

TOLL PA XVIII, L.P.,
Appellant,

v.

WESTTOWN TOWNSHIP BOARD OF
SUPERVISORS,
Appellee,

and

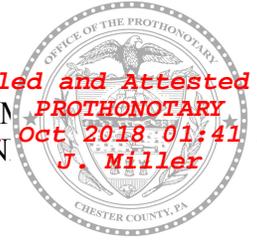
NEIGHBORS FOR CREBILLY, LLC., et
al.,
Intervenors.

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENN.

NO. 2018-02620-ZB

CIVIL ACTION

Filed and Attested by
PROTHONOTARY
01 Oct 2018 01:41 PM
J. Miller



DECISION

Toll PA XVIII, L.P. (“Toll PA”) filed this appeal from the Decision of the Board of Supervisors of Westtown Township (the “Board”) denying Toll PA’s conditional use application for a flexible development on approximately 322 acres of land in Westtown Township, Chester County, Pennsylvania (the “Township”), commonly known as “Crebilly Farm” (the “Application”). Toll PA contends that the Board erred in denying its Application because it satisfied the objective standards required of a flexible development and therefore met its burden for approval.

Upon a complete review of the record, and for the reasons set forth herein, the court concludes that the Board properly denied Toll PA’s conditional use application on at least four (4) separate grounds. Consequently, the appeal is denied.

II. Background

The Property

Toll PA is the equitable owner of approximately 322 acres of land (the “Property”) within the Township commonly known as Crebilly Farm. Intervenors, Crebilly Farm Family Associates, L.P., David M. Robinson, Laurie S. Robinson and David G. Robinson are the separate legal owners of the Property. The Property is comprised of UPI Nos. 67-4-29, 67-4-29.1, 67-4-29.2, 67-4-29.3, 67-4-29.4, 67-4-30, 67-4-31, 67-4-32, 67-4-33, 67-4-33.1 and 67-4-134. It is bordered by Route 202, Route 926, West Pleasant Grove Road and South New Street. (See N.T., pp. 4, 122; Exhs. B-4, B-6, A-2, A-3). Most of the Property is currently farmed, although portions are also used for residential purposes. (See N.T., p. 1393; Exh. B-6). The Property has multiple existing structures on it including, single-family homes, stables, barns, springhouses, equestrian facilities, sheds and additional accessory structures. (See Exhs. A-2, A-3, A-19).

The majority of the Property is situated within the Township’s A/C Agricultural/Cluster Residential District. A portion of it, however, is situated within the R-1 Rural Suburban Residential District of the Township. (See N.T., p. 122; Exh. B-5). The Zoning Ordinance permits a flexible residential development on the Property by conditional use.

Procedural History

On or about October 18, 2016, Toll PA submitted a Conditional Use Application (“Application”) for development of a 319-unit (317 new, 2 existing) flexible residential community on the Property (“Proposed Development”), together with conditional use site plans, a stormwater management report, a traffic impact study, a fiscal impact study, a

geotechnical investigation report and sewer/water feasibility letters. On December 22, 2016, the Township Zoning Officer determined the Application to be administratively complete.

The Township Planning Commission held meetings on the Application on December 15, 2016, January 10, January 24, February 13 and February 16, 2017. On February 16, 2017, the Township Planning Commission reviewed the Application at a public meeting and recommended conditional approval of the Application. (Exh. B-21).

The Board then held ten (10) hearings on the Application. The Hearings took place on February 22, March 29, April 19, May 23, June 20, July 25, August 29, September 19, October 24 and November 27, 2017 (collectively, the "Hearings"). At the Hearings, the Board granted party status to multiple parties including: the Township Planning Commission, a few neighboring municipalities, the West Chester Area School District, multiple homeowners' associations, over twenty (20) nearby landowners and a special interest association. On December 28, 2017, the Board orally voted to deny the Application. On February 12, 2018, the Board issued a written decision denying the Application ("Decision").

