IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Saul and Karin Lazarus, h/w,	:	
	:	
Appellants	:	
	:	
v.	:	No. 2269 C.D. 2007
	:	
Zoning Hearing Board of Radnor Township and Township of Radnor and David A. Surbeck	:	Submitted: May 30, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 15, 2008**

Steven Saul and Karin Lazarus, husband and wife, (Appellants) pro se, appeal an order of the Court of Common Pleas of Delaware County (trial court) that denied their appeal from a decision of the Zoning Hearing Board of Radnor Township (ZHB). Despite Appellants' objections before the ZHB at a public hearing, the ZHB granted relief to Appellants' neighbor, David Surbeck (Surbeck), to construct an addition to his home because it found that the addition does not lie within the 100-year floodplain of Gulph Creek.

Surbeck, a disabled individual, owns a home adjacent to Appellants, in an area zoned R-4 Residential. On July 19, 2001, the ZHB apparently granted Surbeck a dimensional variance to construct a one-story addition to his home to allow for additional living space and a first-floor bathroom so that Surbeck could continue to use and enjoy his residence.[1] No appeal was taken from this decision. Based on the ZHB's approval of the proposed construction, Surbeck applied for a grading permit. Appellants submitted written objections to Surbeck's permit application on the basis that the proposed addition was located in the 100-year floodplain. The Radnor Township Zoning Engineer (Township Engineer) denied Surbeck's permit application and Surbeck appealed to the ZHB.

The ZHB conducted a hearing on Surbeck's appeal on February 21, 2002. At this hearing, neither the Township Engineer, nor any other witness from Radnor Township (Township) presented evidence to support its refusal to grant Surbeck the requested grading permit. However, Surbeck, on his own behalf, presented the testimony of: his wife; Hank Manoney, who is a concerned neighbor and also an elected Township Commissioner; and another concerned neighbor. Surbeck's wife also submitted a report by Yerkes Associates, a consulting engineering, landscaping, architectural and surveying firm, which was marked as Exhibit A-2. In opposition to Surbeck's appeal, Appellants testified that they believed the proposed addition lies within the floodplain and that they had concerns that runoff from the proposed addition would affect their property. On the same day as the hearing, the ZHB issued an order reversing the Township Engineer's refusal of the permit. The ZHB found that, based upon Exhibit A-2, a "certain study dated January 14, 2002 submitted to

[1] The ZHB's determination granting the variance is not part of the certified record.

the Township Engineer by William C. Wermuth, principal and treasurer of Yerkes Associates, Inc. (the 'Yerkes Study'), . . . [Surbeck's] proposed addition does not lie within the 100 year flood plain." (ZHB Order, February 21, 2002.) Appellants appealed the ZHB's order to the trial court.

The parties initially agreed that the trial court could determine the appeal based upon the record established before the ZHB and that additional evidence was unnecessary. However, at the first oral argument held before the trial court, Appellants argued that, because Wermuth, the author of the Yerkes Study, was not present at the ZHB hearing, they had been denied the opportunity to question him on the issue of whether the proposed addition would be constructed in the floodplain. Accordingly, the trial court issued an order on November 14, 2002 remanding the matter to the ZHB "for the limited purpose of receiving testimony from William C. Wermuth . . . and to permit any cross-examination of said witness as may be sought by interested parties." (Trial Ct. Order, 11/14/02.) The ZHB conducted another hearing on remand at which Wermuth testified and was cross-examined.[2] Following the conclusion of the remand hearing, the ZHB issued a decision on March 20, 2003 reaffirming its conclusion that Surbeck's proposed addition does not lie within the 100-year floodplain of Gulph Creek. The ZHB made the following pertinent findings of fact:

> 7. Mr. Wermuth testified that the Yerkes Study, which concluded that [Surbeck's] proposed addition does not lie within the 100-year floodplain, was prepared by measuring the subject premises against the Federal Emergency Management Agency ("FEMA") maps which show

[2] We note that, at the time of the remand hearing, Surbeck's addition had already been constructed. (Remand Hr'g Tr. at 19.)

