

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CHOICE FUELCORP, INC.,	:	
Appellant	:	DOCKET NO. 11-02,238
	:	CIVIL ACTION – LAW
vs.	:	
	:	LAND USE APPEAL
ZONING HEARING BOARD OF	:	
ARMSTRONG TOWNSHIP,	:	
Appellee	:	
	:	
vs.	:	
	:	
ARMSTRONG TOWNSHIP,	:	
Intervenor	:	
	:	
and	:	
	:	
CAROL and JOSEPH LIVORNO,	:	
Intervenors	:	

**OPINION AND ORDER**

This matter comes before this Court on the Land Use Appeal filed by Appellant Choice Fuelcorp, Inc., on November 28, 2011. Appellee Zoning Hearing Board of Armstrong Township (ZHB) rendered the underlying decision on October 29, 2011. *See* 42 Pa. C.S. § 5572. That decision pertains to Appellant’s requested zoning approval of: (i) a water-extraction facility; (ii) the construction of a rail spur; and (iii) the construction/expansion of a parking area. ZHB Decision, 4. These applications relate to Appellant’s property located at 2344 Sylvan Dell Road, Armstrong Township, South Williamsport, Pennsylvania, also identified as Tax Parcel No. 02-350-161. *Id.*

The Court held a conference after the filing of the appeal. At that conference, the parties elected to present no additional testimony to the Court. Instead, the parties’ requested an oral argument before the Court, after a short briefing period. The Court heard oral argument on this appeal on May 30, 2012.

## **I. Standard of Review**

When the trial court receives no additional evidence and relies on the record from the zoning hearing board, its scope of review is limited to determining whether the zoning hearing board manifestly abused its discretion or committed an error of law. *In Re: Appeal of Jones*, 29 A.3d 60, 63 n.4 (Pa. Cmwlth. Ct. 2011); *Northeast Pennsylvania SMSA Ltd. P'ship v. Scott Twp. Zoning Hearing Bd.*, 18 A.3d 1272, 1275 n.5 (Pa. Cmwlth. Ct. 2011); *Borough of Moosic v. Zoning Hearing Bd. of Moosic*, 11 A.3d 564, 564 n.4 (Pa. Cmwlth. Ct. 2010); *Greth Dev. Group, Inc. v. Zoning Hearing Bd. of Lower Heidelberg Twp.*, 918 A.2d 181, 186 n.4 (Pa. Cmwlth. Ct. 2007), *appeal denied*, 929 A.2d 1163 (Pa. 2007). *See also Cellini v. Scott Twp. Zoning Hearing Bd.*, No. 202 C.D. 2011, 2012 Pa. Cmwlth. Ct. LEXIS 33, at \*2-3 n.2 (Pa. Cmwlth. Ct. Jan. 12, 2012). The trial court may conclude that the zoning hearing board abused its discretion when the board's findings are not supported by substantial evidence; substantial evidence means evidence that a reasonable mind could conclude as supporting the ultimate finding. *Jones*, 29 A.3d at 63 n.4; *Greth*, 918 A.2d at 186 n.4. The trial court may also affirm the zoning hearing board's decision if the board reached the correct decision through incorrect reasoning as long as the trial court's decision is based upon the board's record. *Gateside-Queensgate Co. v. Delaware Petroleum Co.*, 580 A.2d 443, 447 (Pa. Cmwlth. Ct. 1990); *Pennsylvania General Energy Co., LLC v. Watson Twp. Zoning Hearing Bd.*, No. 11-01,875 (Lycoming County Mar. 6, 2012).

## **II. Armstrong Township Zoning Ordinance**

All parties agree that the three applications in question pertain to the portion of Appellant's property that is located within a floodway district, as defined by the Armstrong Township Zoning Ordinance (Ordinance). Transcript, 09/19/2011, Pysner, 88 (applications pertain to property that is a single-zoning district, i.e. floodway district). The Ordinance provides that the purpose of a floodway district is:

to prevent the loss of property and life, the creation of health and safety hazards, the disruption of commercial and governmental services, the extraordinary and unnecessary expenditure of public funds for flood protection and relief by allowing only those uses that will not increase the flood hazards. This district recognizes and understands that the hazards in this district are greater than in the Flood Fringe District due to the higher current velocity and thus, the uses permitted must be more restrictive.