On March 6, 2018, Toll PA appealed the Decision. On April 2, 2018, the Board filed the Return of the Record pursuant to the Writ of Certiorari issued for the Appeal. Thereafter, on April 3, 2018, Crebilly Farm Family Associates, L.P., David M. Robinson, Laurie S. Robinson and David G. Robinson intervened in the Appeal as of right as owners of Crebilly Farm. On April 10, 2018, Brandywine at Thornbury Homeowners' Association ("Brandywine HOA") intervened in the Appeal through a Stipulation for Intervention with Toll PA. On June 25, 2018, the court granted the unopposed Amended Petition to Intervene filed by Neighbors for Crebilly, LLC ("Neighbors").

The court held oral argument on the appeal on September 17, 2018.

The court has taken no additional evidence.

II. **DISCUSSION**

Standard of Review

A local governing body is entitled to considerable deference in interpreting its zoning ordinance. See *In re AMA/Am. Mktg. Ass'n, Inc.*, 142 A.3d 923, 934 (Pa. Cmwlth. 2016). In a land use appeal where the trial court does not take additional evidence, such as in this case, the trial court's review is limited to determining whether the Board abused its discretion or committed an error of law. *Fowler v. City of Bethlehem Zoning Hr'g Bd.*, 187 A.3d 287, 294 n.8 (Pa. Cmwlth. 2018)(citing *In re Thompson*, 896 A.2d 659, 666 n.4 (Pa. Cmwlth. 2006)). An abuse of discretion will be found when a Board's findings of fact are not supported by substantial evidence. *Id.* Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

In conditional use proceedings "where the trial court has taken no additional evidence, the Board is the finder of fact empowered to judge the credibility of witnesses and the weight afforded to their testimony; a court may not substitute its interpretation of the evidence for that of the Board." *In re Richboro CD Partners, L.P.*, 89 A.3d 742, 754-755 (Pa. Cmwlth. 2014)(citing *Tennyson v. Zoning Hr'g Bd. of West Bradford Township*, 952 A.2d 739, 743 n. 5 (Pa. Cmwlth. 2008); *In re Cutler Group, Inc.*, 880 A.2d 39, 46 (Pa. Cmwlth. 2005)). The fact-finder does not capriciously disregard competent evidence by choosing to accept one witness' testimony over another witness' testimony. *In re Rural Route Neighbors*, 960 A.2d 856 (Pa. Cmwlth. 2008). Rather, the reviewing court exceeds its

scope of review by reweighing testimony. If it does so, it erroneously assumes the role of fact-finder. *Id.*

Legal Standards for Conditional Use Approval

Generally, in evaluating applications for conditional use approval, the fact finder must determine whether “the plan as submitted complies with all zoning requirements.” *K. Hovnanian Pa. Acquisitions, LLC v. Newtown Township Bd. of Supervisors*, 954 A.2d 718 (Pa. Cmwlth. 2008). An applicant for a conditional use has the initial burden of proving compliance with the criteria set forth in a zoning ordinance. *In re Thompson*, 896 A.2d at 670. If an applicant satisfies this initial burden, the burden then shifts to objectors to demonstrate that the proposed use would be detrimental to public health, safety and welfare. *Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113 (Pa. Cmwlth. 2002). The fact that a certain use is permitted as a conditional use, however, evidences a legislative determination that such use would not have an adverse impact on the public interests in normal circumstances. *In re Cutler Group*, 880 A.2d at 43.

Although acknowledging that the Proposed Development complied with many of the Zoning Ordinances applicable to conditional uses, the Board concluded that Toll PA failed to satisfy several other relevant provisions and denied the requested approval. Decision, at 40. Toll PA thereafter appealed, identifying four (4) grounds on which it contends the Board erred.

Intervenor Neighbors, although supporting the Board’s denial, argue on appeal that the Board should have denied the Application on at least two (2) other grounds and it presents those arguments to the court for consideration.

The court will examine each of these issues in the order presented.