the 100-year floodplain for Gulph Creek, the stream located to the north and east of the subject premises.
8. . . . [T]he subject premises is separated from the bed of Gulph Creek by an intervening residential lot.
9. Mr. Wermuth personally visited the subject premises and adjoining lands, and took those measurements relevant to the preparation of the Yerkes Study and the conclusions set forth therein.
10. Based upon his measurements, and allowing for a generous margin of error, Mr. Wermuth testified that the 100-year floodplain of Gulph Creek at the most intruded no further than ten (10) feet into the subject premises from the eastern border of the subject premises.
11. An intrusion of the floodplain no more than ten (10) feet from the eastern property line of the subject premises would not reach either the proposed addition, or [Surbeck's] existing residence.
12. Mr. Wermuth unequivocally testified that even with a generous margin for error, the 100-year floodplain of Gulph Creek (based on the FEMA maps) did not extend either to the existing residence located upon the subject premises, or to the area encompassed by [Surbeck's] proposed addition, which proposed addition extends west from the western wall of the existing residence, and therefore is located further away from the 100-year floodplain of Gulph Creek than the existing residence.

. . .

15. While [Saul] ha[s] indicated that they do not accept the FEMA maps governing the vicinity of the subject premises as accurate, [Appellants] have not offered any substantiated testimony or evidence as to the inaccuracy of the FEMA maps.
16. Based upon the record before this Board, the Board is obliged to accept the FEMA map of the vicinity of the subject premises as controlling as to the location of the 100-year floodplain of Gulph Creek.
17. Notwithstanding that Mr. Wermuth is not a licensed surveyor, engineer or geologist in the Commonwealth of Pennsylvania, this Board finds that Mr. Wermuth is fully qualified to take relevant measurements from Gulph Creek to the subject premises, and then evaluate such measurements against the applicable FEMA maps to determine whether [Surbeck's] proposed addition lies within the 100-year floodplain of Gulph Creek.
18. . . . [T]his board concludes that Mr. Wermuth correctly and accurately measured the 100-year floodplain as shown on the FEMA maps against the subject premises, and has correctly determined that

> [Surbeck's] proposed addition does not lie within the 100-year floodplain of Gulph Creek.

(ZHB Remand Order, Findings of Fact ¶¶ 7-12, 15-18, March 20, 2003.) The case then returned to the trial court for a final determination of Appellants' appeal.

The trial court issued an order and opinion on November 14, 2007 denying Appellants' appeal. The trial court noted that the ZHB was well within its discretion in accepting the Yerkes Study and the testimony of Wermuth and that there was substantial evidence to support the finding that Surbeck's proposed addition was not within the 100-year floodplain. Additionally, the trial court dismissed Appellants' argument that the ZHB did not comply with the Radnor Township Zoning Code (Code) by requiring a "hydrological profile analysis" and also did not comply with either the Storm Water Management Act or the Delaware County Flood Plain Ordinance because Appellants "offer[ed] no relevant authority whatsoever to support their contentions that the Zoning Hearing Board failed to consider all material matters presented to it before rendering its decision." (Trial Ct. Op. at 4-5, November 14, 2007.) The trial court also noted that Appellants "completely ignore[d] the fact that the burden of sustaining the denial of [Surbeck's] permit application rested with the Township, and not with either [Surbeck] or the Zoning Hearing Board." (Trial Ct. Op. at 5, November 14, 2007.) Lastly, the trial court found meritless Appellants' argument that the ZHB's decision was biased as a result of a Township Commissioner testifying in favor of Surbeck's appeal, because Appellants failed to

offer evidence in support of this contention. Appellants now appeal the trial court's order to this Court.[3]

On appeal to this Court, Appellants contend that the ZHB committed errors of law by: (1) not submitting the complete evidence of record to the trial court and spoiling the evidence; (2) improperly assuming jurisdiction of the case on remand from the trial court; (3) adding new evidence to the record on remand; (4) not adhering to the Radnor Township Code and other known laws; and (5) making a decision based on faulty methodology. Likewise, Appellants argue that the trial court erred as a matter of law by making its decision without the complete evidence of record and basing its decision upon spoiled evidence.[4]

The first issue on appeal can broadly be stated as whether the ZHB submitted to the trial court the complete and accurate evidence of record before it made its determination. More specifically, Appellants contend that the ZHB committed an error of law by not submitting all original exhibits from the February 21, 2002 ZHB hearing to the trial court. Appellants also argue that the ZHB spoiled the evidence because there was a "gap in the 'chain of custody'" while the evidence was in the possession of the ZHB from February 2002 until part of the record was submitted to

[3] In a case where the common pleas court took no additional evidence, our standard of review is limited to determining whether the zoning hearing board committed an error of law or manifestly abused its discretion. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 554, 462 A.2d 637, 639 (1983). The Board's findings of fact must be supported by "substantial evidence," which has been defined as such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Id. at 555, 462 A.2d at 640.

