IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert McLaughlin and Diane McLaughlin,	:	
Appellants	:	
	:	
v.	:	No. 90 C.D. 2008
	:	Submitted: April 25, 2008
The Zoning Hearing Board of Smithfield Township	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: June 11, 2008**

In this appeal, Robert and Diane McLaughlin (Landowners) ask whether the Zoning Hearing Board of Smithfield Township (ZHB) erred in dismissing their appeal from a zoning enforcement notice and determining their outdoor wood-burning furnace violated two general nuisance regulations in Smithfield Township's zoning ordinance. Discerning no error, we affirm.

Landowners own a three-and-a-half acre parcel on Kings Pond Road in the Township (subject property), which is improved with a single-family residence and an in-ground swimming pool. The subject property lies in an R-1 Low Density Residential District.

In November 2005, Landowners installed and began operating an outdoor wood-burning furnace on the subject property. The furnace, which is a

"shed-like" structure, is located 12 feet from Landowners' property line with adjoining landowners Robert and Ilona Harrison, and 95 feet from the Harrisons' bedroom window. Landowners use the furnace to heat hot water that is transmitted into their home and also to heat their swimming pool. Landowners expended approximately $9,450 to install the furnace; they installed the furnace in an effort to lower heating bills for their home and swimming pool.

Landowners use seasoned hardwood in the firebox of the furnace, which is the type of material recommended by the manufacturer. They place wood in the furnace three to five times per day. Landowners extended the height of the smoke stack on the furnace to 26 ½ feet in order to alleviate the impact of smoke and odor experienced by neighboring landowners. Landowners are aware that smoke and odor travels to adjoining properties depending on the temperature and moisture in the air.

In the summer of 2006, neighboring landowners, including the Harrisons, complained to the Township's zoning officer that Landowners' furnace emitted smoke and odor. In response, the zoning officer visited the Harrisons' home and observed the operation of the furnace on the subject property. Although the furnace did not emit smoke at that time, the zoning officer detected a burning odor. In addition, the Harrisons provided the zoning officer with photographs that showed smoke coming from the stack on other days.

Shortly thereafter, the zoning officer issued Landowners a notice of violation that informed Landowners their use of the furnace violated Sections 303.2 and 303.3 of the Smithfield Township Zoning Ordinance (Ordinance), which state:

> §303. Prohibited Uses in All Districts. The following uses are expressly prohibited in any zoning district:
>
> * * * *
>
> 2. Any use that may cause injury, annoyance, or disturbance to any of the surrounding properties or to their owners and occupants.
>
> 3. Any use which is noxious or objectionable by reason of the emission of smoke, dust, ash or other form of air pollution.
>
> * * * *

Sections 303.2, 303.3 of the Ordinance. The notice required Landowners to cease and desist operating the furnace within 30 days. Landowners appealed to the ZHB.

The ZHB conducted three hearings on Landowners' appeal, at which 11 witnesses testified and numerous exhibits were presented. The ZHB heard extensive testimony from the Harrisons and other neighboring landowners, who described the manner in which the furnace disturbed the use and enjoyment of their properties. The ZHB summarized Ilona Harrison's testimony as follows:

> [I]n November of 2005, [Mrs. Harrison] noticed that Mr. McLaughlin was constructing the furnace and he discussed with her that the furnace was to be used to heat his house and pool because it was cheaper than fuel oil heat. She questioned him at that time regarding the close proximity of the furnace to her bedroom and he stated to her that it is "where it has to be." …
>
> In December of 2005, [Landowners] began operation of the wood-burning stove and Mrs. Harrison noticed a tremendous amount of smoke coming from the furnace. She addressed this concern with Mr. McLaughlin and he told her that he would extend the smoke stack, which he did

> accomplish. She testified that the smoke from the wood-burning stove "is very powerful."
>
> She then presented a series of photographs … which show[] the amount of smoke coming from the [subject] property and the impact on the Harrison property. … [Mrs. Harrison] testified that the odor which she smells coming from the [subject] property is not a wood scent, but is a very strong acid[ic] odor that burns her eyes, nose, and throat, even if the smoke itself is not evident.