Issue 1: Applicant's Failure to Include a "Collector Road"

Toll PA first challenges the Board's conclusion that it failed to comply with the objective standards required for conditional use approval because the Application did not provide for a collector street as identified in Article V, §170-503(C)(3) of the Township's Zoning Ordinance. The Board had concluded that the Zoning Ordinance's general provisions related to conditional uses found in Article V are as applicable to Toll PA's request for approval as are those found in Article IX. Decision, at 41.

According to Toll PA, Article IX of the Zoning Ordinance deals specifically with "flexible development" and only the standards found therein should have been utilized by the Board in judging the appropriateness of the Application. If the Board had done so, argues Toll PA, it would not have required a collector street because there is no such provision in Article IX. Toll PA further contends that the Board's collector street requirement was not based on any objective criteria for flexible development, but on the Board's desire to implement the Township's strategic land planning goals found in its Comprehensive Plan.

As the Commonwealth Court explained in *In re AMA/Am. Marketing Ass'n, Inc.*, an applicant for conditional use approval must demonstrate compliance with not only the *specific* standards for the type of conditional use sought but also the *general* standards for conditional use approval. 142 A.3d 923, 932 (Pa. Cmwlth. 2016). Thus, in order for the court to determine if Toll PA met the requirements for conditional use approval, it must first answer this preliminary question: which of the Zoning Ordinance's provisions apply to an application for flexible development?

The court begins its analysis by examining the plain language of the Zoning Ordinance.

The Township’s Zoning Ordinance at Chapter 170 - “Zoning” addresses the requirements for conditional uses. Article XX – Administration at Section 170-2009.A provides as follows:

This chapter provides for certain uses to be permitted within the Township as conditional uses. . . . It is intended that these uses, . . . shall comply with the standards for conditional uses hereinafter set forth, in addition to the relevant stipulations of the district in which the conditional use is authorized . . . Where there is a conflict between the standards set forth in this section and other standards elsewhere established by this or other applicable chapters, it is intended that *the more stringent standards* shall apply, and it is not the intent of this section to abrogate or impair any other such standards or requirements.

Zoning Ordinance, at §170-2009.B(5)(emphasis added).

It further provides that “[w]here specific conditional use requirements are contained within another article of this chapter and are applicable to a particular conditional use authorized by that article, those requirements shall be adhered to and shall prevail in any instance of conflict or overlap.” *Id.*

Turning first to the specific conditional use at issue, flexible development, Toll PA correctly invites the court’s attention to Article IX of the Zoning Ordinance. Article IX governs flexible development procedure. Paragraph C thereunder addresses “access and traffic control.” §170-905.C. It reads:

C. Access and traffic control: As required by §170-1510.

Id.

There is no reference to collector streets in that provision. Likewise, there is no reference to collector streets in Article XV, §170-1510 of the Zoning Ordinance. However, contrary to Toll PA's suggestion, the court's inquiry should not stop there.

There is no dispute that a portion of the Property is located in the A/C Agricultural/Cluster Residential District. As mandated in §170-2009.A, an applicant for conditional use must comply with the relevant stipulations of the district where the conditional use is authorized. Thus, the design standards that govern "all uses permitted by . . . conditional use" in the A/C district must be adhered to by an applicant. Those standards are set forth in Article 5, §170-503(A) "Design Standards". There are eight (8) design standards identified therein, including the following:

(7) Access and traffic control: as required by §§170-503C and 170-1510. Zoning Ordinance, §170-503(A)(7).

Additional guidance is provided in Paragraph B of this section which provides:

B. Residential development as per flexible development procedure: As required by the design standards in Article IX, where those standards *exceed, or address matters not covered by, the requirements of . . . [Section A] above.*

Zoning Ordinance, §170-503.B (emphasis added).

Although the provision makes clear that in residential flexible development, the design standards found in Article IX, Flexible Development Procedure, must be adhered to, such adherence is necessary only when those standards exceed the general standards set forth in Paragraph A. In other words, the Zoning Ordinance allows for more stringent standards to be applied to a proposed flexible development, but it does not authorize an applicant to ignore the requirements of Section A.

