IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Save Small Schools, an unincorporated association, by Deborah Rice, trustee ad litem	:	
v.	:	No. 1441 C.D. 2007
	:	No. 1560 C.D. 2007
	:	No. 2052 C.D. 2007
The Everett Area School District, and the Board of Directors of The Everett Area School District in their official capacities, Appellants	:	No. 2170 C.D. 2007
	:	Argued: April 8, 2008

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: August 11, 2008

Save Small Schools, the Everett Area School District (District) and the Board of Directors (Board) thereof, cross appeal from two orders of the Court of Common Pleas of Bedford County (Trial Court). The first order permanently enjoined the District and Board from taking any action pursuant to a resolution passed by the Board for the purpose of closing Chaneysville-Cove Elementary School, and further denied Save Small Schools' request to conclude that the

passing of that resolution had violated the Sunshine Act.[1] The second order denied both parties' respective Motions for Post Trial relief. We reverse in part, and affirm in part.

The subject of the instant injunctive proceeding is the Chaneysville-Cove Elementary School (School), located approximately ten miles from the Pennsylvania-Maryland line in the southern portion of the District. Originally built in 1953, additions were made to the School in 1989 and 1997. It houses K-5th grades, and had an enrollment in 2005-2006 of 51 total students.

In 2004, the District undertook an updated feasibility study in regards to its schools. That process culminated, in part relevant hereto, with a number of studies and meetings, and ultimately included a public hearing and the receipt of written and oral testimony from the District's citizens. On February 15, 2007, the Board passed a resolution (Resolution) permanently closing the School at the end of the 2006-2007 school year. Reproduced Record (R.R.) at 2367a-2368a. The Resolution listed three express reasons for the Board's action: (1) the balancing of short-term facilities renovations against long-term District-wide needs; (2) the equitable and efficient allocation of educational resources, and; (3) fiscal responsibility in providing quality education to all of the Districts' students.

Subsequently, Save Small Schools, an unincorporated association, filed in the Trial Court an equitable action seeking the issuance of a preliminary injunction enjoining the closing of the School. Therein, Save Small Schools

[1] 65 Pa.C.S. §§ 701-716.

asserted that the Board abused the discretion afforded thereto by Section 1311(a) of the Public School Code of 1949 (Public School Code).[2] Additionally, Save Small Schools asserted that the Board violated the Sunshine Act in the proceedings that ultimately produced the Resolution, thereby invalidating that action.

Following the amendment of Save Small Schools' complaint, and various motions not at issue herein, counsel stipulated that the proceedings should commence as a non-jury trial on a request for a permanent, rather than preliminary injunction. A hearing before the Trial Court ensued, at which both parties were represented by counsel and presented evidence.

By order dated July 13, 2007, the Trial Court permanently enjoined the Board and District from taking any action pursuant to the Resolution for the purpose of closing the School, and denied Save Small Schools' request to find a violation of the Sunshine Act. In its opinion in support of its order, the Trial Court

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[2] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §13-1311(a). Section 1311(a) states, in relevant part:

> Closing schools
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> (a) The board of school directors of any school district may, on account of the small number of pupils in attendance, or the condition of the then existing school building, or for the purpose of better gradation and classification, or other reasons, close any one or more of the public schools in its district. Upon such school or schools being closed, the pupils who belong to the same shall be assigned to other schools, or upon cause shown, be permitted to attend schools in other districts.

24 P.S. §13-1311(a).

concluded that the Board committed an abuse of discretion under Section 1311(a) of the Public School Code, in the following conduct:

> 1. By lack of inquiry into the safety of transporting students over State Route 3005[3] prior to passing the [R]esolution.
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> 2. By lack of inquiry, prior to passing the [R]esolution, as to the length of the bus ride which would result from the closing and any impact academically and physically of such a bus ride on the students.
>
> 3. By conducting the mandated proceedings in a manner such that a deliberative process discussing any safety, academic, economic, or community impact never occurred.
>
> 4. By either misunderstanding or being unaware of the consequences of making Priority One[4] repairs.