ZHB Op. at 15-16.

The Harrisons also presented photographs that depicted their property, house and swimming pool blanketed with thick smoke emanating from Landowners' furnace. The Harrisons testified the higher smoke stack installed by Landowners did not reduce the smoke on their property. Further, when the furnace produces smoke and odor, "[the Harrisons] are not able to sit near [their] pool, enjoy their flower gardens, and [Mrs. Harrison] has difficulty breathing because of her asthmatic condition …. [Mrs. Harrison] … is able to smell the smoke and odor while she is inside the house even when the windows are closed. …" ZHB Op. at 16-17.

Additionally, Mr. Harrison testified "the smoke burns his eyes, produces coughing and a sore throat, and the odor even follows them into the[ir] house." Id. at 19. He also explained the "smoke, fumes and odor spoils his quality of life and produces severe anxiety because of the potential that the pollution will cause him more health problems." Id.

In addition to the Harrisons, Dr. and Mrs. Robert Schramm both testified about the effects of the furnace-generated smoke on their nearby property. Mrs. Schramm testified the previous summer she smelled an odor that she described as

similar to burning plastic. She stated the odor prevented her from sitting outside and enjoying her property. In addition, Dr. Schramm, a chemistry professor at East Stroudsburg University, testified the furnace produced an odor that he "never smelled from any other stove, fireplace, or chemistry laboratory." Id. at 20. Dr. Schramm further testified the odor was objectionable and that it forced him to go into his home and close the windows.

Joanne Deardorff, another neighboring landowner, testified that before Landowners installed the furnace on the subject property, air quality in the neighborhood was good and her windows were left open in the spring and summer for fresh air. She testified after Landowners began using their furnace it smelled like "the woods [were] on fire." Id. at 21. Mrs. Deardorff testified she and her husband "stuff[ed] towels around the windows to prevent smoke from entering [their] home." Id. Mrs. Deardorff's husband agreed with his wife's testimony, and he further described the odor emitted from the furnace as "a plastic burning smell." Id.

In addition to the lay testimony of neighboring landowners, the Harrisons presented expert testimony by Gilbert M. Freedman, a mechanical engineer, who has taught courses at Penn State University on air pollution and the operation of boilers and furnaces. Freedman explained outdoor wood-burning furnaces emit smoke laden with pollutants that can cause respiratory ailments and cancer. He further explained outdoor furnaces are not regulated by any state or federal agency. Freedman also referred to an admitted report from the Northeast States for Coordinated Air Use Management that contained an explanation of wood smoke pollutants and associated health risks posed by outdoor wood furnaces. "Based upon his experience, knowledge, and the use of detailed written reports on

similar units, [Freedman] expressed a firm belief that pollutants and particulates which are emitted from a wood-burning furnace such as the one located on the [subject] property could be dangerous to the health of persons who reside in close proximity to the unit." ZHB Op. at 34.

Additionally, the Harrisons presented the testimony of Jack Muehlhan, a real estate broker and licensed appraiser. Muehlhan testified the location and operation of the furnace would substantially decrease the value of the Harrisons' property.

Ultimately, the ZHB issued a 35-page opinion in which it dismissed Landowners' appeal from the enforcement notice. In so doing, the ZHB credited the testimony of the Harrisons as well as other neighboring landowners, who all explained they found the smoke and odor emitted by the furnace noxious and objectionable. In addition, the ZHB credited the expert testimony of Freedman. Based on the credited testimony, the ZHB determined Landowners' outdoor furnace violated Sections 303.2 and 303.3 of the Ordinance. Landowners appealed to the Court of Common Pleas of Monroe County (trial court).

Without taking additional evidence, the trial court affirmed, stating:

> The [ZHB] had substantial evidence from which to conclude that noxious and objectionable smoke and fumes from [Landowners'] outdoor wood-furnace were injuring, annoying, or disturbing surrounding property owners. The testimony of [neighboring landowners] and the expert testimony of [Freedman] established a substantial basis for the [ZHB's] findings. The [ZHB] did not abuse its discretion and the appeal will be denied.

Tr. Ct. Slip Op. 12/10/07 at 10. This appeal by Landowners followed.