Ordinance, 5. Section 310 of the Ordinance sets forth the use regulations and dimensional requirements in a floodway district. Ordinance, 14. In particular, the Ordinance provides that the permitted principal uses and structures in a floodway district are:

[p]rovided they are not prohibited by other ordinances or regulations and do not require structures, fill or storage of materials or equipment

Agricultural uses including farming, gardening, and nurseries (See also 423)

Public and private recreational uses such as parks, day camps, picnic grounds, golf courses, boat launching and swimming areas, hiking, and horseback riding trails, wildlife and natural preserves, game farms, fish hatcheries, trap and skeet ranges, and hunting and fishing areas.

Residential uses such as yard areas, gardens, play areas, and pervious parking areas.

Temporary uses such as open-air sporting events (See 437)

All uses, activities and structural developments shall be undertaken in strict compliance with the floodproofing provisions of this Ordinance (Article 6). See Article 6 for additional regulations dealing with this district.

NOTE: No development shall be permitted in the Floodway District that would cause any rise in the 100 year flood. No mobile homes shall be permitted under any circumstances.

Ordinance, 14.

### **III. Legal Standards**

In regard to all three of the applications in question, Appellant argues that the applications should have been approved by the ZHB as either a special exception or an expansion of an existing non-conforming use, as defined by the Ordinance. The Court will address each of these standards in turn:

#### **i. Special Exception**

Special exceptions are uses that are expressly permitted within the Ordinance, provided that certain requirements are met. *Greth*, 918 A.2d at 186. Section 310 of the Ordinance outlines the special exceptions permitted in a floodway district. Ordinance, 14. Specifically, that section states that the special exceptions in a floodway district are:

Utilities, railroads, streets, bridges, transmission lines and other related uses and activities

Water related uses and activities such as marinas, docks, wharves, piers, etc. (See 436)

Extraction of sand, gravel, and other materials (See 425)

Storage of materials and equipment provided that they are not buoyant, flammable or explosive, and are not subject to major damage by flooding or provided that such material and equipment is firmly anchored to prevent flotation or movement, and/or can be readily removed from the area in the time available after flood warning

Campgrounds (See 413)

*Id.*

Since special exceptions are permitted by the Ordinance itself, a burden-shifting test is implemented by both the ZHB and the trial court when addressing if these exceptions apply. Initially, an applicant must present evidence that his proposed use satisfies the Ordinance's standards for a special exception use. Once the applicant meets this burden, the burden shifts,

and the objectors must then present sufficient evidence that the applicant's use has "detrimental effect on the public health, safety, and welfare." *Greth*, 918 A.2d at 186.

**ii. Expansion of a Non-Conforming Use**

Currently, Appellant's property is subject to a non-conforming use as a fuel and bio-diesel mixing facility.<sup>1</sup> Article 9 of the Ordinance governs non-conforming structures and uses. Ordinance, 104-07. The Ordinance provides that non-conforming uses cannot be extended or enlarged in a floodway district. Ordinance, 105.<sup>2</sup>

However, in regard to these parties and this property, this Court has previously held that the *natural* expansion of a non-conforming use is permitted within a floodway district. *See Choice Fuelcorp, Inc. v. Zoning Hearing Bd. of Armstrong Twp.*, No. 07-02,598 (Lycoming County Mar. 24, 2008). In particular, the Honorable Dudley N. Anderson held that:

[i]t is well settled that to qualify as a continuation of an existing nonconforming use, a proposed use must be sufficiently similar to the nonconforming use as not to constitute a new or different use. The proposed use need not be identical to the existing use; rather, similarity in use is all that is required. Further, in determining whether a proposed use bears adequate similarity to an existing nonconforming use, the doctrine of natural expansion must be given effect. As was stated in *Chartiers Township v. W.H. Martin, Inc.*, 542 A.2d 985, 988 (Pa. 1988), "once it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural development and growth." The Court there also held that a change in

---

<sup>1</sup> The Honorable Dudley N. Anderson approved this non-conforming use in his Opinion and Order dated March 24, 2008. *Choice Fuelcorp, Inc. v. Zoning Hearing Bd. of Armstrong Twp.*, No. 07-02,598 (Lycoming County Mar. 24, 2008). That opinion and order addressed whether the use of the property as a bio-diesel mixing facility was a natural expansion of the property's then-current non-conforming use as a fuel facility; Judge Anderson answered that question in the affirmative. *See id.*

<sup>2</sup> Specifically, the article provides for the extension and enlargements of non-conforming use may be made if:

- a. the extensions or enlargements do not cumulatively extend the structure or use by more than 25% of the area occupied by such use at the effective date of this Ordinance;
- b. the nonconforming structure or use *is not located in a Floodway District*;
- c. the Zoning Hearing Board approves such proposed extension or enlargement;
- d. the extensions or enlargements shall conform to the yard and height regulations of the district in which the structure or use is situated; and
- e. in the case of a nonconforming use, be immediately adjacent to the existing nonconforming use.

Ordinance, 105 (emphasis added).

instrumentality will not defeat the purpose or existence of a nonconforming use. In other words, an operator of a nonconforming use may incorporate modern technology into his business without fear of losing that business.

*Id.* at 8-9 (citations omitted) (footnotes omitted).

#### **IV. Discussion**

In the current appeal, Appellant contests the ZHB's decision regarding three of its applications: (i) the water-extraction application, (ii) the railroad spur application, and (iii) the parking facility application. The Court will address each of these applications in turn.

##### **i. Water-Extraction Application**

Appellant argues that the ZHB committed an error of law and/or abused its discretion when it denied Appellant's use application. Appellant argues that its use application should have been approved as either a special exception or an expansion of an existing non-conforming use. This Court will address each of these arguments in turn.

##### **A. Special Exception**

Initially, Appellant argues that its use application should have been approved by the ZHB because pumping, storing, transferring, and dispensing liquid water through the existing fuel station is a special exception permitted under the Ordinance. This Court does not agree.

The ZHB did not commit an error of law or abuse its discretion when it held that the water-extraction application should be denied because Appellant did not meet its burden of proof in regards to whether a water-extraction facility is a special exception under the Ordinance. As stated previously, under the burden-shifting standard applied within the Commonwealth, Appellant had the initial burden of proving that the proposed special exception, i.e. water-extraction facility, satisfies the special exception standards in the zoning ordinance. *See Greth*, 918 A.2d at 186. Appellant argues that the water-extraction facility could be approved as a

water-related use. However, it is clear to the Court that the Ordinance envisions water related uses to entail docks, wharves and the like, for recreation purposes, as opposed to the use of water for business-related purposes. Appellant also argues that the facility could be approved as a transmission line. Again, the Court believes that the ordinance envisions transmission lines to be similar to utility and railroad lines, as opposed to lines that extract water from the river to pass-through the property. Transcript, 10/06/2010, Weisz (pipe would be laid under Sylvan Dell Road that would end in the Susquehanna River); Transcript, 10/06/2010, Weisz, 11-12 (water would be pumped from the Susquehanna River into trucks and rail cars on site). The Court believes that the Board did not abuse its discretion when it determined that a pumping line that facilitates the extraction of water from the Susquehanna River does not fall under the special exception as outlined in the Ordinance.