Trial Court Opinion of July 13, 2007 (T.C. Op. 7-13-07) at 4-5.

The Trial Court also specifically noted that its injunctive order only enjoined action taken pursuant to the Resolution, and did not preclude a future school board from addressing the issue again. Finally, despite the presence on the record of certain correspondence from two Board members that may have suggested a violation of the Sunshine Act in the form of deliberation on the

[3] The closing of the School would potentially necessitate the transportation of its students, to another District school, via State Route 3005. State Route 3005 is a mountainous road that traverses Tussey Mountain, and which allegedly is capable of presenting driving safety issues beyond the norm.

[4] Priority One repairs are repairs to the School, as articulated within an engineering and architectural study commissioned by the Board, that are immediately required to continue the School's use over the next three years.

Resolution in executive sessions, rather than at a public session, the Trial Court accepted the testimony of witnesses stating that no such deliberative action occurred at the executive sessions, and concluded that no such violation had occurred.

Thereafter, the Trial Court issued another Memorandum Opinion in which it granted Save Small Schools' motion that an automatic supersedeas be vacated. In that Memorandum Opinion, dated August 17, 2007, the Trial Court expounded on its reasoning in granting the injunctive relief previously requested. That reasoning included an address of the Board's and District's argument that the Trial Court departed from the abuse of discretion standard articulated within Section 1311(a) of the Public School Code, and encompassed a "judge-made standard" in the Court's inquiry into transportation safety matters. Trial Court Memorandum Opinion of August 17, 2007 (T.C. Mem. Op. 8-17-07) at 9-12. The Trial Court stated that the safety and well-being of the students encompassed within the school closing issue necessitated the consideration thereof. Id.

Both parties to this action appealed from the Trial Court's July 13, 2007 order.[5] Additionally, both parties thereafter filed Post Trial Motions in the Trial Court, which were denied by order dated October 18, 2007. The parties have also both appealed the October 18, 2007 order.[6] The matter *sub judice* is a

[5] Our scope of review of a grant of a permanent injunction is limited to determining whether the trial court abused its discretion or committed an error of law. Paek v. Pen Argyl Area School District, 923 A.2d 563 (Pa. Cmwlth. 2007).

[6] Our scope of review of an order of a trial court denying a motion for post-trial relief is limited to a determination of whether the trial court abused its discretion or committed an error

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consolidation of the four appeals, and by agreement of the parties, the District has been designated Appellant herein pursuant to Pa.R.A.P. 2136.

Consolidating and reordering the parties' presented questions involved herein, we are faced with three issues: 1.) whether the Trial Court erred in its inquiry into transportation safety and related student well being issues by creating a new judge-made standard contrary to Section 1311(a) of the Public School Code; 2.) whether substantial evidence exists to support the Trial Court's general findings under the Section 1311(a) abuse of discretion standard, and: 3.) whether the Trial Court erred in failing to conclude that a violation of the Sunshine Act occurred. We will address these issues seriately.

Section 1311(a) vests broad discretionary power within school boards regarding school closings. Borough of Clifton Heights v. School District of Upper Darby Township, 377 A.2d 836 (Pa. Cmwlth. 1977). Courts will not interfere with a school board's exercise of its discretionary power unless the action taken was based upon a misconception of law, ignorance through a lack of inquiry into the facts necessary for an intelligent judgment, or unless the action is a result of arbitrary will or caprice. Zebra v. School District of the City of Pittsburgh, 449 Pa. 432, 296 A.2d 748 (1972).

We first address the Board's and District's argument that the Trial Court erred in applying a "judge-made standard."[7] The Board and District argue

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of law. Pikur Enterprises, Inc. v. Pennsylvania Department of Transportation, 641 A.2d 11 (Pa. Cmwlth.), petition for allowance of appeal denied, 539 Pa. 657, 651 A.2d 543 (1994).