On appeal,[1] Landowners assert the evidence presented before the ZHB was insufficient to support a determination that the furnace violated the Ordinance. In addition, they argue the evidence presented before the ZHB regarding the potentially harmful effects of the furnace was speculative, and, therefore, insufficient to support the ZHB's determination that the furnace violated the Ordinance. Finally, they contend the Ordinance is overly broad and the Township arbitrarily enforced the Ordinance.

I.

Landowners first argue the testimony of neighboring landowners and their experts does not constitute substantial evidence upon which the ZHB could determine the furnace violated the Ordinance.

In Hartner v. Zoning Hearing Board of Upper St. Clair Township, 840 A.2d 1068 (Pa. Cmwlth. 2004), this Court explained that in an appeal of an enforcement notice to a zoning hearing board, the municipality bears the burden of presenting its evidence first. To satisfy this burden, the municipality must present evidence of the named entity's violations of the relevant zoning provisions. Id.

In reviewing a zoning hearing board decision, this Court may not substitute its interpretation of the evidence for that of the zoning hearing board.

[1] Because the parties presented no additional evidence after the ZHB's decision, our review is limited to determining whether the ZHB committed an abuse of discretion or an error of law. Allegheny W. Civic Council, Inc. v. Zoning Bd. of Adjustment of City of Pittsburgh, 547 Pa. 163, 689 A.2d 225 (1997).

Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807 (Pa. Cmwlth. 2005). It is the function of a zoning hearing board to weigh the evidence before it. Id. The zoning hearing board is the sole judge of the credibility of witnesses and the weight afforded their testimony. Id. Assuming the record contains substantial evidence, we are bound by the zoning hearing board's findings that result from resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence. Id.

A zoning hearing board is free to reject even uncontradicted testimony it finds lacking in credibility, including testimony offered by an expert witness. Id. It does not abuse its discretion by choosing to believe the opinion of one expert over that offered by another. Id.

Here, the Township issued Landowners an enforcement notice on the ground their outdoor furnace violated Sections 303.2 and 303.3 of the Ordinance, which prohibit "[a]ny use that may cause injury, annoyance, or disturbance to any of the surrounding properties or to their owners and occupants" and "[a]ny use which is noxious or objectionable by reason of the emission of smoke, dust, ash or other form of air pollution." Id. In order to meet its burden of proving Landowners violated these Ordinance provisions, the Township first presented the testimony of its zoning officer, who explained:

> [H]e … sent to [Landowners] by certified mail a [n]otice of [v]iolation of [the Ordinance] stating that the [T]ownship has received a formal complaint regarding the outside furnace on the[] [subject property] and that the "property clearly constitutes a violation of Chapter 27, section 303, regarding prohibitive uses in all zoning districts, specifically section 27.303.2 and 27.303.3". … [The zoning officer] testified that prior to sending this notice, he had

received numerous complaints regarding the use of the [furnace] in the form of telephone calls from Mr. and Mrs. Harrison, Denny Deardorf[f], and Attorney Jeffrey Durney. He further testified that he actually sent [Landowners] an initial courtesy notice which is a warning that they should not be burning household trash or garbage which would emit smoke and odor from the unit. …

[The zoning officer] stated that in August of 2006 he went to the home of Mr. and Mrs. Harrison and observed the operation of the [furnace] located on [Landowners'] property …. Although there was no smoke being emitted from the stack, he could detect a burning odor. He also was shown photographs taken by Mr. and Mrs. Harrison showing smoke coming from the stack on other days. …

When [the zoning officer] observed the location of the outside boiler from the Harrison property, he estimated that the wood furnace was between 15 to 20 feet from the property line, 50 feet from the home owned by [Landowners], and 50 to 70 feet from the corner of the Harrison house. [The zoning officer] also stated that he knew [Landowners] planned to heat their house and the in-ground swimming pool by using this wood furnace. …

[The zoning officer] was aware that the smoke from [Landowners'] unit was more intense for a period of 10 to 15 minutes when the wood-burning boiler is first started by [Landowners]. He was also aware that [Landowners] increased the height of the chimney in order to avoid the smoke and complaints from adjoining landowners. However, [the zoning officer] testified that he did observe that the smoke from the unit appears to linger on the Harrison property. …