Additionally, this Court notes that the objectors presented substantial evidence that the water-extraction facility would have a detrimental effect on the public health, safety, and welfare. The ZHB held that:

the Objectors have shown a high degree of probability that the proposed uses will result in substantial adverse impacts to the health and safety, not just speculation of possible harms, which has not been credibly refuted by the Applicant. Indeed, the Board concludes that the substantial, credible evidence shows the proposed uses will reduce property values, create safety hazards for residents, create excessive noise, dust and fumes, impair the safe flow of traffic on public streets, impair the safe use of existing public recreational facilities in the zone, and unduly burden public infrastructure.

ZHB Decision, 18-19. The record contains testimony from numerous individuals that support this finding. Transcript, 07/29/2009, Weisz, 44 (facility would handle 30 trucks a day); Transcript, 10/06/2010, Weisz, 15 (facility could handle eight trucks loading at the same time); Transcript, 10/06/2010, Weisz, 17 (facility could operate 24 hours per day); Transcript, 10/06/2010, Weisz, 17 (facility could handle 100-120 trucks per day); Transcript, 10/06/2010,

Matz, 19 (truck turn around could hold up to 20 trucks); Transcript, 10/06/2010, Vole, 24 (school children get on the bus near the turn around); 10/06/2010, Matz, 99-100 (at peak production, facility could handle 32 trucks per hour and 160,000 gallons an hour); Transcript, 03/28/2011, Matz, 76-77 (permit application limits facility capacity to 375 trucks per day).

### **B. Expansion of a Non-Conforming Use**

In the alternative, Appellant argues that its use application should have been approved by the ZHB because pumping, storing, transferring, and dispensing liquid water through the existing fuel station is an expansion of the existing non-conforming use. This Court does not agree.

The ZHB did not commit an error of law or abuse its discretion when it held that the water-extraction application should be denied because expansions of a non-conforming uses are not permitted in a floodway district. The ZHB held that extensions or enlargements of non-conforming uses are not permitted in the floodway. ZHB Decision, 17. To support this conclusion, the ZHB cited to section 900(C)(1)(b) of the Ordinance. *Id.* The parties agree that the water-extraction application pertains to property located within a floodway district. Therefore, this Court cannot find that the ZHB committed an error of law or abused its discretion when it held that the water-extraction application was denied on that ground.

Additionally, the ZHB did not commit an error of law or abuse its discretion when it held that the water-extraction application should be denied because it is not a reasonable, natural expansion of an existing non-conforming use. This application cannot be compared to Appellant's prior application to change the facility from a fuel facility to a bio-diesel and fuel facility. In this instance, Appellant will change various aspects of the facility. 07/29/2009, Welkie, 40-44. This Court notes that Appellant had no definite plans for putting the water-extraction equipment into the existing facility. Additionally, Appellant plans on adding a



component to the station to allow water to be pumped into the facility from the Susquehanna River. Transcript, 06/20/2011, Matz, 20-23 (water storage might occur in an existing tank on site, but none of the other current infrastructure would be used in conjunction with the water extraction facility); Transcript, 10/06/2010, Weisz, 9-10 (pipe would be laid under Sylvan Dell Road that would end in the Susquehanna River). Additionally, the expansion of the facility cannot be considered in a vacuum without considering the expansion of the entire site, which necessarily involves the consideration of Applicant's parking facility application. Transcript, 10/06/2010, Matz, 22 (facility would require excavation of pad, truck turn-around, and water lines). This Court holds that the ZHB did not commit an abuse of discretion when it found that the water-extraction application was not a natural expansion of a fuel facility because reasonable minds could conclude that the proposed water-extraction facility is a new use, not a natural expansion of the existing use as a bio-diesel and fuel facility. *See Jones*, 29 A.23d at 63 n.4; *Greth*, 918 A.2d at 186 n.4. Therefore, this Court cannot find that the ZHB committed an error of law or abused its discretion when it held that the water-extraction application was denied under both standards.

**ii. Railroad Spur Application**

Appellant argues that the ZHB committed an error of law and/or abused its discretion when it denied Appellant's application to construct a railroad spur. Appellant argues that its application should have been approved as a special exception. This Court does not agree.