[4] Some of these issues will be combined and will not be addressed in the order in which they appear in Appellants' brief.

the trial court in November 2006. (Appellants' Br. at 28-29.) Additionally, Appellants contend that the trial court erred in making its determination without the complete evidence of record and reaching a decision based upon spoiled evidence. (Appellants' Br. at 61.)

With regard to missing or altered evidence of record, Appellants contend that Exhibits A-1, A-2, A-3 and A-4 from the initial hearing before the ZHB were not submitted to the trial court and that, instead, two newly labeled exhibits, Surbeck 3(b) and 3(c), which were submitted to and accepted by the ZHB at the remand hearing, were submitted to the trial court. Appellants argue that Exhibit Surbeck 3(b) from the remand hearing differed from the exhibit submitted and accepted at the initial hearing. Likewise, Appellants contend that Exhibit Surbeck 3(c), a blank FEMA map, was not the same as the missing Exhibit A-4, which had an "x and the circle" drawn on it by counsel at the initial February 21, 2002 hearing. Furthermore, Exhibit Surbeck 6, which Appellants contend was new evidence submitted at the remand hearing, was not submitted to the trial court. Appellants argue that the gap in the chain of custody of the possession of the exhibits allowed for "the possibility of substitution, tampering, or changes in condition, either by design or by accident." (Appellants' Br. at 32.) Appellants cite to McHugh v. McHugh, 186 Pa. 197, 40 A. 410 (1898) for the proposition that it is unnecessary to do more than state that the opposing party spoiled the evidence in order to receive a presumption in your favor. (Appellants' Br. at 32.) Appellants argue that, "[h]ad the ZHB submitted the full evidence of record(s) from both [ZHB] hearings as prescribed by law, this lapse in the chain of custody would not have occurred[, and t]he trial court would have had the original evidence on hand for comparative purposes." (Appellants' Br. at 33.)

In opposition, the Township argues that "the entire contents of the Radnor Township Zoning Hearing Board file have been provided to the trial court." (Township Br. at 15.) The Township points out that, in the notes of testimony from the March 20, 2003 remand hearing, a number of exhibits were marked, but the index does not identify any exhibits. The Township also points out that the official court reporter for that hearing was the same court reporter that appeared at the initial hearing on February 21, 2002 and, in the index from that hearing, several exhibits were identified. Township argues that the index prepared by counsel for the ZHB included exhibits from the March 20, 2003 remand hearing and some of those exhibits were the same exhibits that were used in the February 21, 2002 hearing, although marked differently—instead of being marked as Exhibit A-1, for example, the exhibit in the remand hearing was marked Exhibit Surbeck 1. The Township contends that, because Appellants do not question the accuracy of the transcription of the testimony from the hearings, this Court must uphold the ZHB decision because a complete record was developed. See 2 Pa. C.S. § 754(b).[5]

[5] 2 Pa. C.S. § 754(b) provides:

> **(b) Complete record.--**In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa. C.S. § 706 (relating to disposition of appeals).

After a thorough review of the certified record, this Court concludes that the trial court had possession of all exhibits from the hearing on February 21, 2002 and the remand hearing on March 20, 2003. Specifically, the certified record contains Exhibits A-1, A-2, A-3 and A-4 from the February 21, 2002 hearing and also Exhibits Surbeck 1, 2, 3(a), 3(b), 3(c), 4, 5 and 6 from the March 20, 2003 remand hearing. The trial court, on several occasions, requested the ZHB to submit all exhibits for disposition, which, ultimately, it appears the ZHB did. That the trial court had to ask for the ZHB to do this does not require this Court to conclude that the evidence was "spoiled" or tainted in any way. We note that the record has been certified to this Court by the trial court as a true and correct copy of the record on December 20, 2007 and, as such, a presumption of regularity exists. All exhibits admitted for consideration by the ZHB at both hearings have been numbered properly and appear to be what they purport to be. Appellants have not alleged, nor do they argue, that any of the exhibits have been substantively changed or altered or do not accurately reflect the content of the exhibits relied upon by the ZHB or trial court. Therefore, we find that the certified record contains all the exhibits from the ZHB hearings. Accordingly, we disagree with Appellants' position.