Upon cross examination[,][the zoning officer] did admit that the sections of the [O]rdinance … appl[y] to wood-burning stoves as part of the general nuisance regulations. He admitted that he visited the Harrison property for 30 to 40 minutes because he received a number of verbal complaints and over a period of time, was provided with photographs by Mr. and Mrs. Harrison showing the emission of smoke from the wood-burning furnace. It was his opinion that the use of this furnace by

> [Landowners] may cause injury and annoyance to Mr. and Mrs. Harrison and further determined that the use of the furnace was noxious. …

ZHB Op. at 2-5. Thus, the Township, through its zoning officer, presented evidence that Landowners violated Sections 303.2 and 303.3 of the Ordinance through their operation of the outdoor furnace.

In addition, neighboring landowners presented their testimony as well as expert testimony concerning the objectionable effects of Landowners' outdoor furnace. Based on the lay and expert testimony presented by the neighboring landowners, the ZHB made the following relevant findings and determinations:

> 10. [Freedman], who is a mechanical engineer … expressed his opinion that wood-burning stoves of the type located on the [subject] property could cause health problems to persons living in close proximity to the burner, because of certain pollutants and particulates that are emitted from the unit. These health problems could include bronchitis, pulmonary disease, and cancer.
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> * * * *
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> 12. The report prepared by NESCAUM (Northeast States for Coordinated Air Use Management) on the assessment of outdoor wood-fired boilers provides data on issues regarding the use of these boilers which includes an explanation of wood smoke pollutants and associated public health risks.
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> * * * *
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> 14. In addition to the objections of Mr. and Mrs. Harrison, Denny and Joann Deardorff and Robert and Edna [Schramm], who also reside in close proximity to the [subject] property, strongly expressed objections to the smoke and odor which is emitted from the wood-burning unit that is carried by air currents to their respective properties.

15. [] Muehlhan, a real estate broker and licensed appraiser for almost 40 years, expressed an opinion that the value of the property owned by Mr. and Mrs. Harrison has been substantially decreased because of the use of the wood-burning stove on the [subject] property … in close proximity to the homes, swimming pool, and deck located on the Harrison property. …

* * * *

It is clear from the testimony of the neighboring property owners, including Mr. and Mrs. Harrison, that the smoke and smell emitted from the wood burning furnace owned and operated by [Landowners] produces smoke and a smell which is objectionable to each of them.

In fact, [Landowners] admit that at least two to three times per day and one to three times per night, the outdoor wood burning stove does emit smoke and odor which is carried to their property and other neighboring residences. …

It should be noted that in addition to the testimony presented by the Harrisons, other adjoining land owners, such as the Deardorffs and [the Schramms], also testified to the manner in which their lives have been adversely affected by the smoke and odor that is carried by the wind to their respective properties. The expert testimony of [Freedman] who certainly has experience and qualifications in observing the use and operation of wood-burning furnaces was compelling. Based upon his experience, knowledge, and the use of detailed written reports on similar units, [Freedman] expressed a firm belief that pollutants and particulates which are emitted from a wood-burning furnace such as the one located on the [subject] property could be dangerous to the health of persons who reside in close proximity to the unit. …

[In response,] [Landowners] only expressed their own belief that the smoke and odor was not causing these problems and that each person may be affected differently and subjectively. …

ZHB Op. at 33-34.

Based on our review of the record, it is clear the ZHB's findings and determinations are adequately supported by the record. See Hearing of 12/5/06, Notes of Testimony (N.T.) at 9-41 (testimony of Township zoning officer); N.T. at 113, 118-19, 120, 123-24 (testimony of Freedman); Hearing of 1/2/07, N.T. at 146, 152-54, 158-161 (testimony of Mrs. Harrison); 181, 188-202 (testimony of Mr. Harrison); 209-211 (testimony of Mrs. Schramm); 213 (testimony of Dr. Schramm); 221 (testimony of Muehlhan); 224-28 (testimony of Mrs. Deardorff); 229-231 (testimony of Mr. Deardorff). As such, we discern no error in the ZHB's conclusion that Landowners violated Sections 303.2 and 303.3 of the Ordinance. Landowners' arguments to the contrary merely invite this Court to reconsider the ZHB's determinations on matters of credibility and evidentiary weight, which we may not do. Taliaferro.