By requiring only compliance with §170-1510, the traffic and access standards found in Article IX are narrower than the general Article V standards. Thus, this is not a case where only the specific standard will govern. Rather, an applicant seeking flexible development approval must show compliance with *both* §170-1510 and §170-503.C.

It is in Section 170-503.C(3), which identifies the design standards “[a]ny applicant” must demonstrate, that one finds the requirement of a collector street. Section 170-503.C(3) provides:

(3) Continuous collector street(s) and trail(s) shall be developed as part of the subject use or development to provide internal through connection(s) between existing collector and/or arterial streets and trail(s), as applicable, and as required by the Board of Supervisors to provide reasonable access to the subject use or development. (Examples may include but are not limited to: a through collector street connecting the intersection of Skiles Boulevard and U.S. Route 202 with West Pleasant Grove Road and PA Route 926); a through collector street connecting Walnut Hill/Shady Grove Roads to Westtown Road; and a through collector street connection to PA Routes 352 and 926.)

Zoning Ordinance, §170-503.C(3).

Based on the above statutory analysis, the court finds no error in the Board’s conclusion that Toll PA was required to demonstrate compliance with the specific standards for flexible development set forth in Article IX and also the general standards for conditional use applications in Article V, including §170-503.C(3) pertaining to collector streets.

Having concluded that the standards in Article V do apply to this Proposed Development, the court must next determine whether the Board erred in deciding that Toll PA failed to meet the requirements of §170-503.C(3).

Toll PA argues that even if, Article V was relevant to its request for approval, the requirements for a collector street as set forth in §170-503.C(3) do not apply to this particular Proposed Development. Parsing out the statutory language, Toll PA contends in its reply brief that a collector street was not required because (1) there is no existing collector street on the adjacent property to the north of West Pleasant Grove Road to which the required “road link” could connect and (2) a collector street is required only when necessary to provide reasonable access to the subject use or development, a condition not present with the Proposed Development. In response, the Board argues that Toll PA waived any right to challenge the application of the collector street requirement to this Proposed Development, having only raised it for the first time on appeal.

The court agrees that issues not raised before the fact-finder for consideration may not be raised on appeal. Although Toll PA challenged whether a collector street was required generally, it has not demonstrated to the court’s satisfaction that the concerns it now raises were identified below. This argument is thus waived. *See Piccolella v. Lycoming County Zoning Hr’g Bd.*, 984 A.2d at 1059, n.4 (issue not raised before the board is waived for appellate purposes).

Even if the court concluded that Toll PA had not waived this argument, the court would not disturb the Board’s conclusion for the following reasons.

First, at the Hearings, the Board heard testimony from traffic engineer, Albert Frederico. Mr. Frederico testified the roadway system around the Property and how it related to the collector street requirement of §170-503.C(3). (*See generally* N.T., Vol. 6., 7/25/17, 1129, 1142-43). There was no testimony from Mr. Frederico that the requirements for a collector street could not be met in this case. Likewise, there was no evidence

presented by Toll PA to that effect. Instead, in stark contrast to its present argument, Toll PA's planning expert, Ms. Kline, testified that the internal roadway connections in the Proposed Development in fact satisfied the collector street requirement.

Second, contrary to Toll PA's argument, the Zoning Ordinance does not dictate that a proposed collector street be the only means of accessing the Proposed Development. Rather, §170-503.C(3) requires that a collector street provide "reasonable access" to a development.

Finally, Toll PA argues that the collector street requirement amounts to an "unlawful taking" of property by the Township. The Board once again argues waiver pointing out that Toll PA chose not to file a substantive validity challenge to the Zoning Ordinance or present this issue to the Board for its consideration. Having failed to do so, Toll PA may not properly assert this challenge now. *See Piccolella*, 984 A.2d at 1059, n.4.

Issue 2: Applicant's Failure to Mitigate Traffic Impacts at the Intersection of Rt. 926 and South New Street.