[7] We flatly reject Save Small Schools' disingenuous argument that the District and Board

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that inquiry into any alleged abuse of discretion by the Board in passing the Resolution at issue was to be made purely by inquiring into the Board's employment of its express discretionary power to close schools vested in the Board by the language of Section 1311(a), and that issues related to any reassignment of the students affected by the closing – which issues would naturally include the options available for bussing those students to their reassigned schools – were not a proper subject of the Resolution at issue, and thusly not a proper factor in reviewing the Board's exercise of its discretion in closing the School. The Trial Court, however, assumed the posture that the bussing issues that would result from the School's closing under Section 1311(a) inherently impact the safety and well being of the students, which safety and well-being issues required inquiry by the Board, and thus are implicated in any Section 1311(a) abuse of discretion review.[8]

The application of the set of facts in this case to Zebra's abuse of discretion standard, in terms of the Trial Court's inclusion into its inquiry of the related bussing issue, present a tenuous issue upon review. Section 1311(a) directly empowers a school board to close schools for a variety of specified and

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have waived this argument by not raising it before the Trial Court. Putting aside the obvious logic that the District and Board could not have raised this issue until it was articulated as a standard within the Trial Court's multiple opinions following the hearing, we note that the District and Board do not argue that the well established abuse of discretion standard rearticulated in Zebra does not apply herein; the District and Board argue that the Trial Court misapplied that standard in its opinions, by incorporating review of the safety and well being factors involved in the bussing issue into the general abuse of discretion standard.

[8] We note that neither party, nor the Trial Court, alleges or finds any misconception of law, or caprice, on the part of the Board and that the Trial Court's address was limited to its examination into whether the Board's action was based upon either ignorance resulting from a

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unspecified reasons. Notably, the final sentence of Section 1311(a) also directly addresses the reassignment of those students upon a board's closing of those students' prior school, which subject matter inclusion would seemingly imply that an examination into closing-related reassignment factors, such as bussing, are a proper subject for court review of school board closing actions. However, under the specific facts of this case (and most notably, under the actual action taken by the Board's Resolution, which only effectuated the actual closing of the School and did not address any related reassignment issues), an examination of any bussing issues would seem to be premature and beyond the scope of the Resolution's express language and subject. At first blush, therefore, it would appear that the Trial Court extended its examination of the Board's inquiry into the bussing issues beyond the scope of the actual Resolution before it in this matter.

We will not hold that student safety and well being issues which are the direct result of a board's school closing are never factors for review in determining whether a particular board abused its discretion in exercising its school closing powers under Section 1311(a).[9] There may well be potential factual and/or procedural scenarios under which such an examination is within the proper ambit of a trial court's address of a board's exercise of its discretion; this case,

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lack of inquiry into the facts necessary for an intelligent judgment, and/or arbitrary will. Zebra.

[9] We emphasize that the express language of Section 1311(a), however, empowers a school board to determine the assignment of students from a closed school "[u]pon such school or schools being closed," which language clearly contemplates that a board may close a school prior to such assignment, which carries the logical conclusion that the consideration of reassignment-related issues need not necessarily be addressed in the initial closing decision.

however, is not such a case. We need not address the issue, in the case *sub judice*, of whether the Trial Court erred in imposing, as the District and Board characterize it, a "judge-made" standard beyond that applied in prior related, if not factually identical, cases. While the Trial Court herein extended its review of the Board's actions in examining its duty to inquire under the general Zebra standard for an abuse of discretion, the Trial Court's conclusions that the Board failed to properly inquire into the bussing issues is plainly contradicted by the record in this matter, and as such, represents an abuse of the Trial Court's discretion by interfering with the Board's exercise of its broad discretionary power under Section 1311(a). As such, we need not directly address the parties' first stated issue, but can dispose of this matter with address of the parties' second issue.

Substantial evidence does not exist to support the Trial Court's general findings under the Section 1311(a) abuse of discretion standard regarding any lack of inquiries on the Board's part. The Trial Court found an abuse of discretion on the Board's part under Section 1311(a):

> 1. By lack of inquiry into the safety of transporting students over State Route 3005 prior to passing the [R]esolution.
>
> 2. By lack of inquiry, prior to passing the [R]esolution, as to the length of the bus ride which would result from the closing and any impact academically and physically of such a bus ride on the students.