II.

Landowners next contend the Ordinance provisions at issue here are subjective, and, as a result, the neighboring landowners were required to present evidence to show more than a mere speculation of harm in order for the ZHB to rule in their favor. See Abbey v. Zoning Hearing Bd. of Borough of E. Stroudsburg, 559 A.2d 107 (Pa. Cmwlth. 1989). Relying on Abbey, Landowners argue, because Sections 303.2 and 303.3 of the Ordinance set forth subjective standards, neighboring landowners were required to show "the impact would be greater than would normally be expected from that type of use and that this use would pose a *substantial threat* to the health, safety and welfare of the community." Id. at 110 (emphasis in original). This argument fails.

In Abbey, the Monroe County General Authority sought a special exception to construct a "waste-to-energy" and recycling facility in the borough's general industrial zoning district. The Authority presented witnesses who established compliance with the zoning ordinance's objective standards. Ultimately, the zoning board granted the special exception, and the trial court affirmed. On appeal to this Court, the objectors argued the Authority did not prove compliance with certain subjective standards in the zoning ordinance, which prohibited, among other things, any use that may cause injury, annoyance, or disturbance to any of the surrounding properties or to their owners and occupants or any use which is noxious, or objectionable by reason of the emission of smoke, dust, ash or other form of air pollution. Rejecting this argument, we stated:

> As to these subjective standards, the objectors must provide evidence that there is more than a *mere* speculation of harm. The objectors must show that the impact would be greater than would normally be expected from that type of use and that this use would pose a substantial threat to the health, safety and welfare of the community. The [objectors] testified they were concerned about the facility's location being so close to schools and hospitals. They introduced a petition opposing the facility, signed by 700 citizens. This evidence did not demonstrate a "strong degree of probability" that "substantial injury" would occur.

Id. at 110-11 (emphasis deleted) (citations omitted).

Landowners' reliance on Abbey is misplaced for two reasons. First and foremost, the principles discussed in Abbey, upon which Landowners base their argument, speak to the burden of objectors where a special exception is sought. As we explained in City of Hope v. Sadsbury Township Zoning Hearing Board, 890 A.2d 1137, 1147 (Pa. Cmwlth. 2006):

> In a conditional use or special exception case, the applicant first bears the burden of establishing that the application falls within the special exception or conditional use provision of the particular township ordinance. Then, the burden of persuasion shifts to objectors to establish that a detrimental impact will result to the surrounding community, thus rebutting the legislative presumption, which exists in all conditional use or special exception cases, that the use is consistent with the health, safety and welfare of the community.

(Emphasis added).

Here, however, the neighboring landowners were not opposing a special exception request; rather, this case involved Landowners' appeal of an enforcement notice issued by the Township. As a result, the Township bore the burden of presenting evidence of Landowners' violations of 303.2 and 303.3 of the Ordinance. Hartner. Thus, the neighboring landowners here bore no burden and the principles relating to the objectors' burden in a special exception case are inapplicable here. See City of Hope (rejecting applicant's attempt to extend special exception/conditional use cases where objectors have a burden of showing how a proposed use would negatively affect a community to a case involving a request to conduct an accessory use).

In addition, unlike in Abbey, in which the objectors merely presented a petition signed by citizens opposing the proposed use, the neighboring landowners here presented lay and expert testimony that demonstrated more than a "mere speculation of harm" concerning the harmful effects of Landowners' furnace. Therefore, Landowners' argument fails.

III.
A.

Landowners also maintain the Township acted in an arbitrary and capricious manner in enforcing the Ordinance because Landowners' furnace was the only such furnace cited by the zoning officer.