Next, Appellants argue that the ZHB erred in improperly assuming jurisdiction over the case on remand from the trial court. The trial court's remand order specifically stated that the matter is remanded to the ZHB "for the limited purpose of receiving testimony from William C. Wermuth, the author of the report submitted to the Board as Exhibit A-2 and to permit any cross-examination of said witness as may be sought by interested parties." (Remand Order, November 11, 2004.)

Appellants contend that the ZHB went beyond the trial court's remand order by conducting the remand hearing de novo and by questioning Appellants. Appellants also contend that the ZHB improperly accepted new exhibits on behalf of Surbeck, and that this acceptance was outside the scope of the trial court's remand order. In opposition the Township argues that, even if the ZHB assumed jurisdiction of the matter on remand, "the fact remains that the matter was ultimately sent back to the trial court and it was the trial court that ultimately ruled on this appeal." (Township Br. at 17.)

This Court has thoroughly reviewed the trial court's remand order and the transcript of the remand hearing before the ZHB. It is not clear that any questioning directed at Appellants was improper and not within the scope of the remand order. It appears that the ZHB may have been trying to understand Appellants' disagreement with Wermuth's opinion that the proposed addition was not within the floodplain and was trying to help clarify whether Appellants had any maps or documentation that they could present to impeach Wermuth's testimony.[6] Further, it is clear that the

[6] For example, at the remand hearing, a ZHB member questioned Saul in the midst of Saul's cross-examination of Wermuth:

> Saul – If you are not a fully licensed engineer or land surveyor, how can I be assured, as an affected neighbor, that the report you submitted to this board met professional standards[,] . . . fully understood all the criteria involved in a floodplain decision, and were adequately trained in the techniques necessary to render a determination that affects my property?
> Wermuth – What I did was I took ---
> Surbeck's Counsel – You're referring to the FEMA plan; is that correct?
> Wermuth – The FEMA plan. The federal government makes the determination of the extent of - -
> Saul – No. You made the determination - -
> . . .

(Continued…)

ZHB properly allowed direct examination and cross-examination of Wermuth, as directed by the trial court's remand order. As such, the ZHB issued a new determination with factual findings, which included findings regarding Wermuth's testimony. The matter was then returned to the trial court, which ultimately denied Appellants' appeal. We disagree with Appellants' argument that the ZHB erred in accepting new exhibits during the examination of Wermuth at the remand hearing. Exhibits Surbeck 1-6 were part of the direct examination of Wermuth and, indeed, were relevant evidence as to the procedural posture of the case and explaining how Wermuth came to the conclusion that the proposed addition was not within the 100-year floodplain. Appellants' argument is based on an overly narrow reading of the trial court's remand order. Appellants do not consider the fact that the exhibits did not go outside the scope of Wermuth's testimony, either on direct or cross-examination. Accordingly, we believe Appellants' argument is misplaced.

> *Board Member – Mr. Saul, did you look at the map? . . . Would you say that your property is properly placed? . . . Are you able to answer the question?*
> *Saul – I'm not here to answer your questions.*
> *Board Member – Yes, you are.*
> *Saul – I'm here to cross-examine the witness.*
> . . .
> *Board Member – Let the record show that you refused to answer the question.*

(Remand Hr'g Tr. at 30-31 (emphasis added).) The Chairman of the ZHB also questioned Saul about whether or not Saul had any evidence to submit showing that the addition was within the floodplain (Remand Hr'g Tr. at 53-54), to which Saul indicated that his personal experience and observations were the basis for his belief that the proposed addition was within the floodplain. (Remand Hr'g Tr. at 54-55.) Similarly, while Lazarus was cross-examining Wermuth, the Chairman and other ZHB members questioned Lazarus about the dimensions of their property as outlined in their deed and whether Lazarus had a more current FEMA map as evidence that the proposed addition was within the floodplain. (Remand Hr'g Tr. at 77, 85.)

Next, Appellants argue that the ZHB erred as a matter of law by not adhering to the Code and other known laws. Appellants also contend that the trial court erred in stating that the burden of proof rested with the Township and not Surbeck. More specifically, Appellants contend that Surbeck failed to sustain his burden by providing the ZHB with the required information as specified in the Code. According to Appellants, the Code provides that a determination of a floodplain is not based solely on a FEMA map, but a floodplain area can be expanded outside the designated area on a FEMA map based on other available studies and sources, such as hydrologic and hydraulic studies. Appellants contend that it was incumbent upon the ZHB to consider all available studies in a high risk flood area to ensure that adjacent property owners, like them, are not affected in any way.