Toll PA next challenges the Board's denial of its Application based on its failure to mitigate the traffic impact of the Proposed Development on the intersection of Rt. 926 and New Street (the "New Street Intersection") in the form of four (4) turning lanes. Decision, at 45-47. The Board disagrees and maintains that Toll PA's failure to provide for or mitigate the traffic impact at the New Street Intersection was an appropriate basis for denying its Application pursuant to §170-2009.D(1)(h). The court agrees.

Section 2009.D(1)(h) requires as follows:

- (1) In reviewing and acting upon an application for conditional use, the Board of Supervisors shall evaluate the degree of compliance with the following standards:

(h) The burden of proof shall be upon the applicant to prove to the satisfaction of the Board of Supervisors, by credible evidence, that the use will not result in or substantially add to a significant traffic hazard or significant traffic congestion. The peak traffic generated by the development shall be accommodated in a safe and efficient manner. Such analysis shall consider any improvements to streets that the applicant is committed to complete or fund.

Zoning Ordinance, §170-2009.D(1)(h).

Notwithstanding the above, Toll PA argues that under Pennsylvania law, an applicant's request for conditional use approval cannot be denied simply because the proposed use will result in an increase in traffic. Rather, it must be shown that the proposed use will generate traffic not normally generated by the type of use sought. Toll PA contends that there was no evidence offered to demonstrate that the Proposed Development would increase traffic to such a degree that a denial was appropriate.

Toll PA refers the court to the standards utilized by PennDOT (Publication 282 [HOP Operations Manual (July 2017), Appendix A) which require mitigation of an intersection only if the new development results in less than a 10 second delay in the "level of service" of the traffic that will travel through the intersection. According to Toll PA, under these standards, the TIS submitted and presented through expert testimony at the Hearings demonstrated that the traffic impact of the Proposed Development would not warrant Toll PA having to construct separate turning lanes for all four (4) approaches to the New Street Intersection based on PennDOT's standards. (*See e.g.*, Exh. A-33; N.T., 5/23/17, pgs. 696-697).

The Board, however, concluded that Toll PA's TIS was not reliable because it failed to accurately assess the New Street Intersection as it now exists. Decision, at 46-47. Toll

PA prepared a traffic analysis that compared pre and post-development only *after* a proposed customized signalization change at the New Street Intersection that has yet to occur. The Board determined that Toll PA's TIS should have reflected the Proposed Development's impact without reliance upon other changes to the New Street Intersection. By failing to do so, concluded the Board, Toll PA had not met its burden as set forth in the Zoning Ordinance. *Id.* The court finds no error in the Board's conclusion.

Additionally, Toll PA argues that although it included an analysis of the New Street Intersection in its TIS, the Board's mandate that it make changes to the area is in error because it would require Toll PA to make "off-site" improvements. In its Decision, the Board concluded that the necessary improvements were on-site improvements. Decision, at 30, ¶143. The court must decide whether the required improvements were properly determined to be on-site.

The terms off-site and on-site improvement are undefined in the Zoning Ordinance. They are also undefined in Article VI – "Zoning" of the Municipalities Planning Code (the "MPC"). Toll PA points the court to Article V of the MPC, which defines the terms as follows:

"Offsite improvements," those public capital improvements which are not onsite improvements and that serve the needs of more than one development.

"Onsite improvements," all improvements constructed on the applicant's property, or the improvements constructed on the property abutting the applicant's property necessary for the ingress or egress to the applicant's property, and required to be constructed by the applicant pursuant to any municipal ordinance, including, but not limited to, the municipal building code, subdivision and land development ordinance, PRD regulations and zoning ordinance.

MPC, §502-A.

Relying upon these definitions, Toll PA argues that the required changes to the New Street Intersection are off-site improvements because (1) the intersection it is not within the Crebilly Farm parcel and (2) it is an intersection that serves the needs of more than one development. Although Toll PA acknowledges that part of the New Street Intersection abuts the property, it contends that is not necessary for ingress and egress to the Property. Thus, it argues, the changes cannot qualify as an on-site improvement.