Selective enforcement is shown through evidence of conscious discrimination by a zoning board against an applicant by demonstrating the board's actions were arbitrary, irrational or tainted with improper motive. Knipple v. Geistown Borough Zoning Hearing Bd., 624 A.2d 766 (Pa. Cmwlth. 1993). A mere assertion of selective enforcement without evidence is insufficient to support this claim. Gnarra v. Dep't of Labor & Industry Industrial Bd., 658 A.2d 844 (Pa. Cmwlth. 1995), appeal dismissed as improvidently granted, 543 Pa. 483, 672 A.2d 1318 (1996).

Generally, a zoning board's failure to uniformly enforce zoning regulations does not preclude subsequent enforcement of the same. Anselma Station, Ltd. v. Pennoni Assocs., Inc., 654 A.2d 608 (Pa. Cmwlth. 1995); Kar Kingdom, Inc. v. Zoning Hearing Bd. of Middletown Twp., 489 A.2d 972 (Pa. Cmwlth. 1985). However, an exception to that general rule occurs when a governmental body administers a facially neutral law in such a way as to amount to a violation of constitutional rights. Knipple. Further, as our Supreme Court stated in Ridley Township v. Pronesti, 431 Pa. 34, 244 A.2d 719 (1968), where a municipality failed to enforce its zoning ordinance:

> The validity of the ordinance does not usually depend on a completely successful enforcement of its provisions, nor can one who violates it be discharged merely because it is shown that there are other violators who have not been

> convicted, or that those whose duty it is to perform the duties required by it have fallen short, through inattention or intentional omission or neglect.

Id. at 39, 244 A.2d at 721 (citation and quotation omitted).

Here, in rejecting Landowners' contentions that the Township acted in an arbitrary and capricious manner in enforcing the Ordinance, the trial court stated:

> [Landowners] [claim] that [S]ections 303.2 and 303.3 are arbitrary and capricious as applied …. They refer to the fact that other outdoor wood stoves or furnaces were not cited for violations. [The] [z]oning [o]fficer … has not received complaints about all of the other structures, however. N.T. [12/5/06] [at] 14. Section 303.2 requires that the use disturb, injur[e], or annoy surrounding property owners before a violation can occur, and [S]ection 303.3 requires that the smoke be noxious or objectionable. If no one is objecting to the smoke or claiming to be injured, then there is no basis to issue an enforcement notice.
>
> The zoning officer did receive a complaint about one other furnace; upon investigation, he determined not to issue an enforcement notice because he "couldn't imagine the smoke being [the complainant's] source of irritation." N.T. [12/5/06] [at] 21. The distance between the complainant's property and the furnace was more than 300 feet. *Id.* That distance is significantly farther than the approximately [12] feet between [Landowners'] furnace and the Harrisons' property line and the [95] feet between the furnace and the Harrisons' bedroom window. N.T. [1/2/07] [at] 146. The zoning officer also believed the smoke coming from the other furnace was less dense than the smoke coming from [Landowners'] furnace. N.T. [12/5/06] [at] 22-23. The standard is subjective, but that does not render the provisions unenforceable or make enforcement of them arbitrary and capricious.

Tr. Ct., Slip Op. at 8-9 (citations omitted). Based on our review of the record, we discern no error in the trial court's rejection of Landowners' argument. Indeed,

Landowners did not produce any evidence of conscious discrimination in the Township's enforcement of the Ordinance by demonstrating the Township's actions were arbitrary, irrational or tainted with improper motive. Cf. Knipple (holding zoning board consciously discriminated against a landowner by subjecting him to much more stringent requirements for a variance than 10 other similarly situated applicants and by preparing a written decision denying his application request prior to the hearing).

B.

Landowners further contend Section 303 of the Ordinance is overly broad because no specific standards are set and no emission testing is conducted by the Township. They assert the Ordinance sets no limits, relies solely on subjective standards, and is unreasonably applied to owners of outdoor wood furnaces, when owners of indoor fireplaces and wood stoves are not cited. Landowners also maintain the application of the Ordinance is unrelated to the Township's goals, presumably to prevent illegal emissions of harmful materials that pose a threat to residents. They argue there was no evidence that their furnace produced illegal emissions or the emissions pose a threat to residents. As such, they contend the ZHB erred in failing to find Section 303 is unconstitutional.

