

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Adam, Ella Adam, Stephanie :  
Adam, Florence Albertson, :  
Merrill Arndt, Dolores Arndt, :  
Richard Atkinson, Elizabeth Atkinson, :  
Barry A. Brown, Sally Daughtry, :  
Allen Doughtry, Jr., Richard E. Davis, :  
Rita Decker, Venus Fioravanti, :  
Daryl Kalbach, Ann Kalbach, :  
Kenneth Leiby, Diane Leiby, :  
Charles J. Mohn, Barry Moyer, :  
Sara Moyer, Lester Rausch, :  
William Reidnauer, Blanche :  
Reidnauer, Earl Stitzer, Sandra :  
Stitzer, Christine Vaccaro, :  
Charles Watkins, Terry Webb, and :  
Jean D. Zweizig, :

Appellants

v.

The Zoning Hearing Board of Perry  
Township

v.

DLD Leasing, A Pennsylvania  
General Partnership

No. 2660 C.D. 2000  
ARGUED: June 6, 2001

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JIM FLAHERTY, Senior Judge  
HONORABLE SAMUEL L. RODGERS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE RODGERS

FILED: July 13, 2001

PROthonotary's OFFICE  
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BERKS COUNTY, PA.

David Adam et al. (Objectors) appeal from an order of the Court of Common Pleas of Berks County that affirmed the decision of the Perry Township Zoning Hearing Board (ZHB) that granted a special exception to DLD Leasing for the construction and operation of a swine farrowing facility. We affirm.

DLD Leasing filed an application for a special exception seeking to construct and operate a wholesale swine production facility for 5,600 sows, which would be located on approximately 242 acres of land in an R-A rural agricultural district in Perry Township (Township). Section 503.1 of the Township's zoning ordinance allows intensive agricultural activities by special exception subject to applicable conditions and safeguards as follows:

#### 503.1 Intensive Agricultural Activities

Intensive agricultural activities include, but are not limited to mushroom farms, poultry, hog and egg production, and dry lot farms, wherein the character of the activity involves a more intense use of land than found in normal farming operations.

a. Intensive agricultural activities are allowed in the Rural-Agricultural (R-A) District provided that such activity shall not be located within one thousand five hundred (1,500) feet of another zoning district or existing residence located within the Agricultural or any other zoning district.

b. A minimum lot size of five (5) acres is required for intensive agricultural activities, which shall be so located on the lot as to provide front, side and rear yards of one hundred (100) feet. The maximum height of building used for intensive agricultural use is thirty-five (35) feet or 2-1/2 stories, excluding appurtenances.

c. Commercial composting is prohibited. Any on site composting shall be limited for use on the premises on which such composting is made and produced.

d. Solid and liquid wastes shall be disposed of daily in a manner to avoid creating insect or rodent problems, or a public nuisance. No emission of noxious or unpleasant gases shall be permitted in such quantities as to be offensive outside the lot lines of the tract occupied by an intensive agricultural user. [Emphasis added.]

e. Dry lot feeding stations shall be permanently paved.

At the hearings held before the ZHB on February 1 and 24, 1999, DLD Leasing's witnesses provided testimony as well as did Objectors and others. The ZHB voted to grant the special exception, limiting it to 2,800 sows with expansion in the future at the discretion of the Township's Board of Supervisors. Objectors, the City of Reading and the Reading Area Water Authority filed notices of appeal and DLD Leasing filed a notice of intervention. The trial court heard arguments, but remanded the matter to the ZHB for additional findings and a statement of adequate reasoning to allow the trial court to review the matter. In April 2000, the ZHB issued a second decision, again granting the special exception to DLD Leasing. Objectors, the City and the Water Authority appealed from the ZHB's second decision, which was affirmed by the trial court.

Objectors alone now appeal to this Court,<sup>1</sup> and raise the following issues for our review: (1) whether a zoning ordinance, which requires the applicant for a special exception for an intensive swine facility to show that it will

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<sup>1</sup> Our scope of review in a zoning appeal where the court of common pleas took no additional evidence is limited to a determination of whether the zoning hearing board committed an abuse of discretion or an error of law. Valley View Civic Assoc. v. Zoning Board of Adjustment, 534 A.2d 577 (Pa. Cmwlth. 1987).

not emit noxious or unpleasant gases in such quantities as to be offensive outside the lot lines, is sufficiently specific to place the burden on the applicant to show that it can comply, (2) whether substantial evidence exists in the record to support the ZHB's findings and (3) whether the trial court abused its discretion in denying the motion to take additional evidence for the purpose of introducing a hydrogeological study, which Objectors believe bears on the matter.