In response, the Board argues that the definitions of “off-site” and “on-site” improvements found in the MPC at Section 502-A are not relevant to Toll PA’s application for conditional use. According to the Board, those definitions relate solely to land development and not zoning/conditional use applications. Therefore, Toll PA cannot properly rely upon such language in evaluating this issue. Although the Board challenges Toll Pa’s use of these definitions, in the Decision and on appeal it offers the court none of its own.

However, even applying Toll PA’s definition of on-site improvement, the court concludes that there was substantial evidence in the record to support the Board’s finding that the disputed improvements should be considered as on-site improvements.

Exhibit A-6 demonstrates that the New Street Intersection abuts the Property. Furthermore, as testified to by Mr. Federico, the Property “is *bound* by four public roadways”, including Rte. 926 and New Street. (N.T., Vol. 6, 7/25/17, 1129). Mr. Federico also testified that one of the “primary access points proposed” is located on Rte. 926, just east of the New Street Intersection. (*Id.* at 1130). The record shows that the New Street Intersection is necessary for ingress and egress from the “primary access” proposed

by Toll PA on Rte. 926. (N.T., Vol. 6, 7/25/17, 1129). The Board, therefore, did not err in finding the improvements to be on-site.

Toll PA's final argument is that the Board does not have the authority to regulate or dictate what improvements, if any, are required to be made to the New Street Intersection because the New Street Intersection is under the jurisdiction of PennDOT, not the Township. The court finds this argument to be misplaced.

Separate and apart from the issue of jurisdiction and who controls which portion of the New Street Intersection is the fact that it was Toll PA's burden to show compliance with the Zoning Ordinance. However, Mr. Federico opined that if Toll PA did not provide or contribute toward the turn lanes for the New Street Intersection, traffic generated by the Proposed Development could not be safely and efficiently managed on the Township's roadways as required by §170-2009.D(1)(h). (*See e.g.*, N.T., p. 1145). Thus, the Board, in reliance upon the evidence presented from the traffic experts and the Planning Commission, which included PennDOT's requirement for the turning lanes, properly denied Toll PA's Application for its failure to provide a proper means of managing the traffic whether by turning lanes or some other mechanism, such as a roundabout.

Issue 3 – Failure to Show Alternative Accesses

Toll PA contends that the Board erred in denying its Application based on its failure to submit revised plans that depicted a proposed change to the location of one of its accesses. Decision, at 47. According to Toll PA, the access modification was requested, but not required by PennDOT and thus a revision should not have been demanded. The court finds no error in the Board's denial.

Section 170-2009. Conditional Uses reads as follows:

B. Submission and content of conditional use applications.

(1) It shall be the burden of the applicant to demonstrate compliance with the standards for conditional use contained in this section . . .

This section then addresses specifically in subparagraph 3 the requirements of the required “accurate site plan.” Those requirements include the following:

(2) An *accurate* site plan prepared by a qualified professional shall be submitted. Such site plan shall accurately show . . . Proposed Development.

(6) In addition to demonstrating compliance with all standards applicable to the conditional use . . . the site plan shall show the applicant’s intentions with regard to the following:

(a) site access . . .

Zoning Ordinance, §170-2009B.

Toll PA concedes that its Application did not contain the revised site access and argues instead that subsequent correspondence with the Township’s engineer provided a sufficient opportunity for the Board to evaluate the Application. The Board in issuing its denial concluded that without revised plans, a proper evaluation of the traffic impacts of the Proposed Development in the context of the Zoning Ordinance could not be accomplished. The court agrees that Toll PA’s failure to provide for an accurate description of “site access” as required by the Zoning Ordinance provided an appropriate basis for the Board’s denial.

Issue 4: Failure of Application to Account for Conservation Design Standards

Toll PA’s final challenge to the Board’s Decision focuses on its alleged failure to account for “scenic views” as required under the Zoning Ordinance at §170-1617. Decision, at 47-52. Toll PA does not argue that it satisfied the Zoning Ordinance. Instead, it

maintains that the “scenic view” requirement is not an objective standard against which a conditional use application may be evaluated and ultimately denied. The court agrees.