A zoning ordinance is presumptively constitutional. Adams Outdoor Adver., LP. v. Zoning Hearing Bd. of Smithfield Twp., 909 A.2d 469 (Pa. Cmwlth. 2006), appeal denied, 592 Pa. 768, 923 A.2d 1175 (2007). Before a reviewing tribunal may declare a zoning ordinance unconstitutional, the challenging party must clearly establish the provisions of the ordinance are arbitrary and unreasonable. Id. A legislative enactment can be declared void only when it violates the fundamental

law clearly, palpably, plainly and in such a manner as to leave no doubt or hesitation in the mind of the court. Id. An ordinance will be found unreasonable and not substantially related to a police power purpose if it is shown to be unduly restrictive or exclusionary. Id. Where the validity of an ordinance is debatable, the ordinance will be upheld as valid, and if there is room for difference of opinion as to whether the ordinance is designed to serve a proper public purpose, the court should not substitute its judgment for that of the governing body that enacted the legislation. Trigona v. Lender, 926 A.2d 1226 (Pa. Cmwlth. 2007), appeal denied, ___ Pa. ___, 944 A.2d 760 (2008).

Further, in In re: Appeal of Realen Valley Forge Greenes Associates, 576 Pa. 115, 131-32, 838 A.2d 718, 727-29 (2003), our Supreme Court explained:

> Property owners have a constitutionally protected right to enjoy their property.... That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, *i.e.*, governmental action taken to protect or preserve the public health, safety, morality, and welfare. Cleaver [v. Board of Adjustment], 414 Pa. 367, 200 A.2d [408] at 411-12 [(1964)] …. Where there is a particular public health, safety, morality, or welfare interest in a community, the municipality may utilize zoning measures that are substantially related to the protection and preservation of such an interest. National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504, 215 A.2d 597, 607 (1966) …
>
> C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board, 573 Pa. 2, 820 A.2d 143, 150 (2002). The limit beyond which the power to zone in the public interest may not transcend is the protected property rights of individual landowners. Our cautionary words in Cleaver, 200 A.2d at 413 n. 4, are no less appropriate today:

The natural or zealous desire of many zoning boards to protect, improve and develop their community, to plan a city or a township or a community that is both practical and beautiful, and to conserve the property values as well as the 'tone' of that community is commendable. But they must remember that property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish.

Recognizing that "[u]nder the traditional standard applied when determining the validity of zoning ordinances, a zoning ordinance must be presumed constitutionally valid unless a challenging party shows that it is unreasonable, arbitrary, or not substantially related to the police power interest that the ordinance purports to serve", C & M Developers, 820 A.2d at 150-51, nevertheless,

[a]mong other reasons, an ordinance will be found to be unreasonable and not substantially related to a police power purpose if it is shown to be unduly restrictive or exclusionary.... Similarly, an ordinance will be deemed to be arbitrary where it is shown that it results in disparate treatment of similar landowners without a reasonable basis for such disparate treatment.... Moreover, in reviewing an ordinance to determine its validity, courts must generally employ a substantive due process inquiry, involving a balancing of landowners' rights against the public interest sought to be protected by an exercise of the police power.

Id. Moreover,

The substantive due process inquiry, involving a balancing of landowners' rights against the public interest sought to be protected by an exercise of the police power, must accord substantial deference to the preservation of rights of property owners, within constraints of the ancient maxim of our common law, *sic utere tuo ut alienum non laedas.* 9 Coke 59-So use your own property as not to injure your neighbors. A property owner is obliged to utilize his property in a manner that will not harm others in the use of their property, and zoning ordinances may validly protect the interests of neighboring property owners from harm.

> Hopewell Township Board of Supervisors v. Golla, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982).
>
> Hence, the function of judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner's freedom thereby incurred.

(Emphasis added).

Here, we reject Landowners' argument that the Ordinance is invalid. To that end, we perceive an obvious connection between the purpose of the challenged provision and the Township's police powers. The obvious purpose of the challenged provision is to protect landowners from nearby uses that injure, annoy or disturb their enjoyment of their property or uses that are noxious or objectionable based on the emission of smoke or other air pollutants. As noted above, our Supreme Court holds a landowner is required to use his property in a manner that will not harm others in the use of their property, and zoning ordinances may validly protect the interests of neighboring property owners from harm. Realen Valley Forge. Here, the challenged provisions simply protect the interest of neighboring landowners from harm; therefore, we reject Landowners' validity challenge.