In opposition, the Township contends that Surbeck was not required to present a hydrological analysis to show that the proposed addition was not within the boundaries of the floodplain district. The Township argues that it would be unfair for Surbeck "to expend substantial monies for an engineer to come and perform the type of studies which Appellants argue should have been performed . . . . *This is particularly true when the Township did not present any evidence to the effect that the property was within the flood plain*." (Township Br. at 18 (emphasis added).)

At issue is the grading permit for which Surbeck applied, which the Township Engineer initially denied, allegedly because it was located within the 100-year flood plain.[7] Whether Surbeck is entitled to the grading permit is dependent upon whether

[7] We note that the denial is not in the record and was apparently not introduced into evidence. However, the notice of the initial hearing, which is in the record, states that the permit

(Continued…)

the proposed addition is located within the boundaries of the 100-year floodplain. Article XVII, Section 280-73 of the Code addresses the application of regulations in the "FC Floodplain Conservation District." Section 280-75 of the Code, titled "Designation of district; boundaries" provides, in pertinent part:

> A. . . . The Floodplain Conservation District . . . shall be those areas of Radnor Township that are subject to the one-hundred-year flood, as identified on the Flood Insurance Study (FIS) and shown on Map Panels 0001-4, 0006-7, 0008-9 and 0013-14, effective September 30, 1993, as prepared by the Federal Emergency Management Agency (FEMA). *In addition, "floodplain conservation district" shall be defined to include all areas, not shown on the map, which, by hydrological profile analysis, are calculated to be inundated during a one-hundred-year frequency flood. Such maps are hereby made a part of this chapter and shall be available to the public at the Township Municipal Building*. The Floodplain Conservation District shall comprise three subdistricts, as follows:
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> > (1) FW (Floodway Area): the area identified as floodway in the AE Zone in the Flood Insurance Study prepared by FEMA. *The term shall also include floodway areas which have been identified in other available studies or sources of information for those floodplain areas where no floodway has been identified in the Flood Insurance Study.*
> >
> > . . . .
> >
> > (3) FA (General Floodplain Area): the areas identified as Zone A in the FIS for which no one-hundred-year flood elevations have been provided. When available, information from other federal, state and other acceptable sources, including those areas shown as alluvial soils in the Chester and Delaware Counties Soil Survey, shall be used to determine the one-hundred-year elevation, as well as a floodway area, if possible. When no other information is available, the one-hundred-year elevation shall be determined by using a point on the boundary of the identified floodplain area which is nearest the construction

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was denied because "the proposed addition allegedly lies within the flood plain." (Legal Notice, Published February 7 and 14, 2002.)

> site in question. In lieu of the above delineation method, the township may require the applicant to determine the elevation with hydrologic and hydraulic engineering techniques. . . .
>
> B. In the case of any dispute concerning the boundaries of a Floodplain Conservation district, *an initial determination shall be made by the Township Engineer. Such determination shall be based upon the criteria established in this article. It shall be the responsibility of the applicant to supply all the necessary plans and maps in sufficient detail to allow the Township Engineer to make the determination.*
> C. *Any party aggrieved by a decision of the Township Engineer as to the boundaries of the Floodplain Conservation District, as defined in Subsections A and B above, which may include the grounds that the data referred to therein is or has become incorrect because of changes due to natural or other causes or because of changes indicated by future hydrologic and hydraulic studies, may appeal to the Zoning Hearing Board.* The Zoning Hearing Board, in making such determination, shall use criteria established in this article. *The burden of proof in such an appeal shall be on the appellant.*
> . . .
> E. The identified floodplain area may be revised or modified by the Board of Commissioners where studies or information provided by a qualified agency or person document the need for such revision. Prior to the change, however, approval must be obtained from the Federal Insurance Administration.

(Township Zoning Code, § 280-75 (A)-(C),(E) (emphasis added).)

This Court must begin by untying the procedural knot, the threads of which lead back to the February 2002 ZHB hearing. The Township Engineer initially denied Surbeck's permit application to construct the addition and Surbeck appealed the Township Engineer's decision to the ZHB. Before the ZHB, the Township Engineer did not attend the hearing and the certified record does not contain the Township Engineer's determination denying the permit application. The ZHB, nonetheless, continued with the hearing; there was no request for a continuance in order to subpoena the Township Engineer to appear. It appears that under Section