T.C. Op. 7-13-07 at 4. The record herein clearly demonstrates that such inquiry was indeed made by the Board. The record is replete with various inquiries made, and advice and information received, by the Board, including, *inter alia*:

- the preexisting practice of transporting students from the School to the proposed reassignment school, in the academic year 2004-05;
- the request and receipt of information from PennDOT regarding the maintenance and evaluation of the Tussey Mountain route and surrounding area, including information for weather emergency conditions;
- the prior safe use of the Tussey Mountain route for District Head Start, preschool, kindergarten, middle, and high school students;
- revised transportation plans and routes including multiple bus type options and features;
- bus safety reassurances from school bus safety experts;
- discussion with parents of the type, and times, for student transportation on proposed bus routes;
- Tussey Mountain accident report history;
- summative presentations of the transportation issues at a public meeting;
- test runs of the proposed bus routes, and:
- meetings with bus contractors and representatives regarding the proposed routes, including requests for safety proposals therefrom.

R.R. at 1609a, 1662a-1664a, 1709a-1713a, 1732a-1735a, 1741a-1742a, 1751a-1752a, 1756a, 1763a-1769a, 2050a, 2068a-2070a, 2120a-2122a, 2128a-2129a, 2335a, 2338a, 2375a, 2377a, 2558a, 2576a, 2579a, 2596a, 2598a, 2644a, 2676a, 2805a, 2817a-2818a, 2928a.

The above-cited evidence of record clearly establishes that the Board inquired into the details, including the safety and well-being concerns, of the

bussing issues that could result from the closing at issue, in direct contradiction to the Trial Court's conclusion. We emphasize, in the strongest possible terms, that the Trial Court's perspective and/or conclusions regarding the Board's processing of the above-received information is not a basis for a finding of an abuse of discretion by the Board. An abuse of discretion will not be found in unwise acts or mistaken judgment, but must spring from improper influence, a disregard of duty, or a violation of law. Uniontown Area School District v. Allen, 285 A.2d 543 (Pa. Cmwlth. 1971). A court's mere difference of opinion as to the desirability of the closing of a particular school is an insufficient basis for that court to interfere with a board's discretion. Beegle v. Greencastle-Antrim School District, 401 A.2d 374 (Pa. Cmwlth. 1979). Notwithstanding the Trial Court's opinion of the Board's judgment in this matter, and notwithstanding the Trial Court's opinion of the quality and or conclusive effect of the evidence cited above, the record inarguably establishes Board inquiry into the very matters cited by the Trial Court as lacking sufficient inquiry. As such, the Trial Court abused its discretion in interfering with the Board's exercise of its discretionary power on the Trial Court's errant asserted basis that the Board's action was based upon ignorance through a lack of inquiry into the facts necessary for an intelligent judgment, or was a result of arbitrary will. Zebra.

> Next, the Trial Court found an abuse of the Board's discretion:
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> 3. By conducting the mandated proceedings in a manner such that a deliberative process discussing any safety, academic, economic, or community impact never occurred.

T.C. Op. 7-13-07 at 5. Again, the record belies the Trial Court's conclusion. On this issue, the record shows:

- Pre-Resolution fact finding by the District Superintendent and Assistant Superintendent;
- A 3½ hour meeting allowing non-voting Board members, the Assistant Superintendent, and citizens to present facts, ask questions, and testify in opposition to the closing;
- The acceptance of questions by the Board, and address thereof by the Board, as advanced by citizens regarding the closing itself, related transportation and safety issues, and accidents on, and the District history of use of, the Tussey Mountain route;
- Consideration of the academic achievements of the proposed reassignment school under Pennsylvania and Federal benchmarks;
- The past consideration of the Tussey Mountain route potentiality in prior considerations of closing the School;
- The current use of the Tussey Mountain route by a limited number of current elementary students, and:
- Advice regarding using an alternate route around the Tussey Mountain route, and/or the use of early dismissal, in the event of weather related safety concerns on the route itself.