The emphasized sentence in subsection d quoted above is the requirement at issue in Objectors' appeal.<sup>2</sup> Objectors first contend that like the other listed requirements subsection d is a specific requirement and is therefore part of the applicant's burden of proof. Objectors provide an extensive review of the testimony provided by the witnesses and based on that review conclude that DLD Leasing failed to carry its burden of proof that it could control offsite odors as required by subsection d of the ordinance. In the alternative, Objectors argue that even if they had the burden, the extensive testimony they presented met that burden.

A special exception is not an exception to a zoning ordinance; rather it is a use, which is expressly permitted, absent a showing of a detrimental effect on the community. Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa. Cmwlth. 1991). The applicant for the special exception has both the duty of presenting evidence and the burden of persuading the ZHB that the proposed use satisfies the objective requirements of the

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<sup>2</sup> The trial court concluded that subsections a, b, c and e are specific requirements that were met by DLD Leasing and were not at issue in the appeal. The trial court also held that the waste disposal portion of subsection d is pre-empted by the Nutrient Management Act (NMA), Act of May 20, 1993, P.L. 12, 3 P.S. §1701 - 1718 and Objectors did not raise any issues in connection with this part of subsection d in their appeal to this Court.

ordinance. Id. Once the applicant has met this burden of proof and persuasion, a presumption arises that the use is consistent with the health, safety and general welfare of the community. Id. The burden then shifts to the objectors to present evidence and persuade the ZHB that the use will have a detrimental effect on health, safety and welfare or will conflict with the ordinance's expressions of general policy. Id. The objectors' evidence must provide proof that there is more than a mere speculation of harm, that the impact would be greater than would normally be expected from that type of use and that the use would pose a substantial threat to the health, safety and welfare of the community. Id.

In Abbey v. Zoning Hearing Board, 559 A.2d 107, (Pa. Cmwlth. 1989), the court held that the ordinance's language that stated "[a]ny use which is noxious, or objectionable by reason of the emission of smoke, dust, ash or other form of air pollution" was a subjective standard that required proof by the objectors. The ordinance's language here is similar in that it does not quantify the emissions and we, as did the trial court, conclude that subsection d is a subjective criteria that falls on Objectors to prove.

We now turn to examine whether Objectors' carried their burden by providing evidence that there is more than a mere speculation of harm from any offsite odors, i.e., whether substantial evidence supports the ZHB's findings. Manor. The trial court in reviewing the testimony on this same issue stated as follows:

[Objectors] presented Dr. Betts, a chemist and professor from Kutztown University, who testified as to the classes of compounds that make up the odor of pig manure, and the gaseous by-products of its bacterial decomposition. He testified that at high enough concentrations, these can be lethal, and at moderate concentrations they can be irritants. He did not testify as

to the concentrations that would be produced by the applicant's proposed use or that its impact would be greater than would normally be expected from that type of use. He testified that there has not been a conclusive study on the long term low level exposure to these particular compounds.

[Objectors] also presented Mr. Meeter, an air emissions consultant, who testified that there is technology available that could treat emissions from a swine factory such that the odors would be neutralized and not leave the premises. Mr. Meeter had never done an analysis of swine odors. He acknowledged that not all odors have the same treatment to neutralize them, but testified that treating hydrogen sulfide from a hog farm or chicken farm should not be any different from an industrial complex. He himself was not sure about this because he had never done it.

Mr. McIlwee, an engineer, testified that his company, Tellkamp Systems, located in Santa Fe Springs, California, could design a system to prevent odors from leaving the pig farm. He testified that for a thermal oxidizer large enough to handle applicant's operation, it would cost at least 20 million dollars, perhaps as high as 30 million dollars.