Moreover, we reject Landowners' implication that the Ordinance is somehow vague or overbroad because, according to Landowners, it lacks objective standards. To that end, we note, an ordinance is unconstitutionally vague and violates due process when persons of common intelligence must guess at its meaning. Fisher v. Viola, 789 A.2d 782 (Pa. Cmwlth. 2001). Vague ordinances "proscribe activity in terms so ambiguous that reasonable persons may differ as to what is actually

prohibited," and invite arbitrary and discriminatory enforcement because they do not set reasonably clear guidelines for law officials and courts. Id. at 787. Difficulty in establishing whether a situation falls within the penumbra of statutory language that is challenged as vague does not render the language unconstitutional unless it "fails to convey sufficiently definite warning as to proscribed conduct when measured against common understanding and practices." Id. at 787-88.

Both overbroad and vague statutes deny due process in two ways: they do not give fair notice to people of ordinary intelligence that their contemplated activity may be unlawful, and they do not set reasonably clear guidelines for law officials and courts, thus inviting arbitrary and discriminatory enforcement. Scurfield Coal, Inc. v. Commonwealth, 582 A.2d 694 (Pa. Cmwlth. 1990).

Here, the language in Sections 303.2 and 303.3 of the Ordinance is clear as to what is proscribed. The language is not so ambiguous as to cause improper applications of the Ordinance. Indeed, Sections 303.2 and 303.3, which prohibit any use that may "cause injury, annoyance, or disturbance" to "any surrounding properties or to their owners and occupants" or that is "noxious or objectionable by reason of the emission of smoke, dust, ash or other form of air pollution" are sufficiently specific to place a person of ordinary intelligence on notice of what conduct violates these provisions. Cf. Commonwealth v. Ebaugh, 783 A.2d 846 (Pa. Cmwlth. 2001) (ordinance that defined a nuisance as any use of property that would annoy or disturb a person of reasonable sensibilities was not unconstitutionally vague); City of Phila. v. Cohen, 479 A.2d 32 (Pa. Cmwlth. 1984) (ordinance that defined noise as causing adverse psychological or physiological effects in persons was not unconstitutionally vague); Commonwealth v. Cromartie, 65 Pa. D. & C.2d

541, 542 (C.P. Mercer 1973) (ordinance prohibiting "any noise or disturbance ... whereby the public peace and tranquility is disturbed" implies that noise must be sufficient to disturb a reasonable person and, for that reason, is not unconstitutionally vague). Therefore, the Ordinance is constitutional.

Based on the foregoing, we affirm.[2]

ROBERT SIMPSON, Judge

[2] Landowners also very briefly assert they relied on the zoning officer's assurance that they did not need a permit to install their furnace, and, as a result, the zoning officer should have been estopped from issuing the enforcement notice. Again, we disagree. Rejecting this argument, the trial court stated, "The zoning officer correctly informed [Landowners] that they did need a permit for their furnace and they did not receive a notice of violation for failing to obtain one. N.T. [12/5/06] [at] 13. Residents of [the] Township may place an outdoor wood furnace on their property without obtaining a permit first, but that does not mean they may continue to use the furnace if it emits noxious smoke or if it disturbs, annoys, or injures surrounding property owners. The [T]ownship will not be estopped from enforcing [O]rdinance provisions when it never assured [Landowners] that they were in compliance with those particular provisions." Tr. Ct., Slip Op. at 9-10. We discern no error in the trial court's rejection of this argument.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert McLaughlin and Diane McLaughlin, Appellants	:	
v.	:	No. 90 C.D. 2008
The Zoning Hearing Board of Smithfield Township	:	

O R D E R

AND NOW, this 11th day of June, 2008, the order of the Court of Common Pleas of Monroe County is **AFFIRMED**.

ROBERT SIMPSON, Judge