280-75(C) of the Code, Surbeck, as "a party aggrieved by the decision of the Township Engineer as to the boundaries of the Floodplain," would therefore have had the burden of proof at the appeal. However, it does not matter whether Surbeck had the burden: Surbeck was the only party to present any evidence as to the boundaries of the floodplain. Surbeck submitted Wermuth's report, which stated that, after examining the FEMA maps, and plotting the property, the proposed addition was not within the 100-year floodplain. At the remand hearing, Surbeck presented Wermuth's testimony in support of Wermuth's report. Because the Township Engineer was not present at the initial hearing to submit evidence in support of his initial determination, and Appellants did not present any documentary evidence, there was no documentary or expert evidence presented at either the initial hearing or the remand hearing that conflicted with the evidence presented by Surbeck. Although Appellants voiced their objections and concerns at the hearing,[8] they did not present

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[8] At the February 21, 2002 hearing, Saul testified that the proposed addition was within the floodplain "[g]iven the flooding that has occurred in that area over the past." (Hr'g Tr. at 12, 2/21/02.) Saul also asked the ZHB "what kind of guarantees do I get that this project will not have runoff implications on me?" (Hr'g Tr. at 13, 2/21/02.) Saul testified that there are houses in the area around the proposed addition that "basically [have been] deemed by the township [to be] under study . . . as water basin retention areas." (Hr'g Tr. at 13, 2/21/02.) Saul concluded that he would

> appreciate if you consider those statements I made, put them in the public record, and use them as the basis of your decision.
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> . . . .
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> The definition of floodplain, given the definition in a broad sense, would require lots of studies as to what's happened over the last hundred years. Quite honestly, I don't see those studies have been done.

(Hr'g Tr. at 14, 2/21/02.) Similar to Saul's statements at the hearing before the ZHB, Lazarus also testified about her belief that the proposed addition lies within the floodplain. Lazarus stated that "during the last major hurricane, the Surbeck property was surrounded with water. Major water. Not just a little. Our property was mostly surrounded by, completely with water also as a result of the groundwater coming up and from the stream, water from the stream." (Hr'g Tr. at 15, 2/21/02.)

(Continued…)

tangible evidence to support their legal argument that the proposed addition was within the floodplain. Appellants also failed to present any other studies or reports, such as hydrological profile analysis evidence, showing that the floodplain area should have been expanded on the FEMA map to include the area where the proposed addition is located. Surbeck was not required to present such evidence. Thus, Surbeck met his burden of proof.

Next, Appellants argue that the ZHB erred "in rendering a decision based on faulty methodology." (Appellants' Br. at 52 (formatting modified).) Specifically, Appellants contend Wermuth was not a licensed professional and, thus, was not qualified as an expert witness to make a floodplain determination before the ZHB. In support of this argument, Appellants cite to "The Land Surveyor and Geologist Registration Law (Act 367)[, Act of May 23, 1945, as amended, 63 P.S. §§ 148-158.2, which] established a state registration board for professional engineers, land surveyors and geologists[, and also] The Landscape Architects Registration Law (Act 24)[, Act of January 24, 1966, as amended, 63 P.S. §§ 901-913, which] established a state registration board for landscape architects." (Appellants' Br. at 53 (underlining removed).) Appellants explain these Acts by stating that "[b]oth of these boards require that a person who gives engineering advise [sic] or takes a survey meet state requirements, one of which is licensure, and the 'Practice of Engineering, Land Surveying or Geology Without a License and Registration is prohibited' (SEE Act

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Lazarus stated that the proposed addition is adjacent to their home, and she asked the ZHB "[w]here is the runoff from that building going to go, you know, the runoff off of the roof? Are they going to run it down into our property? We're only about a yard away." (Hr'g Tr. at 15, 2/21/02.) Lazarus also testified that, when the Surbecks built their driveway, Appellants' basement would get water during major storms. (Hr'g Tr. at 15-16, 2/21/02.)

376, Section 3)." (Appellants' Br. at 53.) Additionally, Appellants contend that Wermuth's report and testimony cannot be relied upon because he solely used a FEMA map to make his determination and did not use other available studies or sources of information. Appellants also contend that Wermuth's "skeleton map . . . did not meet FEMA standards" as set forth in a May 1995 FEMA publication titled "How to use a Flood Map to Determine Flood Risk for a Property," because Wermuth did not use a property or tax assessor's map and overlay same on the FEMA map to insure an accurate house plot. (Appellants' Br. at 55.) Appellants also take issue with Wermuth's use of his "foot as a reliable measuring instrument" in making a floodplain determination in so far as a foot "lacks calibration and precision." (Appellants' Br. at 56.) Appellants cite to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) for the proposition that an "expert opinion based on a methodology that diverges 'significantly from the procedures accepted by recognized authorities in the field . . . cannot be shown to be generally accepted as a reliable technique.'" (Appellants' Br. at 58 (citations omitted).)

