected the intense use that would come with this type of operation that Mr. Coker uses.”).

⁶² *See id.* at 601-02 (“[T]he property still does have value, still does have use and still can be used in an industrial capacity . . . ”).

⁶³ *See* PX I-1 at 46.

permits from DNREC.⁶⁴ There is no evidence that it had violated DNREC's requirements.⁶⁵ Moreover, the Commissioners did not state why they thought the restrictions imposed by these expert agencies failed to adequately protect the public health or the environment.

Importantly, the Property met these regulatory requirements as it existed at the time of the hearings, but the decision before the Levy Court was whether the Property as proposed in the Plan met the requirements of conditional use permits. As noted earlier, the Plan proposed a number of improvements that would reduce the levels of dust affecting the neighboring properties: moving the stockpiles farther back into the interior of the Property, paving the road the trucks entered the Property on, installing opaque landscape barriers, and installing a DNREC-approved sprinkler system to prevent dust from rising into the air. There is no discussion in the record of why the Commissioners believed these measures were insufficient to address their environmental concerns. As a result, there is not substantial evidence in this record supporting a finding that Coker Concrete posed an environmental threat.

Similarly, the Commissioners' concern regarding Coker Concrete's non-residential neighbors, specifically Kent General Hospital and Dover Air Force Base, is not supported by the factual record. Kent General received minimal attention up until the Levy Court vote. The Staff had recommended in its Report that the proposed landscape

⁶⁴ *Id.* at 8, 43-47.

⁶⁵ *See id.* at 43-47. At the time of the December 20 Levy Court hearing, there was a pending dust violation which Coker planned to contest. There is no evidence in the record of how this claim was resolved.

buffer also run along the border with Kent General's land, and during the presentation of the Plan at the final Levy Court hearing, Coker's counsel noted that the requested barrier had been incorporated into the Plan.⁶⁶ Critically, there is no evidence in the administrative record indicating that Coker Concrete posed a problem or annoyance for Kent General or that the hospital had complained to any authority about the Property, and Kent General's representatives made no effort to participate in the conditional use proceedings.

Evidence about the Dover Air Force Base is also absent from the administrative record. The genesis of the concern seems to be a report from state planners indicating that certain possible future uses of the Property could create a bird strike hazard for the base.⁶⁷ Specifically, if Coker Concrete began storing solid waste or installed stormwater management ponds, then birds would be attracted to the Property, posing a risk to aircraft. But, neither of these features were part of the Plan, and there is no evidence in the record that any of the Plan's features would be abnormally attractive to birds. And, notably, no one from the Air Force opposed the Application or voiced concern over it.

* * *

In sum, despite proffering several reasons for denial of the Application that were not substantiated by the administrative record, the Levy Court articulated a sufficient, non-arbitrary basis for denying the Application based on Coker Concrete's hours of operation and failure to protect Code-required setback lines. Under the deferential

⁶⁶ PX G at 5; PX I-5 at 595.

⁶⁷ See DX F at 4.

treatment accorded to the decisions of local zoning authorities acting within the scope of their authority, this constitutes a sustainable exercise of the Levy Court's discretionary powers.

IV. Conclusion

For the foregoing reasons, the complaint is dismissed. Each side shall bear its own costs. IT IS SO ORDERED.