R.R. at 1661a-1664a, 1720a, 1785a-1787a, 2355a, 2601a-2611a, 2614a, 2796a-2804a, 2854a.

Again, the above-cited evidence of record clearly establishes that the Board conducted the mandated proceedings in a properly deliberative fashion discussing necessary related factors.[10] Again, the Trial Court abused its discretion in interfering with the Board's exercise of its discretionary power on the Trial Court's errant asserted basis that the Board's action was not sufficiently deliberative or discussional. Zebra.

Next on this issue, the Trial Court found an abuse of the Board's discretion:

> 4. By either misunderstanding or being unaware of the consequences of making Priority One repairs.

T.C. Op. 7-13-07 at 5. Again, the record belies the Trial Court's conclusion. On this issue, the record shows that the Board received and reviewed the study of the School's physical condition, the District's Facilities Master Plan, at least nine options for renovation, and discussion of the concept of Priority One repairs during at least one public meeting. R.R. at 1616a-1617a, 1622a-1623a, 1700a-1702a, 1757a-1759a, 2038a, 2040a, 2042a, 2599a, 2633a-2634a, 2644a-2700a, 2859a. The Trial Court's perspective of the Board's "understanding" on the Priority One repairs is irrelevant, and is an improper basis for interfering with the Board's discretion. Beegle; Uniontown. Again, the Trial Court abused its discretion in interfering with the Board's exercise of its discretionary power on the Trial Court's

[10] The Trial Court itself, in one of its three opinions in this matter, articulated some of the above-related deliberative factors in its own partial recitation of the history of this matter. See T.C. Op. 8-17-07 at 5-9.

errant asserted basis that the Board's action was insufficiently aware of the Priority One implications and consequences, as evidenced by the above-cited portions of the record. Zebra.

Finally, we address the third issue presented herein: Save Small Schools' argument that the Trial Court erred in failing to conclude that a violation of the Sunshine Act occurred. Save Small Schools' argument on this issue essentially relies upon selected evidence of record that Save Small Schools argues supports a conclusion contrary to that made by the Trial Court. As such, Save Small Schools' argument is essentially a request that this Court reweigh that evidence, and find the testimony presented in Save Small Schools' favor more credible than that presented for the District and Board. The Trial Court's conclusion that no violation of the Sunshine Act occurred in the proceedings on the Resolution is founded on its credibility determinations regarding the testimony presented before it as the fact-finder. T.C. Op. 10-18-07 at 4-5, n.1. As such, we will not disturb those determinations on appeal. Capital Academy Charter School v. Harrisburg School District, 934 A.2d 189 (Pa. Cmwlth. 2007), petition for allowance of appeal denied, ___ Pa. ___, 947 A.2d 738 (2008).

Accordingly, we reverse the Trial Court's grant of permanent injunctive relief permanently enjoining the District and Board from taking any action pursuant to the Resolution of February 15, 2007 for the purpose of closing

the School; we affirm the Trial Court's denial of Save Small Schools' request for invalidation of the Resolution based on a violation of the Sunshine Act.

JAMES R. KELLEY, Senior Judge

Judge Cohn Jubelirer concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Save Small Schools, an unincorporated association, by Deborah Rice, trustee ad litem	:	
v.	:	No. 1441 C.D. 2007
	:	No. 1560 C.D. 2007
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The Everett Area School District, and the Board of Directors of The Everett Area School District in their official capacities, Appellants	:	No. 2170 C.D. 2007

O R D E R

AND NOW, this 11th day of August, 2008, the orders of the Court of Common Pleas of Bedford County, dated July 13, 2007 and October 18, 2007, at No. 292 for the year 2007, are reversed in part and affirmed in part in accordance with the foregoing opinion.

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JAMES R. KELLEY, Senior Judge