The ZHB did not commit an error of law or abuse its discretion when it held that the railroad spur application should be denied because Appellant did not meet its burden of proof in regards to whether a rail spur is a special exception under the Ordinance. Under the burden-shifting standard applied within the Commonwealth, Appellant had the initial burden of proving

that the proposed special exception, i.e. rail spur, satisfies the special exception standards in the zoning ordinance. *See Greth*, 918 A.2d at 186. Appellant argues that the rail spur could be approved as a railroad or a transmission line. However, the ZHB found that the proposed rail spur was more than a right-of-way through the property, as envisioned by the special exception criteria. ZHB Decision, 17. The special exception permitting railroads and transmission lines provides for “[u]tilities, railroads, streets, bridges, transmission lines and other related uses and activities.” Ordinance, 14. The ZHB particularly held that:

[w]ith regard to the proposed rail spur, its use in conjunction with a facility to store or transload materials, as opposed to simply a right of way through the zone to transport materials, is not permitted in a floodway by right or Special Exception.

ZHB Decision, 17. *See also* Transcript, 10/02/2010, Weisz, 116 (could not state the exact purpose for a second rail spur on the property). The Court believes that the Board did not abuse its discretion when it held that a rail spur that facilitates the storing and loading of materials in a floodway district, as opposed to a basic right-of-way through the property, does not fall under the special exception as outlined in the Ordinance.

Appellant bases its argument on a prior order rendered by the ZHB on September 11, 2008. In that order, the ZHB held that the construction of a railroad spur at Appellant’s fuel storage/distribution and bio-diesel facility is a special exception under the Ordinance, if ten (10) conditions were met. This prior decision is not before the Court at this time, and this Court will not render an opinion based upon that prior decision, not binding on this Court.

Additionally, as stated previously, this Court notes that the objectors presented substantial evidence that the rail spur, in conjunction with the facility, would have a detrimental effect on the public health, safety, and welfare. ZHB Decision, 18-19.

**iii. Parking Facility Application**

Lastly, Appellant argues that the ZHB committed an error of law and/or abused its discretion when it denied Appellant's cut-and-fill application to accommodate additional parking. Appellant argues that its application should have been approved as an expansion of an existing non-conforming use. This Court does not agree.

The ZHB did not commit an error of law or abuse its discretion when it held that the parking facility application should be denied because expansions of a non-conforming uses are not permitted in a floodway district. The ZHB held that extensions or enlargements of non-conforming uses are not permitted in the floodway. ZHB Decision, 17. To support this conclusion, the ZHB cited to section 900(C)(1)(b) of the Ordinance. *Id.* The parties agree that the parking facility application pertains to property located within a floodway district. Additionally, this Court notes that the ZHB held that Appellant's parking facility application was incomplete. ZHB Decision, 20. Transcript, 09/19/2011, Pysher, 87 (all three applications currently before the ZHB are incomplete). *See* Transcript, 06/20/2011, Krise, 35 (Pennsylvania Department of Transportation issued a low volume occupancy permit regarding property, permitting 25 to 750 vehicles per day); Transcript, 03/28/2011, Matz, 51 (the only permit applied for was the highway occupancy permit). Therefore, this Court cannot find that the ZHB committed an error of law or abused its discretion when it held that the parking facility application was denied on these grounds.

**ORDER**

AND NOW, this 12<sup>th</sup> day of July, 2012, for the foregoing reasons, the Zoning Hearing Board of Armstrong Township's decision to deny Appellant's requests for special exceptions and expansions of non-conforming uses are AFFIRMED, as the record fully supports that decision.

BY THE COURT,

---

Date

---

Richard A. Gray, J.

RAG/abn

cc: Scott T. Williams, Esquire  
Karl K. Baldys, Esquire  
Michael J. Wiley, Esquire  
John Bonner, Esquire  
Gary L. Weber, Esquire