During the Hearings, the Planning Commission presented the expert testimony of John Snook. Mr. Snook opined on the Application’s compliance with the Township’s conservation design standards applicable to flexible development. During his testimony, Mr. Snook acknowledged that the term “scenic view” is undefined. He nonetheless opined that the Application failed to comply with the “scenic view” standard. According to Mr. Snook, he reached his conclusion by utilizing what he stated was the “common and ordinary usage” of the words “scenic” and “view.” The Board then accepted his opinion that the term “scenic view” includes the “scenic value” of the Property and the historical interpretation of the Battle of Brandywine.

The court disagrees that the term “scenic view” is an objective standard against which an application may be evaluated. As reflected in Mr. Snook’s testimony, the term does not have an ordinary and common meaning in this *zoning* context upon which an applicant could rely in judging compliance with the Zoning Ordinance. Nor is it a term of art to which an ordinary meaning could be attached.

In *Williams Holding Group, LLC v. Board of Supervisors*, the Commonwealth Court addressed the difficulty faced in evaluating standards for conditional use approval where a provision lacks definitions for key terms. 101 A.3d 1202, 1216 (Pa. Cmwlth. 2014). In *Williams*, the zoning ordinance at issue required that the proposed construction be “minimally invasive.” As the court explained,

“[t]he question that arises is: What is the benchmark by which an applicant can determine whether construction is “minimally invasive?” The provision contains no point of

reference from which to answer the question of what constitutes construction that is “minimally invasive.”

In sum, the court concluded that the term was ambiguous such that developers “have no way to know whether a proposal will be” determined compliant. *Id.* at 1217.

The same reasoning applies in this case. The term “scenic view” is not an objective standard against which a developer could judge compliance. Beauty is ever in the eye of the beholder. Thus, Toll PA’s denial on this basis was in error.

Notwithstanding the above, the Board also found that Toll PA failed to properly comply with yet another conservation design standard. Specifically, the Board found that Toll PA failed to properly depict “[a]ll lands visible from any adjacent public road” as required by 170-905(A)(1)(m).” Decision, at 52. Although Toll PA presented the testimony of Robert J. Wise, Jr., who opined that the Application complied with various design standards, the Board found that he failed to establish compliance with §170-905(A)(1)(m). *Id.* Toll PA did not address this additional basis for denial in its appeal or brief. The court finds no error in the Board’s denial of the Application on this basis.

Issue 5: Neighbors’ challenges to the Application

Because Neighbors is an intervenor who did not file its own appeal, Toll PA challenges its right to address issues in this appeal that were not raised by Toll PA. According to Toll PA, the intervenor takes the litigation as he finds it and all other arguments are waived. The court disagrees that Neighbors have waived any right to argue in this appeal that Toll PA failed to satisfy criteria for conditional use approval other than those addressed by the Board. *See Northeast Pa. SMSA Ltd. Partnership v. The Scott Twp. Zoning H’rg Bd.* 18 A.3d 1272 (Pa. Cmwlth. 2011).

The court nonetheless dismisses Neighbors’ claims for following reasons.

Augmenting the conditional use requirements with ERA criteria runs afoul of the legislative decision underlying the Zoning Ordinance.

A conditional use, like a special exception, is not an exception to a municipal zoning ordinance, but rather a use to which an applicant is entitled as a matter of right unless the municipal legislative body determines "that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use." *EQT Production Co. v. Borough of Jefferson*, 162 A.3d 554, 560 (Pa. Cmwlth Ct. 2017)(citing *In Re: Drumore Crossings, L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009)).

In *EQT*, the court of common pleas reversed the decision of borough council to deny the conditional use application of EQT to construct and maintain a natural gas production facility. Council determined that the applicant, EQT, had complied with all the general requirements for conditional uses, and had satisfied additional standards in the zoning ordinance for the specific conditional use of oil and gas drilling. But, in addition to its analysis under the applicable conditional use criteria, Council also considered the Environmental Rights Amendment (ERA) in rendering its decision to deny the application. The court of common pleas reversed without taking additional evidence and without addressing the ERA. On further appeal, the Commonwealth Court noted that "given the fact that there has been a legislative decision that the particular use is presumptively consistent with the health, safety and welfare of the community . . . it is not the role of the Council in adjudicating a conditional use application, let alone for the courts, to second guess the legislative decision underlying the ordinance." 162 A.2d at 563.