In opposition the Township argues that, although the ZHB determined that Wermuth was not a licensed surveyor, engineer or geologist in the Commonwealth, the ZHB still "accepted his opinion testimony based upon [Wermuth's] expertise in plotting and design." (Township Br. at 14; see also ZHB Remand FOF ¶ 17; Remand Hr'g Tr. at 10-11, 13.) The Township points to Wermuth's testimony that he reviewed the FEMA maps and ultimately concluded that the proposed addition fell outside of the floodplain. The Township asserts that the ZHB acted well within its discretion in accepting Wermuth's testimony and report as credible evidence to support its decision.

We agree with the trial court and the Township that whether Wermuth was a licensed surveyor went to the weight of the evidence, which was solely within the ZHB's discretion to determine. This Court succinctly stated in Taliaferro v. Darby Township Zoning Hearing Board, 873 A.2d 807 (Pa. Cmwlth. 2005), that:

> [t]his Court may not substitute its interpretation of the evidence for that of the zoning hearing board. It is the function of a zoning hearing board to weigh the evidence before it. The board is the sole judge of the credibility of witnesses and the weight afforded their testimony. Assuming the record contains substantial evidence, we are bound by the board's findings that result from resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence.
>
> A zoning board is free to reject even uncontradicted testimony it finds lacking in credibility, including testimony offered by an expert witness.

Id. at 811 (citations omitted).

Here, Wermuth credibly testified that he is a co-owner and treasurer for Yerkes Associates, which is a civil engineering, landscape architectural and survey firm. (Remand Hr'g Tr. at 10.) Wermuth stated that he has an architectural degree and that he has worked at Yerkes for about 35 years. (Remand Hr'g Tr. at 10.) Wermuth also credibly testified that he has been qualified as an expert in variance issues and plotting and designing plans throughout the area, particularly in the Township. (Remand Hr'g Tr. at 11.) Appellants' contention that Wermuth failed to follow FEMA requirements as outlined in the above-referenced May 1995 FEMA publication is without merit for two reasons: first, the FEMA publication was not introduced into evidence before the ZHB and, instead, improperly attached to a supplemental brief to the trial court; second, even if we could consider this publication, Wermuth testified that he used "*the real estate tax map, the Franklin*

map of the area and proceeded to plot the nearby houses on the [FEMA] floodplain map itself. I've done this probably a hundred times." (Remand Hr'g Tr. at 13 (emphasis added).) Thus, Wermuth appears to have properly followed the correct procedures. Wermuth opined that the proposed addition "clearly fell out of the floodplain." (Remand Hr'g Tr. at 15.) Wermuth explained that the proposed addition was on the western edge of Surbeck's property and the floodplain was on the opposite side, or eastern side of Surbeck's property. Wermuth testified that the proposed addition was about 50-60 feet from the edge of the floodplain, as plotted by the FEMA map, with the closest part of the addition being 45 feet from the floodplain. (Remand Hr'g Tr. at 13, 18.) Additionally, Wermuth explained that Surbeck's house, which is between the proposed addition and the floodplain, is not in the floodplain either. (Remand Hr'g Tr. at 18-19.) Wermuth also testified that he

> further took a precaution of going out to the properties and pacing them off to make sure the properties . . . matched the mapping. In other words, reality and occupation and the mapping all coincided.
>
> In pacing it off, I found that everything fell into place, and I was comfortable with the federal map being my plotting and the results.

(Remand Hr'g Tr. at 14-15.) Further, Wermuth explained that when he physically visited the site, the proposed addition was already built:

> The addition is elevated above the ground. It's positioned on structural columns so that there's an open area several feet between the level, the bottom of the addition and the ground level.
>
> And I was quite pleased to see, just from a good faith point of view, the applicant went to every measure possible to mitigate, if you even had a flood beyond the hundred year flood, the applicant went to the trouble to elevate the addition above the ground level.
>
> And it showed good faith effort, I believe, on the Surbecks' part to act in good faith even though they weren't required to do so. They took that additional precaution.

(Remand Hr'g Tr. at 19-20.)