Julie Jansen, who owns a farm in Minnesota which is three-quarters of a mile from a 2,500 sow swine farrowing operation and a mile and a half from a 16,000 finishing operation, testified that air samples from her yard revealed levels of hydrogen sulfide as high as 1,400 parts per billion. She said she experienced vomiting, nausea, diarrhea, upper respiratory problems, tearing of the eyes and coughing. The [O]bjectors did not offer any expert medical testimony to connect these symptoms to the swine operation. Further, the construction of the shallow pit on the Minnesota operation was different from that of the proposed swine operation in this case.

The ZHB found as a fact that general concerns not supported by specific substantial evidence was [sic] expressed by neighbors and protestants and that, although

swine manure/excrement contains many chemical compounds, no evidence was submitted to conclude that such chemicals would travel to neighboring properties in a level to harm residents or workers. (Decision of the ZHB of the Township of Perry, April 14, 2000, Findings of Fact #38 and #45). These findings were supported by substantial evidence in the record. [Objectors'] evidence falls short of the 'strong degree of probability that substantial injury will occur' standard necessary to sustain their burden of production.

(Trial court's opinion, pp. 12-13).

The trial court also noted that although manure smells could at times travel off the property, the odor from the "intensive agricultural operation was not beyond the contemplation of the supervisors when they legislated a special exception for these facilities in this zoning district." (Trial court's opinion, p. 13). The trial court also recognized that the elimination of all odors was not required by the ordinance; nor had Objectors provided evidence that a feasible method of completely eliminating the odors existed.

To a large extent, Objector's arguments contain references to the testimony of the various witnesses, suggesting that the evidence does not exist to support the ZHB's findings. However, these arguments are in essence attacks on the ZHB's credibility determinations. "Determinations as to the credibility of witnesses and the weight to be given to the evidence are matters left solely to the [ZHB] in the performance of its factfinding role." Shamah v. Hellam Township Zoning Hearing Board, 648 A.2d 1299 (Pa. Cmwlth. 1994). Moreover, the ZHB has the power to reject even uncontradicted testimony. Hersh v. Zoning Hearing Board of Marlborough Township, 493 A.2d 807 (Pa. Cmwlth. 1985).

Our review of the record reveals that the trial court's summation of the testimony comports with the testimony that was provided at the hearings before the

ZHB and with the ZHB's findings of fact and conclusions of law. Therefore, we conclude, as did the trial court, that Objectors did not prove that the impact of DLD Leasing's use would be greater than normally would be expected of an intensive agricultural hog farm. Furthermore, we conclude that the ZHB's findings are supported by substantial evidence.

Lastly, without citing any authority, Objectors contend that the trial court abused its discretion in denying their motion in which they requested that the court take additional evidence. They argue that the hydro-geological study they wished to submit had far reaching significance relevant to the swine facility, particularly, as it related to the alleged danger of pollution of the local water supplies.

DLD Leasing and the ZHB respond that pursuant to Section 1005-A of the Pennsylvania Municipalities Planning Code,<sup>3</sup> the trial court has the sole discretion to allow or disallow additional testimony. See also Kossman v. Zoning Hearing Board, 597 A.2d 1274 (Pa. Cmwlth. 1991). In Kossman, the court stated that "[i]n order to be entitled to present additional evidence, an appellant must demonstrate either that the record before the [ZHB] is incomplete because appellant was refused the opportunity to be fully heard, or that relevant testimony was excluded." Id. at 1278. The court may also refuse to consider additional evidence where that evidence was available at the time of hearing. Id. DLD Leasing also contends that the subject addressed by Objectors' study is moot in that a determination was made by the trial court that issues concerning pollution of surface and ground water are pre-empted by the NMA (see footnote 2). We agree


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<sup>3</sup> Act of July 31, 1968, P.L. 805, as amended, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §11005-A.



and conclude that the trial court did not abuse its discretion in denying Objectors' petition.

Accordingly, for the reasons stated above, we affirm the trial court's order.



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SAMUEL L. RODGERS, Senior Judge

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Township :

v.

DLD Leasing, A Pennsylvania :  
General Partnership :

ORDER

AND NOW, July 13, 2001, the order of the Court of Common  
Pleas of Berks County in the above-captioned matter is affirmed.

C.I.M.  
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Completed By:     CW    

Dated: \_\_\_\_\_

*Samuel L. Rodgers*

SAMUEL L. RODGERS, Senior Judge

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BERKS COUNTY, PA.