The court wrote that the decision of the Council "to augment the conditional use requirements with criteria based on the ERA is tantamount to an attempt to, *sub silentio*, abrogate the legislative determination that a conditional use for oil and gas drilling is

consistent with municipal planning objectives, and with the public health, safety and welfare, including protection of the environment." *Id.* at 564. Such augmentation should similarly be refused here.

PEDF is inapposite

Neighbors contend that Toll's application should be denied by virtue of the Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Com.*, 161 A.3d 911 (Pa. 2017) ("PEDF"). It asserts that this case imposes constitutional and fiduciary duties on the Township to protect its environmental and historic resources. Its argument is based on the text of the ERA that all citizens of this Commonwealth, including future generations, have a right to clean air and pure water and to the preservation of natural, scenic, historic and aesthetic values of the environment. The Supreme Court in *PEDF* held that the Commonwealth has a corresponding duty as a trustee to prohibit the degradation, diminution and depletion of public natural resources and to act affirmatively through legislation to protect the environment. 161 A.3d 911, 930. The Supreme Court observed that, as a fiduciary, the Commonwealth has a duty to act towards the corpus of the trust – the public natural resources – with prudence, loyalty and impartiality. *Id.*

It is Neighbors belief that the holding of the case extends to the Township. The Honorable Jeffery R. Sommer of this court had recent occasion to distinguish *PEDF* in the case of *Rapp v. Zoning Hearing Board of East Whiteland Twp., et al.*, Chester County Civil Docket No. 2017-05486-ZB (2017). Borrowing his dialectic, *PEDF* is distinguishable upon a number of grounds. First and foremost, the land in question there was owned by the Commonwealth. In this case, the land is privately owned. Secondly, at issue in the cited case was the Commonwealth's desire to lease land that it held in public trust. In the instant case, the Commonwealth owns nothing. Thirdly, the Commonwealth wanted to lease state-owned land for oil and gas exploration. Here the applicants wish to develop townhouses. Fourth, the

land to be leased was natural, unspoiled land devoted to conservation and maintenance. Here the land is zoned for development.

The corpus in this case is not state forest or park lands as in *PEDF*. The corpus is the land subject to the present development application which does not belong to the Township. If sold, the proceeds would not belong to the Township. The land is simply not among the public natural resources that the Township has any identifiable obligation as a trustee to maintain. The court is not persuaded that the cases cited by Neighbors signify an intention to protect public natural resources that trumps all other legal concerns raised by every type of party under all circumstances, as noted by the Commonwealth Court in *Delaware Riverkeeper Network v. Sunoco Pipeline, L.P.*, 179 A.3d 670, 696 (Pa. Cmwlth. 2018).

The Board considered necessary stormwater protections.

Neighbors alternatively argue that the Board could (and should) have denied the Application because of its failure to provide adequate stormwater protections as required under §170-2009(B)(6). According to Neighbors, the Board failed to credit the testimony of its expert, Michele Adams, which demonstrated that the Property failed to provide for adequate management of stormwater.

The Decision of the Board at ¶¶97-108, however, addressed and evaluated the issue of stormwater management, including Ms. Adams testimony. The Board concluded that, based on the evidence presented, Toll PA had satisfied the initial objective requirements of the Zoning Ordinance. The court finds no error in its conclusion.

An appropriate order follows.

Date: _____

BY THE COURT:

Mark L. Tunnell,

J.



Type: DECISION BY THE HONORABLE
Case Number: 2018-02620-ZB
Case Title: TOLL PA XVIII, LP VS. WESTTOWN TOWNSHIP BOARD OF SUPERVISORS

So Ordered

/s/ Mark Tunnell

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