Notwithstanding the fact that Wermuth was not a licensed surveyor, engineer, or geologist, the ZHB still found Wermuth's testimony and report credible that the proposed addition was not within the 100-year floodplain. Because Wermuth had experience in plotting FEMA maps to determine whether or not a property line lies within a floodplain, his testimony was admissible, and the ZHB could determine the weight to give that testimony. See Allstate Bond and Mortgage Co. v. Zoning Board of Adjustment of the City of Philadelphia, 401 A.2d 399 (Pa. Cmwlth. 1979) (finding neighboring property owners competent to testify as to the location of structures with respect to property lines even though they were not qualified surveyors.). Appellants did not cross-examine Wermuth with any other studies or sources of information, nor did they present him with any other maps which would dispute the placement of the proposed addition on the FEMA map that Wermuth used in plotting the area at issue.

Further, although Appellants cite to the fundamental principles elaborated in Daubert for determination of the validity of a certain mode of scientific reasoning or methodology, such analysis does not apply in the case *sub judice*. We first note that Daubert was a federal matter applying the Federal Rules of Evidence and, here, the ZHB is not governed by the Federal Rules of Evidence. Additionally, it is not scientific principles that are at issue here; to the contrary, it is the ZHB's credibility determination, based on the testimony of Surbeck's competent witness, Wermuth, and the lack of any documentary or expert evidence submitted to contradict the evidence offered by Surbeck. Because the ZHB made its determination based on substantial evidence of record, we are bound by its decision. Taliaferro.

This Court fully understands Appellants' arguments and the position Appellants were put in when the Township Engineer failed to attend the ZHB hearing to explain his reasons for denying the permit application. We share the frustration expressed by the trial court and Appellants in the Township Engineer's failure to do his job. We too, are frustrated, as was the trial court, with the ZHB continuing with the hearing in light of the Township Engineer's absence.[9] However, we are constrained by the language of the Code and conclude that Surbeck sustained his burden in showing that the proposed addition was not within the floodplain. The ZHB, as the fact finder, weighed the evidence presented and found in Surbeck's favor. Accordingly, we agree with the trial court that Appellants "offer[ed] no relevant authority whatsoever to support their contentions that the [ZHB] failed to consider all material matters presented to it before rendering its decision." (Trial Ct. Op. at 5, November 14, 2007.)[10]

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[9] This Court is also troubled by the fact that the Township Engineer denied the permit application and failed to attend the ZHB hearing, but, coincidentally, at the ZHB hearing, a Township Commissioner appeared to testify on behalf of his neighbor and friend, Surbeck, and in opposition to the Township's denial.

[10] Appellants also argue that Wermuth failed to "consider other available studies or sources of information including the Pennoni engineering report by James C. McCann, P.E. which clearly showed that David Surbeck's property was in a high flood area." (Appellants' Br. at 46-47.) Thus, Appellants argue that the ZHB "made a flood plain decision without the benefit of vital information," such as the Pennoni Study, which was "part of Radnor Township's effort to study high flood areas in the township and eventually comply with Act 167 by developing a full and complete Comprehensive Storm Water Management Master Plan." (Appellants' Br. at 50.) Accordingly, Appellants contend that the ZHB "lacked the totality of evidence necessary to support its decision." (Appellants' Br. at 50-51.) We disagree.

Wermuth's report does not mention the Pennoni Study. In fact, the Pennoni Study was not submitted into evidence at the ZHB hearing on February 21, 2002. Instead, Appellants attached that study to a supplemental brief before the trial court, which was improper because the ZHB was the finder of fact, not the trial court. Had Appellants submitted the Pennoni Study to the ZHB at the initial hearing for the proposition that the Surbeck property was within the 100-year floodplain, the

(Continued…)

Accordingly, for the foregoing reasons, we affirm.

RENÉE COHN JUBELIRER, Judge

ZHB would have had conflicting evidence to review in making its determination. Alternatively, Appellants could have questioned Surbeck about the Pennoni Study during their cross-examination of him at the Remand Hearing. Appellants failed to do this. This Court may not review any documents that were not part of the original record, and may not make findings of fact.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Saul and Karin Lazarus, h/w,	:	
	:	
Appellants	:	
	:	
v.	:	No. 2269 C.D. 2007
	:	
Zoning Hearing Board of Radnor Township and Township of Radnor and David A. Surbeck	:	

O R D E R

NOW, August 15, 2008, the order of the Court of Common Pleas of Delaware County in the above-captioned matter is hereby affirmed.

RENÉE COHN JUBELIRER, Judge